



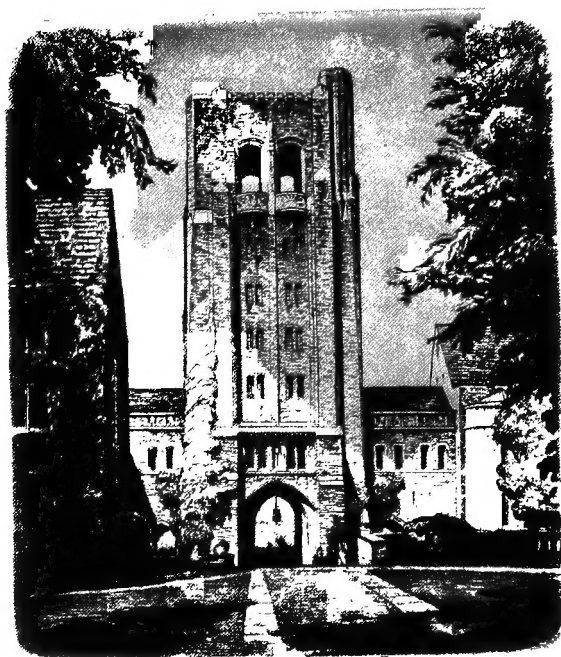


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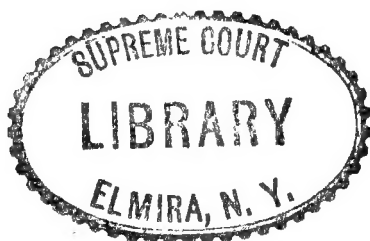
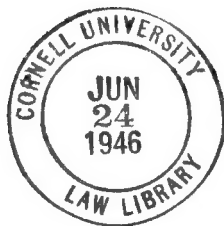
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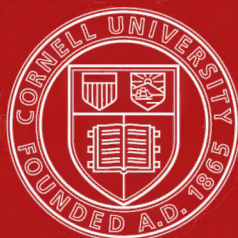
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**BRANDENBURG**  
**ON**  
**BANKRUPTCY**

**FOURTH EDITION**  
**By WILLIAM H. OPPENHEIMER**

**CHICAGO**  
**CALLAGHAN AND COMPANY**  
**1917**

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## PREFACE TO FOURTH EDITION

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Fourteen years have elapsed since the publication of the last edition of this work. Since that time the Bankruptcy Act has been amended by acts of Congress passed in 1906 and 1910. The amendments of 1910 particularly made a number of drastic changes in the Act. Many of the rules announced by earlier decisions are, therefore, obsolete.

Since the last edition also, many of the uncertainties arising from conflicts among the various state and federal courts have been clarified by the authoritative decisions of the Supreme Court of the United States. For the first time since the passage of the Act, therefore, it is now possible to state with practical certainty the various principles arising in the application of the Act.

The former edition has been practically rewritten and reclassified. It is not a mere annotation of the Bankruptcy Act but is, in fact, a complete treatise on the Law of Bankruptcy.

Considerably over 100 unofficial forms carefully prepared and based, in most cases, upon forms used in cases passed upon by the courts, have been added to the present edition. These supplemental forms together with the official forms which have also been included will be sufficient, it is believed, to present a complete guide to the bankruptcy practitioner on practically every proposition likely to arise.

In the appendix will be found the Acts of 1898 and 1867 together with the General Orders adopted by the Supreme Court of the United States. Under the various sections of the Act of 1898 and the General Orders, references have been incorporated showing where these provisions are treated in the work.

Credit is cordially given to Mr. T. Otto Streissguth for his work in connection with the preparation of the present edition.

WILLIAM H. OPPENHEIMER.

St. Paul, Minn., February, 1917.





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# LAW OF BANKRUPTCY

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## CHAPTER I

### HISTORY AND GENERAL NATURE

- § 1. History—In general.
- § 2. Bankruptcy and insolvent laws.
- § 3. Object.
- § 4. English history.
- § 5. History in United States.
- § 6. Constitutionality of act.
- § 7. State and federal laws.

#### § 1. History—In general.

In early times systems of bankruptcy laws were unknown, individual creditors being allowed to pursue the remedies afforded by the laws of the community. These were usually drastic so far as the debtor was concerned. Under some his body might be cut to pieces and divided among his creditors.<sup>1</sup> Under others the debtor might be imprisoned or he and his family sold into slavery.<sup>2</sup> The growth of commerce and the development of popular rights has, however, led to a gradual development of systems of bankruptcy until, with hardly an exception, they now form a part of the administrative systems of all civilized nations. Great Britain, Germany, Russia, France, Italy, Norway, Sweden, Spain, Mexico, Belgium, Denmark, Turkey, and many other nations, have responded to the needs of their people and wisely provided laws governing bankruptcy.

The systems in vogue in the several nations show much diversity, varying from that which is found in Russia—where the right

1—Roman Law of the Twelve Tables.

2—See New Testament, Matthew,  
c. 18.

of the debtor to resume business is dependent upon the good will of his creditors, and where a single dissatisfied creditor can, upon making a paltry monthly payment, keep the bankrupt a prisoner until the debt is paid—to the highly advanced system which prevails in England and the United States.

## § 2. Bankruptcy and insolvent laws.

Bankruptcy is an ancient English word which has come down to us at least from the time of Elizabeth, bearing all the way a meaning co-extensive with insolvency, and it was especially equivalent to that word when the constitution was adopted.<sup>3</sup>

There is no substantial difference between a strictly bankrupt law and an insolvent law except possibly theoretically, and that is in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. But, even in the respect named, there is no difference in this instance. The present law is both a bankrupt law and an insolvent law by definition, for it affords relief upon the application of either the debtor or creditor under the heads of voluntary and involuntary bankruptcy.<sup>4</sup> Hence a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law.<sup>5</sup>

## § 3. Object.

Every business transaction involving the giving of credit necessarily implies two classes—a debtor and a creditor. Bank-

3—Kunzler v. Kohaus, 5 Hill 320.

4—Martin v. Berry, 37 Cal. 222. In Klein's Case, 1 How. 277n, the constitutionality of the act of 1841, so far as the same contained the features of an insolvency law, was attacked; the act was sustained and all practical distinction between insolvency and bankruptcy laws obliterated.

"The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among cred-

itors, and a provision for priorities or other matters not permissible in the absence of such statute. A provision for the discharge of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law." In re Weedman Stave Co., 199 Fed. 948, 29 A. B. R. 460.

5—Sturges v. Crownshield, 4 Wheat. 196; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; Grunsfeld Bros. v. Brownell, 12 N. M. 192, 11 A. B. R. 599.

ruptcy laws are not designed for one but for both classes, and are beneficial to all but the dishonest debtor.<sup>6</sup> The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of the tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others.<sup>7</sup> In the absence of a bankruptcy law, the least suspicion of the insolvency of a debtor, his inability to meet financial obligations or the like, naturally cause the zealous creditor to institute attachment proceedings and perhaps cause liquidation of his debtor, who, left to his own resources and given reasonable time, would be able to avoid a suspension and perhaps ruin. The sole gainer through the absence of such a law, outside of the dishonest debtor, is he who is first on the ground with his attachment process and whose lien operates to defeat other creditors with equally just claims, but who are perhaps more merciful and less anxious to cause the creditor's liquidation.

In addition to the value of a bankruptcy law in conducing to a better business understanding between the debtor and creditor, it acts as a preventive and check to overtrading, by largely preventing the giving of preferences by the insolvent. In this connection Cadwalader, J., said: "In this respect its operation will be gradual, but must be highly beneficial. When relations and friends of a debtor, and when capitalists, who without affection or friendship would make profit from his embarrassments, learn that they cannot be secured by a preference out of the wreck of his affairs, they will not furnish him the means of overtrading. So long as he could, by securing advances and accommodations, obtain them, the temptation to attempt to retrieve his losses, by doubling his investments was, before the enactment of the bankrupt law, irresistible; and the system of business was that of mere gambling adventure. But when a debtor who suffers losses knows that he cannot prefer his relations and friends; and when capitalists know that they cannot, without risk, assist him to the injury of other creditors, he will stop his business in season, to give a fair dividend to all his

6—In re Cohn, 171 Fed. 568, 22 A. B. R. 761.

7—Shawhan v. Wherritt, 7 How. 627, 12 L. ed. 847.

creditors, and thus make a fair settlement with them in the court of bankruptcy, or, much oftener, out of it. Then, in the course of time, few judicial bankruptcies will occur."<sup>8</sup>

The purpose of a bankrupt law is to place within the possession of the creditor that to which he may be entitled, within the shortest reasonable time, and at the same time, if the bankrupt has made a fair and honest surrender, and complied with the requisites made of him, to give him a speedy release, and let him begin anew to provide an honest living for himself and those dependent upon him and again become a useful and active member of society,<sup>9</sup> the cardinal principle being to grant to

8—In re Woods, 7 N. B. R. 126.

9—In re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17920.

The proceeding contemplated by the bankruptcy act is not a mere personal action against the bankrupt for the collection of debts, but its purpose is to impound all of his non-exempt property, to distribute it equitably among his creditors, and to release him from further liability, being both a proceeding *in personam* and *in rem*. *Hills v. F. D. McKinniss Co.*, 188 Fed. 1012, 26 A. B. R. 329.

The equal and equitable distribution of the estates of insolvents and their discharge from the obligations of their debts are the ends sought by proceedings in bankruptcy. In re Forbes, 128 Fed. 137, 11 A. B. R. 787.

The policy of all national bankruptcy acts is primarily to secure an equal and speedy distribution of the property of the bankrupt among his creditors. A further object is to relieve the honest debtor from legal proceedings for his debts, and to enable him to have a fresh start in business life; but the distribution of the property is the principal object to be attained—the discharge of the debtor is incidental and subordinate. In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 A. B. R. 282.

"Bankruptcy proceedings are primarily designed for the protection of the creditors and have for their principal object the payment of the debts of the

bankrupt, and to this end the distribution of his assets ratably amongst his creditors under equitable principles. Secondly, though not necessarily, such acts usually contemplate the relief and discharge of the debtor upon full disclosure of his property and compliance with the law. The court in bankruptcy simply marshals the assets of the debtor and distributes them, having regard to preferences created by law. All other proceedings, such as the dissolution of attachments, the barring of nonpresented claims, and the like, are mere incidents, which may or may not be found in a bankruptcy act, and which, if not found, in no sense affect its construction as a bankruptcy act." *Continental Building & Loan Ass'n v. Superior Court*, 163 Cal. 579, 28 A. B. R. 873.

In *Hardie v. Swofford Bros. Dry Goods Co.*, 165 Fed. 588, 21 A. B. R. 457, 461 (rev'g 143 Fed. 607, 16 A. B. R. 313), the court says that: "the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity, in the interest of his family, and the general public, are the main, if not the most important, objects of the law."

For statements of the objects and purposes of the bankruptcy act similar to the above, see *McDonald v. Tefft-Weller Co.*, 128 Fed. 381, 11 A. B. R. 800; *Barton Bros. v. Texas Produce Co.*, 136 Fed. 355, 14 A. B. R. 502; In re Blount, 142 Fed. 263, 16 A. B. R. 97; In re Harr, 143



creditors those rights which would have been theirs if bankruptcy had not suspended, and to save to the bankrupt and his family every right which would have been theirs as against creditors enforcing their claims by ordinary judicial process.<sup>10</sup>

A bankrupt or insolvent law, viewed as operating on the rights of creditors, is a system of remedy. It takes out of the hands of the creditors the ordinary remedial processes, and suspends the ordinary rights which by law belong to creditors, and substitutes in their place a new and comprehensive remedy designed for the common benefit of all. The rights with which the trustee is clothed as the representative of creditors are to render this great and common remedy effectual.<sup>11</sup>

#### § 4. English history.

As the idea of a National bankruptcy system may be said to have become a part of the Federal constitution by a process of evolution from the English statutory law, it is interesting to note as a matter of history that the earliest statute on the subject of bankruptcy is found in 34 and 35 Henry VIII (chapter 4), which was primarily provided as a protection against the Lombards and fraudulent traders, who, like the dishonest debtors of to-day, incurred obligations and liabilities and then surreptitiously removed themselves beyond the jurisdiction, without having been first discharged therefrom. It was without limit as to the persons who could become recipients of its provisions, the restriction as to traders first appearing in the statute of Elizabeth, while the right of a trader to become a voluntary bankrupt first appears in the statute of 6 George IV (chapter 16).<sup>12</sup> Among the earliest laws affecting insolvents, we find applicants for relief referred to as "persons craftily obtaining into their hands great substance of other men's goods, who suddenly flee to parts unknown or keep their houses, not minding to pay or restore to their creditors their debts and duties, but at their own will and pleasure consume the substance

Fed. 421, 16 A. B. R. 213; *Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 17 A. B. R. 609; *Hurley v. Devlin*, 151 Fed. 919, 18 A. B. R. 627; *In re Tindal*, 155 Fed. 456, 18 A. B. R. 773; *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 21 A. B. R. 474.

10—*In re Cohn*, 171 Fed. 568, 22 A. B. R. 761.

11—*Curtis, J.*, in *Betton v. Valentine*, 1 Curt. 176.

12—*Kunzler v. Kohaus*, 5 Hill 322.

obtained by credit of other men, for their own pleasure and delicate living against all reason, equity and good conscience.”<sup>13</sup> While these early bankruptcy laws went upon the hypothesis that one guilty of bankruptcy was a criminal,<sup>14</sup> this view certainly does not now prevail, and in fact did not at the time of Lord Loughborough, who remarked, with reference to bankrupts, “the law, upon the act of bankruptcy being committed, vests his property upon a just consideration; not as a forfeiture; not on a supposition of a crime committed; not as a penalty.”<sup>15</sup>

### § 5. History in United States.

The oppressor's hand resting heavily upon our forefathers in the old world, and causing them to migrate to new and untried fields, naturally inclined them to incorporate liberal and wise provisions for the protection of all classes in the federal constitution. Among them is one evidently suggested by the English bankruptcy statutes, and it is found in section 8 of article 1 of that instrument, which authorizes congress “to establish . . . uniform laws on the subject of bankruptcy throughout the United States.” This section, together with section 10 of the same article, providing that “no state shall . . . pass any laws impairing the obligation of contracts,” are most important factors in the legal and commercial world. Pursuant to the authority contained in section 8, congress has on four different occasions enacted laws providing a uniform system of bankruptcy. All of these acts, excepting the present one, for evident reasons failed of their purpose and early expired. The first was the act of April 4, 1800,<sup>16</sup> and was limited to five years; but it was repealed by the act of December 19, 1803.<sup>17</sup> The fact that it was intended chiefly for the protection of creditors, the sparseness of the settlements, the scarcity of federal courts, and the difficulty and slowness of travel, contributed mainly to its failure. The distance between places where courts were held, by reason of the method of locomotion, made ready relief almost impossible and soon brought about a

13—34 and 35 Henry VIII, Chap. 4.

14—3 Pars. on Contracts, 425.

15—Sill v. Worswick, 1 H. Bl. 665; In

re De Forrest, 9 N. B. R. 278, Fed. Cas. No. 3745.

16—2 Stat. L. 19.

17—2 Stat. L. 248.

demand for the repeal of the law. Under this act only involuntary proceedings were permitted. The second act was approved August 19, 1841,<sup>18</sup> but like its predecessor was short lived, being repealed March 3, 1843.<sup>19</sup> In addition to some of the causes that contributed to the failure of the prior law, this one was framed so as to greatly favor the debtor; it also became the subject of political contention, and under the combined influence naturally failed. Under this act voluntary proceedings were provided for. The next bankruptcy law was approved March 2, 1867,<sup>20</sup> and after an existence of eleven years was repealed by the act of June 7, 1878, to take effect September 1, 1878.<sup>21</sup> The law was several times amended, the most important modification being that made by the act of June 22, 1874.<sup>22</sup> While this law of 1867 had many imperfections, its provisions were more equitable as between creditor and debtor; but the expenses attending litigation and its administration, together with the lack of uniform rules and regulations governing assignees and registers, more than all else, contributed to its failure and induced its repeal. The law now in force in the United States was enacted on July 1, 1898, and amended in various respects on February 5, 1903, June 15, 1906, and June 25, 1910. The amendments made on the latter date are not retroactive,<sup>23</sup> though they apply to every bankruptcy the petition in which was filed after their passage.<sup>24</sup>

Reference to these former acts and the decisions thereunder are frequently valuable for, in interpreting the present act and general orders, reference may be had to the interpretation placed on similar language in previous acts and general orders.<sup>25</sup>

18—5 Stat. L. 440.

19—5 Stat. L. 614.

20—14 Stat. L. 517.

21—20 Stat. L. 99.

22—18 Stat. L. 178.

23—In re New Amsterdam Motor Co., 180 Fed. 943, 24 A. B. R. 757; In re United States Restaurant & Realty Co., 187 Fed. 118, 25 A. B. R. 915.

24—Holt v. Henley, 193 Fed. 1020, 27 A. B. R. 578, aff'g 190 Fed. 871, 27 A. B. R. 178. Amendment of 1910 to section 47a does not affect rights vested

under a conditional sale contract made before its passage. In re Schneider, 203 Fed. 589, 29 A. B. R. 469.

25—In re Levin, 23 A. B. R. 845; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 5 A. B. R. 829; Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 17 A. B. R. 484; York Mfg. Co. v. Cassell, 201 U. S. 344, 15 A. B. R. 633, 50 L. ed. 782; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102.

### § 6. Constitutionality of act.

Congress is given plenary power over the "subject of bankruptcy," as that subject was recognized in the jurisprudence of England and America in 1787,<sup>26</sup> under one limitation only, that the law passed upon that subject shall be uniform throughout the United States,<sup>27</sup> and this power carries with it a right to establish the details of the system if it shall think proper.<sup>28</sup> In this connection a system of bankruptcy national in its character to be uniform in its operation must of necessity be unique in its method of administration, and when one of its provisions involving the very policy of the law is deemed inconsistent with the general law, the special provision must control.<sup>29</sup>

In dealing with the phrase, "subject of bankruptcy," the courts have refused to make any refined distinction between "bankruptcy" and "insolvency" laws,<sup>30</sup> hence the bankruptcy act is not unconstitutional because dealing with persons other than traders<sup>31</sup> or with voluntary bankruptcy.<sup>32</sup> The constitutionality of the bankruptcy law has been frequently attacked on the ground that by adopting the various state exemption laws<sup>33</sup> or dower rights,<sup>34</sup> or making a distinction between natural and artificial persons, and between classes of artificial persons,<sup>35</sup> it lacked uniformity. But the courts have almost invariably held that the uniformity required is geographical and not personal in the sense of being alike applicable to all members of the community, no limitation being placed upon congress as to the

26—*Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

27—*In re Silverman*, 4 N. B. R. 173, Fed. Cas. No. 12855; *In re Duerson*, 13 N. B. R. 183, Fed. Cas. No. 4117; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

28—*Six Penny Savings Bank v. Stuyvesant Bank*, 10 N. B. R. 399, Fed. Cas. No. 12919; *In re Deckert*, 10 N. B. R. 1, Fed. Cas. No. 3728.

29—*Hills v. F. D. McKinniss Co.*, 188 Fed. 1012, 26 A. B. R. 329; *In re Edes*, 135 Fed. 395, 14 A. B. R. 382. Bankruptcy act held to supersede Revised Statutes giving priority to claims of the United States. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224

U. S. 152, 27 A. B. R. 873, rev'g 174 Fed. 385, 23 A. B. R. 340.

30—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

31—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

32—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

33—*In re Beckerford*, 4 N. B. R. 203, 1 Dill. 45, Fed. Cas. No. 1209; *In re Deckert*, 2 Hughes 183; *Hanover Nat. Bank v. Moyses*, 46 L. ed. 1113, 186 U. S. 181, 8 A. B. R. 1.

34—*Thomas v. Woods*, 173 Fed. 585, 23 A. B. R. 132.

35—*Leidigh Carriage Co. v. Stengel*, 1 N. B. N. 387, 95 Fed. 637, 2 A. B. R. 383.

classification of persons who are to be affected by such laws, and that the constitution contemplated uniformity of administration only,<sup>36</sup> and so far as the distribution of the assets are concerned, the law is uniform.<sup>37</sup> The recognition of the local law in the matter of exemptions, dower, priority of payments and the like, is not an attempt by congress to unlawfully delegate its legislative power, and the act is not for that reason void,<sup>38</sup> nor does it violate the fifth amendment because in voluntary proceedings it deprives creditors of their property without due process of law in failing to provide for notice.<sup>39</sup>

The retrospective effect of the bankrupt law, by impairing the obligation of contracts, does not render it unconstitutional as the inhibition to the impairment of contracts does not apply to the federal government.<sup>40</sup> While it is perhaps true that congress cannot impose upon state courts any duties in connection with the enforcement of bankrupt laws,<sup>41</sup> still state, as well as federal courts, are bound to respect the rights acquired under such laws,<sup>42</sup> and all state courts having jurisdiction of bankruptcy or insolvency cases are obliged to enforce the laws of that subject enacted by congress.<sup>43</sup>

## § 7. State and federal laws.

When congress exercises its constitutional power to establish uniform laws on the subject of bankruptcy, the law passed under such power is paramount and exclusive of all state insolvent

36—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; *In re Jordan*, 8 N. B. R. 180, Fed. Cas. No. 7514; *Thomas v. Woods*, 170 Fed. 764, 23 A. B. R. 132. *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

“Congress can pass any law on the subject of bankruptcy . . . which it sees fit to pass, however, lacking in uniformity in its operation upon different classes of persons and kinds of property.” *Id.*

37—*In re Beckerford*, 4 N. B. R. 203, 1 Dill. 45, Fed. Cas. No. 1209.

38—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; *In re Rahrer*, 35 L. ed. 572, 576, 140 U. S. 545, 560.

39—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

40—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; *In re T. H. Thompson Milling Co.*, 144 Fed. 314, 16 A. B. R. 454; *In re Jordan*, 8 N. B. R. 180, Fed. Cas. No. 7514; *In re Smith*, 14 N. B. R. 295, 2 Woods 458, Fed. Cas. No. 12996; *In re Everett*, 9 N. B. R. 90, Fed. Cas. No. 4579.

41—*Goodall v. Tuttle*, 7 N. B. R. 193, 3 Biss. 219, Fed. Cas. No. 5533; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

42—*Hall v. Chicago, B. & Q. R. Co.*, 88 Neb. 20, 25 A. B. R. 53.

43—*Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

laws inconsistent therewith,<sup>44</sup> and the state laws relating to the subject-matter are suspended or superseded during the existence of the federal law,<sup>45</sup> even as between citizens of the same state,<sup>46</sup>

44—*Sturgis v. Crownshield*, 4 Wheat. 122, 4 L. ed. 529; *Parmenter Mfg. Co. v. Hamilton*, 1 N. B. N. 8, 1 A. B. R. 39; In re *Bruss-Ritter Co.* 1 N. B. N. 39, 1 A. B. R. 58, 90 Fed. 651; In re *Rouse, Hazard & Co.*, 1 N. B. N. 75, 91 Fed. 96, 1 A. B. R. 234, 1 N. B. N. 231, 91 Fed. 514; *Blake v. Francis-Valentine Co.*, 1 N. B. N. 47, 1 A. B. R. 372, 89 Fed. 691; In re *Curtis*, 1 N. B. N. 163, 1 A. B. R. 440, 91 Fed. 737; In re *Sievers*, 1 N. B. N. 68, 1 A. B. R. 117, 91 Fed. 366; s. c. as *Davis v. Bohle*, 1 N. B. N. 216, 1 A. B. R. 412, 92 Fed. 325; In re *Etheridge Furn. Co.*, 1 N. B. N. 139, 1 A. B. R. 112, 92 Fed. 329; In re *McKee*, 1 N. B. N. 139, 1 A. B. R. 311; In re *Rennie*, 1 N. B. N. 335, 2 A. B. R. 182; In re *Dept. Store*, 1 N. B. N. 300; In re *Fellerath*, 1 N. B. N. 292, 2 A. B. R. 40, 95 Fed. 121; In re *Langley*, 1 N. B. R. 155; *VanNostrand v. Barr*, 2 N. B. R. 154; *Thornhill v. Bk.*, 5 N. B. R. 367, 1 Woods 1, Fed. Cas. No. 13992; In re *Merchants' Ins. Co.*, 6 N. B. R. 43, 3 Biss. 162, Fed. Cas. No. 9441; In re *Ind. Ins. Co.*, 6 N. B. R. 260, *Holmes* 103, Fed. Cas. No. 1017; In re *Safe Dep. & Sav. Inst.*, 7 N. B. R. 392, Fed. Cas. No. 12211; In re *Citizens' Sav. Bk.*, 9 N. B. R. 152, Fed. Cas. No. 2735; *Schryock v. Bashore*, 13 N. B. R. 481, Fed. Cas. No. 12820; contra, *Sedgwick v. Place*, 1 N. B. R. 204, 34 Conn. 552, Fed. Cas. No. 12622; *Maltbie v. Hotchkiss*, 5 N. B. R. 485; *Chandler v. Siddle*, 10 N. B. R. 236, Fed. Cas. No. 2594; In re *Hall Co.*, 121 Fed. 992, 10 A. B. R. 88; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276; *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206, 12 A. B. R. 392; In re *Pickens Mfg. Co.*, 158 Fed. 894, 20 A. B. R. 202; *Martin v. Globe Bank & Trust Co.*, 193 Fed. 841, 27 A. B. R. 545.

45—*Sturgis v. Crowninshield*, 4 L. ed. 529, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Parmenter*

*Mfg. Co. v. Hamilton*, 172 Mass. 178; 1 A. B. R. 39; In re *Bruss-Ritter Co.*, 90 Fed. 651, 1 A. B. R. 58; In re *Anderson*, 110 Fed. 141, 6 A. B. R. 555; In re *Mason Sash, Door & Lumber Co.*, 112 Fed. 323, 7 A. B. R. 66; In re *Storek Lumber Co.*, 114 Fed. 360, 8 A. B. R. 86; *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29; *Littlefield v. Gray*, 8 A. B. R. 409; In re *Richard*, 2 A. B. R. 506; see *Hanover Nat. Bank v. Moyses*, 46 L. ed. 1113, 186 U. S. 181, 8 A. B. R. 1; *Herron Co. v. Superior Court*, 8 A. B. R. 492; *Perry v. Langley*, 1 N. B. R. 559; *Griswold v. Pratt*, 9 Metc. 16; In re *Reynolds*, 9 N. B. R. 50, Fed. Cas. No. 11723; *Thornhill et al. v. Bank*, 5 N. B. R. 367, 1 Woods 1, Fed. Cas. No. 13992; *Shryrock et al. v. Bashore*, 13 N. B. R. 481; In re *Hall Co.*, 121 Fed. 992, 10 A. B. R. 88; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276; *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206, 12 A. B. R. 392; In re *Allison Lumber Co.*, 137 Fed. 643, 14 A. B. R. 78; In re *Keith-Cara Co.*, 203 Fed. 585, 29 A. B. R. 466.

California act known as "The Building and Loan Commissioners Act" while in certain features a bankruptcy act, contains provisions entirely foreign to the federal act, or to the legal concept of bankruptcy. If the investigation which the state court is authorized to conduct results in a finding of bankruptcy or insolvency, within the meaning of the federal act, then, under such finding or judgment, by force of the federal act itself, the jurisdiction of the state court is suspended. But if the corporation is found to be neither a bankrupt nor insolvent within the meaning of the federal act, then the power of the state court to proceed cannot be questioned. *Continental Building & Loan Ass'n v. Superior Court*, 163 Cal. 579, 28 A. B. R. 873.

46—*Kassard v. Kroner*, 4 N. B. R. 569.

but can in no sense be said to be repealed by it,<sup>47</sup> the same being true of territorial laws of like nature.<sup>48</sup> Hence an insolvent law may be amended, repealed or enacted by a state during the existence of the bankrupt law, and such amendment, repeal and enactment, will be valid legislative acts, though the operation of these acts in so far as they conflict with the federal law are suspended while it continues in force. When the bankrupt law is repealed, the insolvent laws of the states again become operative without re-enactment; and if amended during the existence of the bankrupt law, they will become operative in their amended form.<sup>49</sup>

It is only, however, to the extent that congress has legislated upon the subject that the statutes of the several states are suspended by its legislation. As stated by Chief Justice Marshall<sup>50</sup> with reference to the power given congress: "This establishment of uniformity is perhaps incompatible with state legislation on that part of the subject to which the act of congress may extend. . . . It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach; but, be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." If, therefore, the bankruptcy law excepts from its operation either in express terms or by necessary implication a class of cases, it must be considered that it was the intention of congress not to interfere in that class of cases with the laws of the several states in reference thereto. The state laws will remain operative in all cases which are not within the provisions of the bankruptcy law.

47—*Lavender v. Gosnell*, 12 N. B. R. 282; *In re Everett*, 9 N. B. R. 90, Fed. Cas. No. 4579; *In re McKee*, 1 N. B. N. 139, 1 A. B. R. 311.

48—*In re Renie*, 1 N. B. N. 335, 2 A. B. R. 182.

49—*In re Wright*, 1 N. B. N. 428, 95

Fed. 807, 2 A. B. R. 592; *In re Worcester Co.*, 102 Fed. 808, 4 A. B. R. 496; *Ex p. Eames*, 2 Story, 322, Fed. Cas. No. 4237; see *Butler v. Gorley*, 36 L. ed. 981, 146 U. S. 303, 314.

50—*Sturgis v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529.

Therefore, any class of persons or corporations not covered by the bankruptcy law are subject to the laws of the several states governing insolvency and the states are authorized to legislate with reference thereto. In such cases there is no conflict of jurisdiction between the state and federal law but each statute is operative within its own jurisdiction and may be enforced without in any respect infringing upon the jurisdiction of the other.<sup>51</sup> To whatever extent congress has undertaken to provide remedies and prescribe procedure, its authority being unquestionably paramount, state statutes designed for the same or similar purposes must give way.<sup>52</sup> This rule relates merely to the administration of the state laws in proceedings in the state courts, and does not prevent the enforcement in the federal bankruptcy proceedings of any general priorities recognized by the state laws, where such priorities are conferred by the state statutes as substantive rights of priority not in conflict with the express priorities declared by the bankruptcy act itself or otherwise in conflict with its provisions.<sup>53</sup>

The present "system of bankruptcy" does not pretend to cover the whole field of either voluntary or involuntary bankruptcy and insolvency,<sup>54</sup> and in so far as state insolvency laws deal with cases over which the federal bankruptcy courts have no jurisdiction they remain in full operation.<sup>55</sup> The bankrupt law does not suspend an ordinary law for the collection of debts,<sup>56</sup> or for the arrest of fraudulent or absconding debtors,<sup>57</sup> or to prevent fraudulent assignments in trust for creditors and other fraudulent conveyances,<sup>58</sup> or laws relating to the insolvent estates of persons under legal disability, as lunatics or spend-

51—*Herron v. Superior Court*, 68 Pac. (Cal.) 814, 8 A. B. R. 492; *In re Winternitz*, 4 B. R. 127; *Clarke v. Ray*, 1 Har. J. 318; *In re Shepardson*, 36 Conn. 23; *In re Geery*, 43 Conn. 289; see *Simpson v. Bank*, 56 N. H. 466; *Steelman v. Mattix*, 36 N. J. Law 344; *Martin v. Berry*, 37 Cal. 208.

52—*In re McKee*, 1 N. B. N. 139, 1 A. B. R. 311.

53—*In re Standard Oak Veneer Co.*, 173 Fed. 103, 22 A. B. R. 883.

54—*Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

55—*Herron Co. v. Superior Court*, 136

Cal. 279, 8 A. B. R. 492 (case decided prior to amendments 1903 and 1910); *Old Town Bank v. McCormick*, 10 A. B. R. 767; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 A. B. R. 276.

56—*Chandler v. Siddle*, 10 N. B. R. 236, 3 Dill. 477, Fed. Cas. No. 2594.

57—*In re Scott*, 1 N. B. N. 265, 1 A. B. R. 650; *McCullough v. Goodhart*, 1 N. B. N. 512, 3 A. B. R. 85; *Ex parte Crawford*, 154 Fed. 769, 18 A. B. R. 618.

58—*Ebersole v. Adams*, 13 N. B. R. 141.



thrifts,<sup>59</sup> or a law merely protecting the debtor from imprisonment,<sup>60</sup> or a law to prevent debtors in contemplation of insolvency from preferring one or more creditors,<sup>61</sup> or statutes prescribing the conditions upon which foreign corporations may enter the state for purposes of business.<sup>62</sup> Laws relating to general assignments, and not constituting general insolvency laws, are not suspended,<sup>63</sup> and an assignment made thereunder is voidable only in case bankruptcy proceedings should be begun.<sup>64</sup> The bankruptcy act has not superseded the right and power of a court of equity to take charge of the property of an insolvent corporation for the protection of stockholders and creditors, marshal the same, recognize and enforce valid liens and priorities, and equitably distribute the surplus proceeds among its creditors.<sup>65</sup>

In the absence of a federal bankruptcy law, each state has full authority to enact insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts.<sup>66</sup> A state law discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debt, cannot constitutionally be made to apply to debts contracted prior to the passage of the law; but the law may be made to apply to such future contracts as can be considered as having been made in reference to the law.<sup>67</sup> Statutes of this class must be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation.<sup>68</sup> In fact, the inhibition of the constitu-

<sup>59</sup>—*Mayer v. Hellman*, 23 L. ed. 377, 91 U. S. (1 Otto) 496; *Hawkins v. Learned*, 54 N. H. 333.

<sup>60</sup>—*Sullivan v. Heiskell*, *Crabbe*, U. S. Dist. Ct. 525.

<sup>61</sup>—*Grunsfeld Bros. v. Brownell*, 12 N. M. 192, 11 A. B. R. 599.

<sup>62</sup>—Statute giving local creditors priority. In *re Standard Oak Veneer Co.*, 173 Fed. 103, 22 A. B. R. 883.

<sup>63</sup>—*Randolph v. Scruggs*, 10 A. B. R. 1; In *re Pattee*, 143 Fed. 994, 16 A. B. R. 450 (common-law assignment).

<sup>64</sup>—*Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1.

<sup>65</sup>—In *re Ellsworth Co.*, 173 Fed. 699, 23 A. B. R. 284.

<sup>66</sup>—*Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529, 122, 32 L. ed. 491; *Denny v. Bennett*, 128 U. S. 489, 497; In *re Reynolds*, 9 N. B. R. 52, Fed. Cas. No. 11723.

<sup>67</sup>—*Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531.

<sup>68</sup>—*Denny v. Bennett*, 32 L. ed. 491, 128 U. S. 489.

tion is wholly prospective. The states may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effects.<sup>69</sup> A state cannot, however, by such a law, discharge one of its own citizens from his contracts with citizens of other states<sup>70</sup> though made after the passage of such a law unless they voluntarily become parties to the proceedings in insolvency. While this is true, each state has the power by general law, so long as it does not impair the obligation of any contract, to regulate the conveyance and disposition of all property, real or personal, within its limits and jurisdiction. Accordingly a discharge under a state insolvency law has no extra-territorial force or effect.<sup>71</sup> Legal notice cannot be given, and as a result there can be no obligation to appear, and, of course, there can be no legal default, and so a discharge under a foreign bankrupt law cannot be pleaded as a bar to an action on a contract made in this country.<sup>72</sup>

Proceedings instituted under state insolvency laws prior to the passage of the national bankruptcy law are not affected by it,<sup>73</sup> though the mere fact that a state court has taken possession of the property of an insolvent, thereby first gaining jurisdiction, cannot be allowed to defeat the proper execution of the latter law.<sup>74</sup>

69—*Edwards v. Kearzey*, 96 U. S. (6 Otto), 595, 603, 24 L. ed. 793, 797; *Denny v. Bennett*, 32 L. ed. 491, 494, 128 U. S. 489, 495.

70—*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531; *Gilman v. Lockwood*, 4 Wall. 409, 18 L. ed. 432; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. ed. 527; *Clay v. Smith*, 3 Pet. 411, 7 L. ed. 723; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491.

71—*Denny v. Bennett*, 32 L. ed. 491, 128 U. S. 489; *Baldwin v. Hale*, 1 Wall.

223, 17 L. ed. 531; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606.

72—*McMillan v. McNeill*, 4 Wheat. 209, 4 L. ed. 552.

73—See last paragraph of act, also *Longis v. Creditors*, 20 La. Ann. 15; *Martin v. Berry*, 37 Cal. 208, where the same is held to be the effect of the act of 1867; *Muslin v. Creditors*, 3 N. B. R. 126.

74—*Geo. M. West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. ed. 1098, 1 N. B. N. 409, 2 A. B. R. 483; *In re Safe Dep. & Ins.*, 7 N. B. R. 392, Fed. Cas. No. 12211.

## CHAPTER II

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION

§ 8. Creation of courts of bankruptcy and statutory powers.

§ 9. Jurisdiction—In general.

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§ 14. Place of business, residence or domicile.

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§ 19. Judgment of state court.

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§ 24. Reopening estate.

§ 25. Court always open—Term.

§ 26. Expedition in hearing.

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§ 28. Judge; qualification, duty and conduct.

#### § 8. Creation of courts of bankruptcy and statutory powers.

Courts of bankruptcy are creatures of statute and exercise such powers as are expressly or impliedly conferred upon them by statutory enactment.<sup>1</sup> Under the Bankruptcy Act of 1898, "courts of bankruptcy" are defined to "include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory and of Alaska,"<sup>2</sup> and these courts are expressly "made courts of bankruptcy,"<sup>3</sup> and are<sup>4</sup> invested,

1—In re Williams, 120 Fed. 38, 9 A. B. R. 741; In re Elmira Steel Co., 109 Fed. 456, 5 A. B. R. 484; Brumley v. Jones, 141 Fed. 318, 15 A. B. R. 578; In re Steele, 161 Fed. 886, 20 A. B. R. 446; In re Morris, Fed. Cas. No. 9825.

2—Act 1898, § 1, subd. 8, and § 2.

3—Act 1898, § 2.

4—Act 1898, § 2.

within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

**(1) To adjudicate bankrupt.**—Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

**(2) Allowance of claims.**—Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

**(3) Appoint receivers or marshal.**—Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

**(4) Trial of offenses.**—Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

**(5) Temporary transaction of business.**—Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; and allow such officers additional compensation for such services,<sup>5</sup> as provided in section 48 of this act.

5—Subdivision 5 of section 2 was amended by the act of February 5, 1903, by the addition at the end thereof of the words “and allow such officers ad-

ditional compensation for such services, but not at a greater rate than in the act allowed trustees for similar services,” as found in the text. The amendment of

(6) **Substitution of parties.**—Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) **To collect and distribute assets.**—Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) **To close estates.**—Close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) **To confirm or reject compositions.**—Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

(10) **To consider referee's findings.**—Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) **To determine exemptions.**—Determine all claims of bankrupts to their exemptions;

(12) **To grant discharges, etc.**—Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) **To enforce orders.**—Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) **To extradite bankrupts.**—Extradite bankrupts from their respective districts to other districts;

(15) **To make orders.**—Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act;

(16) **To punish contempts.**—Punish persons for contempts committed before referees;

(17) **To appoint or remove trustees.**—Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees; and upon complaints

1910 struck out the words "but not at a greater rate than in this act allowed trustees for similar services," and added

the phrase "as provided in section 48, of this act." See c. —, § —.

of creditors, remove trustees for cause upon hearings and after notices to them;

(18) **To tax costs.**—Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;<sup>6</sup>

(19) **To transfer cases.**—Transfer cases to other courts of bankruptcy; and

(20) **Ancillary jurisdiction.**—Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.<sup>7</sup>

**Unspecified powers.**—Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.<sup>8</sup>

6—By the amendment of 1910 the word “and” in clause “nineteen” was stricken. The use of the word “nineteen” is apparently a clerical error and should be “eighteen.”

7—Added by amendment of 1910.

8—Act of 1867. Sec. 1. *Be it enacted* . . . That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the

bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of, the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity. Said courts may sit, for the transaction of business in bankruptcy, at any place in the district, of which place and the time of holding court,

### § 9. Jurisdiction—In general.

A district court of the United States, as a court of bankruptcy, is a court of record, and, although its jurisdiction is limited,<sup>9</sup> it is not an inferior court in such a sense that all facts essential to its jurisdiction must affirmatively appear on the face of its record in order to sustain its judgment,<sup>10</sup> and its judgments are therefore supported by the same presumptions which are indulged in favor of the judgments of all superior courts of general jurisdiction.<sup>11</sup> Its jurisdiction is absolute, paramount

they shall have given notice, as well as at the places designated by law for holding such courts.

Sec. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases of bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the supreme courts of the several territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

9—In re Columbia Real Estate Co., 101 Fed 965, 4 A. B. R. 411; In re Williams, 120 Fed. 38, 9 A. B. R. 741; Taft Co. v. Century Sav. Bank, 141 Fed. 369, 15 A. B. R. 594; In re Billing, 145 Fed. 395, 17 A. B. R. 80; Edelstein v. United States, 149 Fed. 636, 17 A. B. R. 649; In re First Nat. Bank of Belle Fourche, 152 Fed. 64, 18 A. B. R. 265.

“The bankruptcy court is one of limited jurisdiction, having jurisdiction only of proceedings which look to the allowance of provable claims, and to the discharge of the bankrupt from his debts on the one hand, and to the collection and distribution of his assets among his creditors on the other. A proceeding which has no relevancy to one or the other of these ends must be without the juris-

diction of the bankruptcy court.” In re Walker, 176 Fed. 455, 23 A. B. R. 805.

Court has no jurisdiction to order sale of exempt property though bankrupt consents. In re Rising, 27 A. B. R. 519.

*An independent controversy* between two creditors about the ownership of money that is not a part of the fund for distribution, growing out of a transaction that took place prior to bankruptcy, is not within the jurisdiction of the bankruptcy court. In re Girard Glazed Kid Co., 136 Fed. 511, 14 A. B. R. 485.

Court has no jurisdiction of the claim of a solvent partner against his bankrupt co-partner for reimbursement of the amount expended by him in liquidating the firm debts, over and above his share in the deficiency in firm assets, since claim is not provable. In re Walker, 176 Fed. 455, 23 A. B. R. 805.

But see In re Marion Contract & Construction Co., 166 Fed. 618, 22 A. B. R. 81, wherein it is stated that inasmuch as bankruptcy courts are vested exclusively with all jurisdiction in bankruptcy proceedings they can hardly be called courts of “limited jurisdiction.”

10—In re Columbia Real Estate Co., 101 Fed. 965, 4 A. B. R. 411; In re Billing, 145 Fed. 395, 17 A. B. R. 80; Edelstein v. United States, 149 Fed. 636, 17 A. B. R. 649.

11—In re Billing, 145 Fed. 395, 17 A. B. R. 80; Edelstein v. United States, 149 Fed. 636, 17 A. B. R. 649; Kilgore v. Barr, 75 S. E. 762, 28 A. B. R. 860.

Possess every attribute of finality and estoppel of such courts. In re First Nat.

and exclusive to adjudicate the question of bankruptcy, to settle and liquidate the estate of the bankrupt and as to all matters and questions arising in bankruptcy proceedings touching the persons and property of the bankrupts, their relations to their creditors, and the rights of creditors in and to the bankrupt's estate,<sup>12</sup> from the commencement of the proceedings<sup>13</sup> to their close.<sup>14</sup> Such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in due course, and the supervision and control of the trustees and others who are employed to assist them.<sup>15</sup>

*Bank of Belle Fourche*, 152 Fed. 64, 18 A. B. R. 265.

12—*Bank of Dillon v. Murchison*, 213 Fed. 147, 31 A. B. R. 740; *Hall v. Kinsell*, 2 N. B. N. R. 745, 102 Fed. 301; *In re Gutwillig*, 1 N. B. N. 40, 1 A. B. R. 78, 90 Fed. 475; s. c. 1 N. B. N. 554, 92 Fed. 337, 1 A. B. R. 388; *In re Bruss Ritter Co.*, 1 N. B. N. 39, 1 A. B. R. 58, 90 Fed. 651; *In re Etheridge Furn. Co.*, 1 N. B. N. 139, 1 A. B. R. 112, 92 Fed. 329; *In re Huddleston*, 1 N. B. N. 214, 1 A. B. R. 572; *Carpenter Bros. v. O'Connor*, 1 N. B. N. 132, 1 A. B. R. 381; *Keegan v. King*, 3 A. B. R. 79, 96 Fed. 758; *Allen v. Montgomery*, 10 N. B. R. 503; *In re Archenbrow*, 11 N. B. R. 149, Fed. Cas. No. 504; *In re Barrow*, 1 N. B. R. 125, Fed. Cas. No. 1057; *Walker v. Seigel & Bott*, 12 N. B. R. 394, Fed. Cas. No. 17085; *In re Charles F. Sievers*, 91 Fed. 366, 1 A. B. R. 117; *Lea Bros. & Co. v. West Co.*, 91 Fed. 237, 1 A. B. R. 261; *Matter of The Lengert Wagon Co.*, 110 Fed. 927, 6 A. B. R. 535; *In re Watts*, 190 U. S. 1, 47 L. ed. 933, 10 A. B. R. 113; *In re Knight*, 125 Fed. 35, 11 A. B. R. 1; *In re Granite City Bank of Dell Rapids*, 137 Fed. 818, 14 A. B. R. 404; *In re Marion Contract & Construction Co.*, 166 Fed. 618, 22 A. B. R. 81; *Moore Bros. v. Cowan*, 173 Ala. 536, 26 A. B. R. 902; *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 28 A. B. R. 207; *Martin v. Globe Bank*

& Trust Co., 193 Fed. 841, 27 A. B. R. 545; *In re Wentworth Lunch Co.*, 191 Fed. 821, 27 A. B. R. 515; *In re Heintz*, 201 Fed. 338, 29 A. B. R. 19.

Bankruptcy jurisdiction, when properly invoked, supersedes prior proceedings in a state court for winding up a corporation as to which the jurisdiction is not concurrent. *In re Standard Fuller's Earth Co.*, 186 Fed. 578, 26 A. B. R. 562.

The bankruptcy court cannot, when properly applied to, refuse to take jurisdiction because a proceeding to the same end is pending in a state court, but, *per contra*, it may stay all action in the state court. *In re Benwood Brew. Co.*, 202 Fed. 326, 29 A. B. R. 759.

13—*In re Carow*, 4 N. B. R. 178, Fed. Cas. No. 2426.

14—*Bucknam v. Dunn*, 16 N. B. R. 470, 2 Hask. 215, Fed. Cas. No. 2096; *Penny v. Taylor*, 10 N. B. R. 200, Fed. Cas. No. 10957.

After dismissal of the petition, the court has no jurisdiction to hear and determine the status of the account between a creditor and the bankrupt. *In re Sig. H. Rosenblatt & Co.*, 193 Fed. 638, 28 A. B. R. 401.

15—*United States Fidelity & Guaranty Co. v. Bray*, 56 L. ed. 1055, 225 U. S. 205, 28 A. B. R. 207; *Martin v. Globe Bank & Trust Co.*, 193 Fed. 841, 27 A. B. R. 545; *In re United Wireless Telegraph Co.*, 192 Fed. 238, 27 A. B. R. 1.



In this connection the "estate" of the bankrupt "is to be construed as covering all property in the possession of the debtor at the time proceedings in bankruptcy are commenced, to which the trustee may fairly make a pretension of claims."<sup>16</sup> But this exclusive jurisdiction is limited to the bankruptcy proceedings and does not extend to suits at law or in equity affecting the bankrupt's estate.<sup>17</sup> Possession of the property by the bankrupt at the time of the institution of the bankruptcy proceedings, and hence possession of the property by the bankruptcy court,<sup>18</sup> or

16—*In re New England Piano Co.*, 122 Fed. 937, 9 A. B. R. 767.

17—*Frank v. Vollkommer*, 205 U. S. 521, 17 A. B. R. 806, aff'g 107 App. Div. (N. Y.) 594, 14 A. B. R. 695; *Skilton v. Codington*, 185 N. Y. 80, 15 A. B. R. 810; *In re Spitzer*, 130 Fed. 879, 12 A. B. R. 346; *In re Platteville Foundry & Machine Co.*, 147 Fed. 828, 17 A. B. R. 291.

18—*Chicago Title & Trust Co. v. National Storage Co.*, 174 Ill. App. 365, 31 A. B. R. 410; *Johnston v. Spencer*, 195 Fed. 215, 27 A. B. R. 800; *Bardes v. First Nat. Bank of Hawarden*, 178 U. S. 524, 44 L. ed. 1175, 4 A. B. R. 163; *In re Rochford*, 124 Fed. 182, 10 A. B. R. 608.

The court of bankruptcy has jurisdiction to determine by summary proceedings after reasonable notice to the claimants all controversies between the trustee and adverse claimants over liens upon and title and possession of (1) property in the possession of the bankrupt when the petition was filed; (2) property held by third parties for him; (3) property lawfully seized by the marshal as bankrupt's under clause 3 of section 2 of the act, and (4) property claimed by the trustee which has been lawfully reduced to actual possession by the officers of the court. These controversies relative to the property of the bankrupt are within the court's jurisdiction under section 2 of the act, and are not controversies at law or in equity as distinguished from proceedings in bankruptcy within the meaning of section 23. A plenary suit may be maintained in the bankruptcy court to

determine the controversies above specified which it has jurisdiction to determine by summary proceedings. *Clay v. Waters*, 178 Fed. 385, 24 A. B. R. 293.

The district court has no jurisdiction of suit in equity between third persons involving the question of title to the property of the bankrupt which is not in the possession of the trustee, or a part of the fund for distribution among general creditors of the bankrupt. *Brumley v. Jones*, 141 Fed. 318, 15 A. B. R. 578.

Bankruptcy court cannot summarily determine adverse claims to property not in its possession, whether claimant claims title or only a lien. *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102, rev'g 125 Fed. 169, 11 A. B. R. 79.

"While a summary proceeding to collect property belonging to the estate of the bankrupt which is in the possession of a stranger who resides outside of the territorial limits of the court of original jurisdiction is ancillary in character, nevertheless it presents a completely distinct and separable controversy, and, therefore, one which must be determined by the court within whose jurisdiction the property is located and the respondent resides." *In re Heintz*, 201 Fed. 338, 29 A. B. R. 19.

See *Hinds v. Moore*, 14 A. B. R. 1, rev'g 129 Fed. 922, 12 A. B. R. 136, holding bankruptcy court has no jurisdiction to require party to whom referee voluntarily surrendered property to show cause why he should not pay the value of

consent of the defendant,<sup>19</sup> is essential to the jurisdiction of the bankruptcy court to determine suits by the trustee to reach property in the hands of adverse claimants except suits for the recovery of property fraudulently or preferentially transferred.<sup>20</sup> Having possession of the property the bankruptcy court has exclusive jurisdiction to hear and determine all questions respecting the "title, possession or control,"<sup>21</sup> and parties who claim such liens may appear and be heard without first

the property to the bankrupt's estate; and also *In re Zehner*, 193 Fed. 787, 27 A. B. R. 536, holding that the rule that liens are not affected by the bankruptcy act does not extend to remedy for enforcing lienholder's rights.

19—*Johnston v. Spencer*, 195 Fed. 215, 27 A. B. R. 800; *In re MacDougall*, 23 A. B. R. 762; *Bardes v. First Nat. Bank of Hawarden*, 178 U. S. 524, 44 L. ed. 1175, 4 A. B. R. 163; *In re Hutchinson & Wilmoth*, 158 Fed. 74, 19 A. B. R. 313; *In re Rochford*, 124 Fed. 182, 10 A. B. R. 608.

Where property is voluntarily surrendered to receiver or trustee, the court may pass upon the validity of the claim to the property. *In re Kolin*, 134 Fed. 557, 13 A. B. R. 531.

20—Act 1898, §23b, as amended by acts of 1903 and 1910. See *post*, c. XXVI, § 1095.

21—*Murphy v. Hofman Co.*, 53 L. ed. 327, 211 U. S. 562, 21 A. B. R. 487, *aff'g* 187 N. Y. 548; *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 14 A. B. R. 45; *Cleminshaw v. International Shirt & Collar Co.*, 165 Fed. 797, 21 A. B. R. 616; *In re Rose Shoe Mfg. Co.*, 168 Fed. 39, 21 A. B. R. 725; *In re Beede*, 138 Fed. 441, 14 A. B. R. 697; *In re Noel*, 137 Fed. 694, 14 A. B. R. 715.

District court has exclusive jurisdiction, either plenary or summary, where property has been seized by receiver or marshal and is in its possession. *Le-Master v. Spencer*, 203 Fed. 210, 29 A. B. R. 264.

The bankruptcy court has exclusive jurisdiction to determine by plenary

action or summary proceedings all adverse or conflicting claims with reference to the property in the actual or constructive possession of the bankrupt at the date of the filing of the petition. *Smith v. Berman*, 8 Ga. App. 262, 24 A. B. R. 849. See, also, *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, *aff'g* 152 Fed. 943, 18 A. B. R. 513.

*Test of jurisdiction* is whether property is or has been in possession of the bankruptcy court. If it is in the possession of the court, claimants can be cited into the bankruptcy court to determine the validity of any liens or claims asserted against it. If it has been in such possession and has been wrongfully withdrawn therefrom, suits may be brought in the bankruptcy court to recover it. *Plaut v. Gorham Mfg. Co.*, 159 Fed. 754, 20 A. B. R. 269.

*Surrender of property* by receiver without authority of court does not oust jurisdiction. *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 14 A. B. R. 45.

Jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by officers of the court, or through the seizure thereof by an adverse claimant. *In re Schermehorn*, 145 Fed. 341, 16 A. B. R. 507.

*Sale by trustee*:—A court of bankruptcy has jurisdiction over proceedings brought before it, both in the nature of plenary and summary actions, to try the title to property of the bankrupt once in the possession of the court and sold by the trustee without authority. *In re Monsarrat*, 25 A. B. R. 815.

resorting to the state court for their establishment.<sup>22</sup> This jurisdiction to collect and distribute estates and determine controversies in relation thereto depends, first, on whether the controversy has reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt estate; second, whether it arises in the bankruptcy proceedings and the property becomes therefore subject to distribution; or third, whether by the nature of the controversy power is conferred on the court to determine conflicting liens and apportion assets.<sup>23</sup> The bankruptcy court has jurisdiction to determine the validity of liens upon property in its possession,<sup>24</sup> but a lien claimant never having appeared in the bankruptcy court nor assented to its jurisdiction may have the validity of his lien determined in a state court of competent jurisdiction though of course no action by the latter court can divest or interfere with the possession of the property by the bankruptcy court.<sup>25</sup>

It is true that the supreme court once said that the filing of a petition in bankruptcy "is a caveat to all the world and in

22—In re Byrne, 2 N. B. N. R. 246, 3 A. B. R. 268, 97 Fed. 762.

23—In re Kellogg, 113 Fed. 120, 7 A. B. R. 623.

Where the property is in the possession of bankruptcy court, its jurisdiction to determine the distribution thereof is exclusive. *United States Fidelity & Guaranty Co. v. Bray*, 56 L. ed. 1055, 225 U. S. 205, 28 A. B. R. 207.

24—In re Noel, 137 Fed. 694, 14 A. B. R. 715.

Validity of liens may be determined in plenary suit in bankruptcy court where the property on which the liens are asserted is within the actual or constructive possession of the trustee. *Goodnough Mercantile & Stock Co. v. Galloway*, 156 Fed. 504, 19 A. B. R. 244.

Bankruptcy court has plenary jurisdiction to determine the existence and extent of liens. *Cleminshaw v. International Shirt & Collar Co.*, 165 Fed. 797, 21 A. B. R. 616.

25—In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 A. B. R. 291; *Frank v. Vollkommer*, 51 L. ed. 911, 205

U. S. 521, 17 A. B. R. 806, aff'g 107 App. Div. (N. Y.) 594, 14 A. B. R. 695; In re *United Wireless Telegraph Co.*, 192 Fed. 238, 27 A. B. R. 1; *Matter of Kanter v. Cohen*, 121 Fed. 984, 9 A. B. R. 372. See *Thomas v. Woods*, 173 Fed. 585, 23 A. B. R. 132.

Possession cannot be disturbed. *Murphy v. John Hofman Co.*, 53 L. ed. 327, 211 U. S. 562, 21 A. B. R. 487, aff'g 187 N. Y. 548.

In a recent case where application was made to a bankruptcy court for leave to a mortgagee to foreclose his mortgage in a state court, the bankruptcy court, in denying the application, said: "The jurisdiction of the state court to sell the property of the bankrupt, even after adjudication, is concurrent with that of the federal court and the latter's jurisdiction is only exclusive by reason of its custody of the *res*." In re *Zehner*, 193 Fed. 787, 27 A. B. R. 536.

But see In re *Oxley & White*, 182 Fed. 1019, 25 A. B. R. 656, holding that mortgage sale under order of state court may be enjoined by bankruptcy court.

effect an attachment and injunction,"<sup>26</sup> that the adjudication in bankruptcy puts the property of the bankrupt in custodia legis, and that its title vests in the trustee upon his appointment. But the later decisions of that court adjudge that the statement quoted applies only to parties who have no substantial claim of a lien upon or title to the property claimed as that of the bankrupt, and that against those who have such claims of existing titles or liens when the petition in bankruptcy is filed its filing is neither a caveat nor an attachment, that it creates no lien, and that they are strangers to the proceedings in the absence of an order or process making them parties, or some equivalent notice. Again, it is the title of the bankrupt only that is placed in custodia legis by the adjudication and that vests in the trustee when appointed.<sup>27</sup> The bankruptcy court has no power to determine the validity or amount of liens that may be established in the state court in a suit commenced by leave of the bankruptcy court.<sup>28</sup> The validity of the claim being determined, questions of priority rest exclusively in the jurisdiction of the bankruptcy court.<sup>29</sup> A general appearance and pleading to the merits constitutes a consent to the jurisdiction of the court.<sup>30</sup> The court has, however, no jurisdiction over suits not affecting the bankrupt's estate and having nothing to do with the bankruptcy proceedings.<sup>31</sup> The court may order the property to be sold free of liens and marshal and distribute

26—*Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. ed. 405, 7 A. B. R. 224.

27—*Fidelity Trust Co. v. Gaskell*, 195 Fed. 865, 28 A. B. R. 4; *Jacquith v. Rowley*, 9 A. B. R. 525, aff'g 106 Fed. 666, 6 A. B. R. 285; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 15 A. B. R. 633; *Hiscock v. Varuk Bank of New York*, 206 U. S. 28, 51 L. ed. 945, 18 A. B. R. 1, aff'g 144 Fed. 818, 15 A. B. R. 362, rev'g 134 Fed. 101, 14 A. B. R. 226. In *re Rathman*, 183 Fed. 913, 25 A. B. R. 246.

"The proposition quoted from *Mueller v. Nugent* must be taken with reference to the facts then before the court, and not as applicable to all intents and purposes." *Jones v. Springer*, 226 U. S. 148, 57 L. ed. 161, 29 A. B. R. 204.

28—*Virginia Iron, Coal & Coke Co. v. Oleott*, 197 Fed. 730, 28 A. B. R. 321.

29—In *re McCallum*, 113 Fed. 393, 7 A. B. R. 596; *American Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. 158, 23 A. B. R. 337.

The provision that valid liens are not affected by the bankruptcy act has reference only to validity of contract and not to remedy for enforcing lienholder's rights. In *re Zehner*, 193 Fed. 787, 27 A. B. R. 536.

30—*Detroit Trust Co. v. Pontiac Savings Bank*, 196 Fed. 29, 27 A. B. R. 821.

Consent is shown by demurring on jurisdictional grounds and to the merits. *Sheppard v. Lincoln*, 184 Fed. 182, 25 A. B. R. 804.

31—In *re Saxton Furnace Co.*, 136 Fed. 697, 14 A. B. R. 483.

the proceeds so as to protect the rights and interests of all;<sup>32</sup> or it may enforce a lien against the purchaser of property sold by an assignee subject to such lien;<sup>33</sup> but a judgment creditor cannot claim the jurisdiction of the court for the collection of a debt which is fully secured by the only lien on real estate.<sup>34</sup> A prior lien gives a prior claim, and the district court may ascertain and liquidate it.<sup>35</sup> After jurisdiction has been acquired of the property, the court of bankruptcy will by summary proceedings stop any interference with it, and if it has been seized, will cause its return.<sup>36</sup> Its jurisdiction operates as a supersedeas of the process in the hands of a sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of the court until the bankruptcy shall have been closed.<sup>37</sup>

Whenever such jurisdiction is properly and in good faith invoked, the courts are bound to assume and exercise it, there being no discretion in the matter,<sup>38</sup> and the court cannot take into consideration that the proceedings may not be of any great practical value,<sup>39</sup> nor will it undertake to revise the proceedings of the state courts in mere matters of detail.<sup>40</sup> The fact that the bankrupt's attorneys had not been admitted to practice in the federal courts would not invalidate proceedings already had, for the provision<sup>41</sup> that the bankrupt may conduct his case by an

32—*In re Worland*, 1 A. B. R. 450, 1 N. B. N. 316, 92 Fed. 893; *In re Pittelkow*, 1 A. B. R. 472; *In re Frank S. Keet*, 128 Fed. 651, 11 A. B. R. 117; *In re Shoe & Leather Reporter*, 129 Fed. 588, 12 A. B. R. 248; *In re Prince & Walter*, 131 Fed. 546, 12 A. B. R. 675. See *post*, c. XXX, § 1270.

33—*Bucknam v. Dunn et al.*, 16 N. B. R. 470, 2 Hask. 215, Fed. Cas. No. 2096.

34—*In re Johann*, 4 N. B. R. 143, Fed. Cas. No. 7331.

35—*In re Winn*, 1 N. B. R. 131.

36—*In re Schloerb*, 2 N. B. N. R. 721, 44 L. ed. 1183, 178 U. S. 542; *In re Russell*, 101 Fed. 248, 3 A. B. R. 658; *In re Murphy*, 2 N. B. N. R. 393, 3 A. B. R. 499; *Byrd v. Harrold*, 18 N. B. R. 433, Fed. Cas. No. 229; *Carter v. Hobbs*, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed.

594; *In re Huddleston*, 1 A. B. R. 572, 1 N. B. N. 214.

37—*Jones v. Leach*, 1 N. B. R. 165, Fed. Cas. No. 7475.

38—*In re Keller*, 18 N. B. R. 10, Fed. Cas. No. 7647; *Cook v. Waters*, 9 N. B. R. 155, but see *Avery v. Johnson*, 3 N. B. R. 36; 4 N. B. R. 143, Fed. Cas. No. 675.

39—*In re Pangborn*, 185 Fed. 673, 26 A. B. R. 40.

40—*Hobbs v. Head & Dowst Co.*, 184 Fed. 409, 26 A. B. R. 63, *aff'd* 231 U. S. 692, 31 A. B. R. 656.

Failure to take proper step to get exceptions heard on merits by the Supreme Court of the state in which a lien suit is prosecuted by a claimant does not give the trustee a right to go behind the state judgment in order to defeat it. *Id.*

41—G. O. IV.

attorney authorized to practice in the federal courts is not the source of jurisdiction.<sup>42</sup>

There seems to be nothing to prevent a creditor from attacking the jurisdiction without first filing formal proof of his claim, which would import a recognition of the jurisdiction, but he must show he is a creditor and has an interest to protect.<sup>43</sup> If the court has no jurisdiction of the subject-matter, it cannot be conferred by the voluntary act of the defendant and the point can be raised at any time.<sup>44</sup> If want of jurisdiction appears upon the face of the petition and respondent consents to it, the court may take notice of the point on its own motion;<sup>45</sup> but, if it is merely want of jurisdiction over the person, the objection may be waived expressly or by implication.<sup>46</sup>

### § 10. In law and equity.

Under the bankrupt law the district court has jurisdiction both at law and in equity.<sup>47</sup> Its equitable jurisdiction is, how-

42—*In re Kindt*, 2 N. B. N. R. 373, 98 Fed. 867, 3 A. B. R. 546.

43—*In re Boston H. & E. R. R. Co.*, 6 N. B. R. 209, 9 Blatch. 101, Fed. Cas. No. 1678.

44—*Jobbins v. Montague*, 6 N. B. R. 509, Fed. Cas. No. 7330.

45—*In re Hopkins*, 18 N. B. R. 339, Fed. Cas. No. 6686.

46—*Shutts v. Bk.*, 2 N. B. N. R. 320, 98 Fed. 705, 3 A. B. R. 492; *Hall v. Kincell*, 2 N. B. N. R. 745, 102 Fed. 301; *People v. Brennan*, 12 N. B. R. 567.

47—*In re Fendley*, 10 N. B. R. 250, Fed. Cas. No. 4728; *In re Salkey*, 11 N. B. R. 423, 6 Biss. 269, Fed. Cas. No. 12253; *In re Bowie*, 1 N. B. R. 185, Fed. Cas. No. 1725; *In re Ind. Cin. & Laf. R. R. Co.*, 8 N. B. R. 302, Fed. Cas. No. 7023; *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 980, 7 A. B. R. 351; *In re Rochford*, 124 Fed. 182, 10 A. B. R. 608; *Burleigh v. Foreman*, 125 Fed. 170, 11 A. B. R. 74; *In re Kane*, 127 Fed. 552, 11 A. B. R. 533; *Lockman v. Laug*, 128 Fed. 279, 11 A. B. R. 597; *Dodge v. Norlin*, 133 Fed. 363, 13 A. B. R. 176; *In re Waugh*, 133 Fed. 281, 13 A. B. R. 187; *Mason v. Wolkowich*, 150 Fed. 699, 17

A. B. R. 709; *Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 21 A. B. R. 270; *First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436; *Westall v. Avery*, 171 Fed. 626, 22 A. B. R. 673; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 25 A. B. R. 282; *In re Brenner*, 190 Fed. 209, 26 A. B. R. 646.

"Proceedings in bankruptcy generally are in the nature of proceedings in equity, and the words 'at law' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity." *Bardes v. First Nat. Bank of Hawarden*, 178 U. S. 524, 44 L. ed. 1175, 4 A. B. R. 163.

A district court sitting in bankruptcy, whether it is exercising its primary or ancillary jurisdiction, is a court of equity. *Fidelity Trust Co. v. Gaskell*, 195 Fed. 865, 28 A. B. R. 4.

ever, "confined to controversies relating to a bankrupt estate. Within this limited area, whether or not a bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the plaintiff has an adequate remedy at law."<sup>48</sup> The mere fact that there is a remedy at law will not oust the jurisdiction of equity if the remedy at law is not as prompt, practical and efficient to the ends of justice and its prompt administration as the equitable remedy.<sup>49</sup>

As a court of equity, it will deal with the rights of the parties upon their merits, rather than be controlled by strict legal forms,<sup>50</sup> and will seek to administer the law according to its spirit and not merely by its letter.<sup>51</sup> It follows that within the limits prescribed by the bankruptcy acts and the special rules of practice prescribed by the supreme court, bankruptcy proceedings are to be administered in accord with the general principles and practices of equity,<sup>52</sup> and this applies to the correction of mistakes in judgment and other matters of record injurious to the rights of the parties.<sup>53</sup>

The court can exercise the full powers of a court of equity for the ascertainment and enforcement of the equities of parties interested in the bankrupt estate,<sup>54</sup> and, as between contending creditors, in the interest of fair dealing and good conscience, it will postpone the claim of one where there is evidence of a fraudulent combination and scheme in favor of others.<sup>55</sup> It will also restrain the enforcement of a legal right so that it shall

48—*Sessler v. Nemcof*, 183 Fed. 656, 25 A. B. R. 618; *Brumley v. Jones*, 141 Fed. 318, 15 A. B. R. 578.

49—*Cox v. Wall*, 2 N. B. N. R. 572, 99 Fed. 546, 3 A. B. R. 664.

50—*In re Byrne*, 2 N. B. N. R. 246, 3 A. B. R. 268, 97 Fed. 762; *In re North Carolina Car Co.*, 127 Fed. 178, 11 A. B. R. 488.

51—*In re Kane*, 127 Fed. 552, 11 A. B. R. 533.

52—*Westall v. Avery*, 171 Fed. 626, 22 A. B. R. 673; *In re Gerber*, 186 Fed. 693, 26 A. B. R. 608.

As to taking of testimony before ref-

eree. *First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436; *Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 21 A. B. R. 270.

53—*In re Brenner*, 190 Fed. 209, 26 A. B. R. 646. See, also, *Virginia Iron, Coal & Coke Co. v. Oleott*, 197 Fed. 730, 28 A. B. R. 321.

54—*In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 980, 7 A. B. R. 351; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 25 A. B. R. 282.

55—*In re Headley*, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 Fed. 765.

not cause unnecessary loss or embarrassment to the estate.<sup>56</sup> It will protect infants, lunatics and other incompetents and appoint a guardian ad litem for them.<sup>57</sup>

### § 11. In rem or personam.

While in so far as it affects the bankrupt, a bankruptcy proceeding is to a certain extent a proceeding in personam,<sup>58</sup> still the proceeding is essentially one in rem<sup>59</sup> so far as the bankruptcy proceeding proper is concerned,<sup>60</sup> and, except in those instances where notice is provided for and required, so far as such proceedings are in rem, what is done therein is binding upon creditors whether or not they have actual notice or knowledge of the pendency of the proceeding.<sup>61</sup> "A proceeding in rem determines the status of persons or things. The particular proceedings in rem known as bankruptcy proceedings determine status both of a person and of a thing. The proceedings leading up to the adjudication in bankruptcy determine the status of the debtor as a bankrupt; those concerned with the distribution of assets determine the status of the property of the bankrupt."<sup>62</sup> An attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of the administration under the act of congress for "the exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."<sup>63</sup>

### § 12. Territorial jurisdiction.

It has been held that the process of the bankruptcy court is restricted to the territorial limits of the district,<sup>64</sup> and that it has

56—*In re Chambers, Calder & Co.*, 2 N. B. N. R. 388, 98 Fed. 865, 3 A. B. R. 537.

57—*In re O'Brian*, 2 N. B. N. R. 312.

58—*In re Billing*, 145 Fed. 395, 17 A. B. R. 80.

59—*Johnson v. United States*, 163 Fed. 30, 20 A. B. R. 724; *In re Billing*, 145 Fed. 395, 17 A. B. R. 80; *In re Reynolds*, 127 Fed. 760, 11 A. B. R. 758; *In re Beals*, 116 Fed. 530, 8 A. B. R. 639.

From the minute of adjudication all assets are in custody of court. *Walter A. Wood Co. v. Eubanks*, 169 Fed. 929, 22 A. B. R. 307.

60—*Receiver's accounting not in rem. Whitney v. Wenman*, 140 Fed. 959, 14 A. B. R. 591.

61—*In re Billing*, 145 Fed. 395, 17 A. B. R. 80; *In re Benedict*, 140 Fed. 55, 15 A. B. R. 232.

62—*In re Continental Corporation*, 14 A. B. R. 538.

63—*Acme Harvester Co. v. Beekman Lumber Co.*, 36 L. ed. 208, 222 U. S. 300, 27 A. B. R. 262.

64—*In re Boston-Cerrillos Mines Corp.*, 206 Fed. 794, 30 A. B. R. 739.



no jurisdiction to control the actions of parties out of the district, who are not claiming the exercise of the jurisdiction of the court, who have not become parties therein, or who can never be brought in unless they voluntarily appear.<sup>65</sup> Under the terms of the bankruptcy law, bankruptcy courts are invested with the designated jurisdiction "within their respective territorial limits as now established, or as they may be hereafter changed."<sup>66</sup> Notwithstanding this language, many courts held that the district courts of the United States had no ancillary jurisdiction in bankruptcy proceedings,<sup>67</sup> and that the court of original jurisdiction had the power to determine title, the right to the possession and the existence of liens upon specific property claimed as a part of the bankrupt's estate situated in other districts, and the power to enforce its decisions in those districts.<sup>68</sup> In 1910, however, the federal supreme court held that such ancillary jurisdiction existed<sup>69</sup> and its decision has been construed as a determination that the limitation of section 2 of the bankruptcy act, above set forth, restricts the exercise of the power of a district court in which a petition in bankruptcy is filed to its own district and that it may not enforce its process or its order for the delivery of property without the territorial limits of its district.<sup>70</sup> A contrary conclusion is, however, reached by the supreme court itself in a subsequent decision in which it announces the rule that a court of bankruptcy is not confined in the administration of the property of a bankrupt to state or district boundaries, and it is unnecessary to commence ancillary

65—In re Schwartz, 204 Fed. 326, 30 A. B. R. 344.

66—Act 1898, § 2.

An objection that the court is without jurisdiction to make a sale of land situated in another state, without raising the question of ancillary power under the amendment of 1910 nor the statute of 1893 requiring sales regulating sales under federal court orders, held sufficient. In re Britannia Min. Co., 197 Fed. 459, 28 A. B. R. 651.

67—See *post*, § 13.

68—In re Granite City Bank of Dell Rapids, 137 Fed. 818, 14 A. B. R. 404; In re Dempster, 172 Fed. 353, 22 A. B. R. 751; Hurley v. Devlin, 151 Fed. 919;

18 A. B. R. 627; In re Tybo Mining & Reduction Co., 132 Fed. 697, 13 A. B. R. 62; In re Bridge & Iron Co., 133 Fed. 568, 13 A. B. R. 304.

69—Babbitt v. Dutcher, 54 L. ed. 402, 216 U. S. 102, 23 A. B. R. 519. See *post*, § 13.

70—Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 28 A. B. R. 4; Stanton v. Wooden, 179 Fed. 61, 24 A. B. R. 736; In re Isaac Harris Co., 173 Fed. 735, 23 A. B. R. 237; In re Dunseath & Son Co., 168 Fed. 973, 22 A. B. R. 75; In re Owings, 140 Fed. 739, 15 A. B. R. 472; In re Benedict, 140 Fed. 55, 15 A. B. R. 232; In re Nat. Mercantile Agency, 128 Fed. 639, 12 A. B. R. 189.

proceedings in all such states or districts in order to subject the property therein to administration and sale, though the court may invoke the ancillary power of another court, if it so desires.<sup>71</sup>

### § 13. Ancillary jurisdiction.

Prior to the year 1910 there were many decisions that the district courts of the United States had no ancillary jurisdiction in bankruptcy proceedings.<sup>72</sup> These decisions were not, however, unopposed,<sup>73</sup> and when the question finally came before the federal supreme court in January, 1910, it decided that "the respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district court of another district."<sup>74</sup> In June, 1910, congress enacted that courts of bankruptcy may "exercise ancillary jurisdiction over persons and property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of

71—Robertson v. Howard, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611.

And see, Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 28 A. B. R. 4.

The court may order the sale of property situated in another jurisdiction, without invoking the ancillary power of the court in whose jurisdiction the property is situated. Robertson v. Howard, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611; T. E. Wells & Co. v. Sharp, 208 Fed. 393, 31 A. B. R. 344.

72—In re Williams, 123 Fed. 321, 10 A. B. R. 538; In re Tybo Mining and Reduction Co., 132 Fed. 697, 13 A. B. R. 62; In re Granite City Bank of Dell Rapids, 137 Fed. 818, 14 A. B. R. 404; In re Von Hartz, 142 Fed. 726, 15 A. B. R. 747; In re Dempster, 172 Fed. 353, 22 A. B. R. 751.

73—In re Sutter Bros., 131 Fed. 654, 11 A. B. R. 632; In re Benedict, 140 Fed. 55, 15 A. B. R. 232; In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 A. B. R. 66; In re Dunseath & Son Co., 168 Fed. 973, 21 A. B. R. 742; In re Dun-

seath & Son Co., 168 Fed. 973, 22 A. B. R. 75.

74—Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, 23 A. B. R. 519; In re Madison Steele Co., 54 L. ed. 407, 216 U. S. 115, 23 A. B. R. 614; In re Robinson, 179 Fed. 724, 24 A. B. R. 617.

Ancillary jurisdiction exercised for the purpose of aiding the court of primary jurisdiction to collect assets and distribute them. In re Lipman, 201 Fed. 169, 29 A. B. R. 139.

Court in which real property belonging to estate lies has ancillary jurisdiction. Hartman v. Ackoury, 210 Fed. 188, 31 A. B. R. 514.

The reduction of the property of the bankrupt to actual possession is a mere detail of the bankruptcy proceedings, to aid in which a court of a district other than that of the adjudication, within whose jurisdiction the property is found, has ancillary jurisdiction, regardless of diversity of citizenship or the amount in controversy. Musica v. Prentice, 211 Fed. 326, 31 A. B. R. 687, aff'g 205 Fed. 413, 30 A. B. R. 555.

"bankruptcy."<sup>75</sup> Whether ancillary jurisdiction of another jurisdiction shall be invoked is optional.<sup>76</sup>

"Ancillary jurisdiction is a term which has a plain and well-known meaning in the equity jurisprudence of the United States, a meaning fixed by settled practice and adjudged by the uniform current of the decisions of the courts of the United States. As neither the court nor the congress modified or limited the term the unavoidable presumption is that they used it, and intended to use it, in its recognized legal significance. In that significance ancillary jurisdiction includes the power to hear and adjudge, at the request of interveners, their claims to title to, or legal or equitable liens upon, the property it takes, or holds in its legal custody, by virtue of that jurisdiction and to send the proceeds to the court of original jurisdiction, or to apply it to the discharge of the claims of the interveners in accord with its decision. A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale and distribution of the property seized within the territorial limits of its district, of which it takes the legal custody, this receiver is, and must be, governed by its orders exclusively. He may not justify any action by any orders of the court of primary jurisdiction."<sup>77</sup> He must account to the court appointing him and all requirements of comity to the court of primary jurisdiction are met if the latter court, through its proper officer, is afforded the opportunity to question the correctness of the accounting.<sup>78</sup> As to the compensation of the receiver it would seem as though the court has authority not alone to fix his compensation but to pay the same and the receiver's legitimate expenses out of any funds in its hands belonging to the bankrupt's estate,<sup>79</sup> or failing to

75—Bkr. Act. 1898, § 2, as amended by Act June 25, 1910, 36 Stat. (Part One) c. 412, § 2, p. 839.

76—See *ante*, § 12.

77—Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 28 A. B. R. 4; Loeser v. Dallas, 192 Fed. 909, 27 A. B. R. 733.

In *In re Benedict*, 15 A. B. R. 232, the court says that the ancillary receiver

"must account to, and be largely controlled by, the original court that is charged with the administration of the estate."

78—Loeser v. Dallas, 192 Fed. 909, 27 A. B. R. 733.

79—Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 28 A. B. R. 4; Loeser v. Dallas, 192 Fed. 909, 27 A. B. R. 733.

order such payment the court of original jurisdiction will give full faith and credit to the determination of the court of ancillary jurisdiction as to the value of the receiver's or other officer's services.<sup>80</sup>

#### § 14. Place of business, residence or domicile.

Place of business, residence and domicile are three distinct alternative jurisdictional requisites under the present law,<sup>81</sup> so that if the alleged bankrupt does not have either his principal place of business, his residence or domicile within the district, a court of bankruptcy has no power to obtain jurisdiction over him by any service of process otherwise than in accordance with the rule,<sup>82</sup> and the court learning facts depriving it of jurisdiction will act of its own motion.<sup>83</sup> Even though the alleged bankrupt appear on the return day and consent to the adjudication, the court will nevertheless dismiss the proceedings on objections from other creditors that he never resided or carried on business in the state.<sup>84</sup> A prior involuntary petition filed in another district cannot deprive the court of the district in which a voluntary petition is filed of jurisdiction, or of the power to determine its own jurisdiction over the debtor who alleges in his petition that such district is the one he has or has had his principal place of business for the preceding six months.<sup>85</sup> In the case of voluntary proceedings, if objection be made to the adjudication because of lack of these jurisdictional requisites, there is a conflict as to who bears the burden of showing their existence, some cases holding that it rests on the bankrupt,<sup>86</sup> others, on the cred-

80—In *re Isaacson*, 174 Fed. 406, 23 A. B. R. 98.

81—In *re Glisdell*, 2 A. B. R. 424; In *re R. H. Williams*, 9 A. B. R. 736; In *re Elizabeth J. Harris*, 11 A. B. R. 649.

Place of business, residence and domicile are distinct. In *re Lemen*, 208 Fed. 80, 30 A. B. R. 638.

82—*Hyslop v. Hoppock*, 6 N. B. R. 557, 5 Ben. 533, Fed. Cas. No. 6989.

83—In *re Garneau*, 127 Fed. 677, 11 A. B. R. 679.

But see language of court in *White Mountain Paper Co. v. Morse*, 127 Fed.

643, 11 A. B. R. 633, *aff'g* 127 Fed. 180, 11 A. B. R. 491.

84—In *re Fogerty*, 4 N. B. R. 143, 1 Sawy. 233, Fed. Cas. No. 4895.

Creditor may object to jurisdiction in voluntary proceedings on ground that corporation did not have its principal place of business in district for greater part of six months. In *re Guanacevi Tunnel Co.*, 201 Fed. 316, 29 A. B. R. 229.

85—In *re Beiermeister Bros. Co.*, 208 Fed. 945, 31 A. B. R. 474.

86—In *re Scott*, 111 Fed. 144, 7 A. B. R. 39. See In *re Waxelbaum*, 97 Fed. 562, 3 A. B. R. 392.

itor.<sup>87</sup> If, however, the respondent in bankruptcy proceedings consents to a reference to take proof, he thereby gives the court jurisdiction over his person, and cannot impeach its decrees in a collateral action;<sup>88</sup> but, in a dispute over the ownership of a fund controlled by a trustee in bankruptcy, the court has jurisdiction without reference to the residence of the parties.<sup>89</sup>

"Place of business" means a place where a man is conducting a business of his own.<sup>90</sup>

In the case of a corporation, its principal place of abode should be construed to mean its principal office.<sup>91</sup> A court would have jurisdiction of a petition in case of a foreign corporation, if it has its principal place of business as distinct from its residence or domicile within the district where filed,<sup>92</sup> and this, though its articles of incorporation, or certificates filed by it, recite the fact to be otherwise,<sup>93</sup> and though it has not obtained a license to do

87—Statement in voluntary petition filed by authority of directors of corporation held prima facie evidence as to principal place of business and burden was on creditor. *In re Guanacevi Tunnel Co.*, 201 Fed. 316, 29 A. B. R. 229.

88—*People ex rel. Jennys v. Brennan*, 12 N. B. R. 567.

89—*In re Sabin*, 18 N. B. R. 157, Fed. Cas. No. 12195; *Markson & Spaulding v. Meany*, 4 N. B. R. 165, Fed. Cas. No. 9098; *Payson v. Dietz*, 8 N. B. R. 193, Fed. Cas. No. 10861.

90—Clerk in employ of express company in capacity of rate clerk and attorney in fact authorized to endorse all bank papers and to sign custom house clearances held not to have a place of business. *In re Henry H. Lipphart*, 201 Fed. 103, 28 A. B. R. 705.

91—*In re Cal. Pac. R. R. Co.*, 11 N. B. R. 193, 3 Sawy. 24, Fed. Cas. No. 2315; see *In re Elmira Steel Co.*, 109 Fed. 456, 5 A. B. R. 484.

A corporation doing business in several states, regard will be had to which is in fact the "principal" office or place of business. *In re Matthews Consol. Slate Co.*, 144 Fed. 724, 16 A. B. R. 350, aff'g 15 A. B. R. 779; *In re Matthews Consol. Slate Co.*, 144 Fed. 737, 16 A. B. R. 407, aff'g 144 Fed. 724, 16 A. B. R. 350.

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Mining corporation held to have its principal place of business in New York, offices being maintained there for the sale of stock, though little or no business was transacted, it appearing that corporation had never actually engaged in mining. *In re Guanacevi Tunnel Co.*, 201 Fed. 316, 29 A. B. R. 229.

92—*In re Magid v. Hope Silk Mfg. Co.*, 110 Fed. 352, 6 A. B. R. 610; *In re Marine Machine & Conveyor Co.*, 91 Fed. 630, 1 A. B. R. 421.

93—Statement in charter not conclusive as to principal place of business. *Dressel v. Lumber Co.*, 107 Fed. 255, 5 A. B. R. 744; *In re Wenatchie-Stratford Orchard Co.*, 205 Fed. 964, 30 A. B. R. 540; *In re Beiermeister Bros. Co.*, 208 Fed. 945, 31 A. B. R. 474; *In re Guanacevi Tunnel Co.*, 201 Fed. 316, 29 A. B. R. 229.

Where the charter of a corporation states its principal place of business to be in one state and its actual business is in another, a bankruptcy court of the latter state first exercising jurisdiction will retain it against a court of the former state; it not appearing that greater convenience of parties would be promoted by transfer. *In re Pennsylvania Con. Coal Co.*, 163 Fed. 579, 20 A. B. R. 872.

A certificate filed in a public office by a foreign corporation which designates a

business as a foreign corporation.<sup>94</sup> So the determination of the question of where the principal place of business of a corporation is depends upon where its actual business is transacted and not upon where its chief officers reside and maintain in office.<sup>95</sup> While the locus of the principal place of business of a corporation is always a question of fact, yet ordinarily the doubt should be resolved in favor of the jurisdiction in which the corporation obtained its corporate existence and where the state law requires the maintenance of an office.<sup>96</sup>

The winding up of corporate affairs by receivers appointed by a state court is not "business" as that word is used in the expression "principal place of business,"<sup>97</sup> though, as to debts previously contracted, a corporation, by stopping business and going into liquidation, does not change its character of business within the contemplation of the law.<sup>98</sup> "Wherever, therefore, the principal place of business of such person has been established for the greater part of six months preceding the filing of the petition, and without regard to the business there carried on, as to debts previously contracted, proceedings may be maintained."<sup>99</sup> This rule, which seems based on the law of estoppel, would seem to apply only as against the bankrupt and not to operate against creditors who might object.<sup>1</sup> Where the affairs of two corporations have become so intermingled as to render the separation of their assets in bankruptcy impossible, the court first acquiring jurisdiction has the right to deal with them as joint parties.<sup>2</sup>

Where the bankrupt asserts his residence in a district other than that in which proceedings are instituted and procures a dis-

place as its principal place of business is not conclusive. *In re Thomas McNally Co.*, 208 Fed. 291, 31 A. B. R. 382.

94—*In re Duplex Radiator Co.*, 142 Fed. 906, 15 A. B. R. 324.

95—*In re Tygarts River Coal Co.*, 203 Fed. 178, 30 A. B. R. 183.

Arizona mining corporation licensed to do business in Missouri held to have its principal place of business in Missouri though managing officers lived in Illinois, and directors' meetings were held there and proceeds of sale of stock were deposited in Illinois bank. *Home Powder Co. v. Geis*, 204 Fed. 568, 29 A. B. R. 580.

96—*In re Tennessee Const. Co.*, 207 Fed. 203, 31 A. B. R. 67.

97—*In re Perry Aldrich Co.*, 165 Fed. 249, 21 A. B. R. 244.

98—*Tiffany v. LaPlume Condensed Milk Co.*, 141 Fed. 444, 15 A. B. R. 413.

99—*Tiffany v. LaPlume Condensed Milk Co.*, 141 Fed. 444, 15 A. B. R. 413.

1—*In re Perry Aldrich Co.*, 165 Fed. 249, 21 A. B. R. 244.

2—*In re Alaska-American Fish Co.*, 162 Fed. 498, 20 A. B. R. 712; *In re Bridge & Iron Co.*, 133 Fed. 568, 13 A. B. R. 304.

missal of the proceedings, neither he nor his administrator can deny his residence in such other district upon proceedings being commenced therein.<sup>3</sup>

### § 15. — Distinction between "residence" and "domicile."

There is a clear difference intended to be made by the law between "residence" and "domicile;" the essential distinction being that the first involves the intent to leave when the purpose for which one has taken up his abode is accomplished; the other has no such intent, the abiding is *animo manendi*. Thus one may seek a place for the purpose of health, business or pleasure; and if his intent be to remain, it becomes his domicile; if it be to leave as soon as his purpose is accomplished, it is his residence. Perhaps the most satisfactory definition is that one is a resident of a place from which his departure is indefinite as to time, but definite as to purpose, and for this purpose he has made the place his temporary home; so one can have but one domicile but many residences, and cannot be without a legal domicile somewhere.<sup>4</sup> A temporary absence will not destroy either residence or domicile, though an absence that would suffice to destroy a residence might not affect a domicile. Bodily presence is necessary to residence while it is not to domicile: for instance, a New Yorker may spend years in Europe retaining his domicile in New York while his residence might be, in the spring, in London; in the summer, in Paris; in the winter, on the Riviera.<sup>5</sup> But where sojourning in or removing to a district for the purpose of filing a petition in bankruptcy and on the termination of the proceedings removing from the district does not constitute one a resident.<sup>6</sup> A domicile once required is presumed to con-

3—*Long v. Lockman*, 135 Fed. 197, 14 A. B. R. 172.

4—In *re Williams*, 99 Fed. 544, 3 A. B. R. 677; In *re Grimes*, 94 Fed. 800, 2 A. B. R. 160; In *re Garneau*, 127 Fed. 677, 11 A. B. R. 679; In *re Owings*, 140 Fed. 739, 15 A. B. R. 472.

"Residence" acquired for purpose of acquiring a divorce held the bankrupt's domicile. In *re Henry H. Lipphart*, 201 Fed. 103, 28 A. B. R. 705.

Residence of traveling salesman held not to be in state wherein he was travel-

ing with his wife, but in state wherein he had resided almost three months prior to starting on his trip. In *re Hurley*, 204 Fed. 126, 29 A. B. R. 567.

5—In *re Berner*, 2 N. B. N. R. 330, 3 A. B. R. 325; In *re Clisdell*, 2 N. B. N. 698, 2 A. B. R. 424, 101 Fed. 246; In *re Grimes*, 1 N. B. N. 339, 2 A. B. R. 160, 94 Fed. 800; *Brisenden v. Chamberlain*, 53 Fed. 311; In *re Watson*, 4 N. B. R. 197, Fed. Cas. No. 12272.

6—In *re Garneau*, 127 Fed. 677, 11 A. B. R. 679.

tinue until it is shown to have changed, and where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation,<sup>7</sup> and change of domicile can only be proved by showing the acquisition of a new one, and it is not sufficient to show residence in another place which is not inconsistent with an intention to return to the place of domicile.<sup>8</sup> Where a bankrupt, before the filing of the petition, absconds, his domicile is not thereby changed unless an intent to change is shown. The burden of proof in such case is upon the person alleging the change.<sup>9</sup>

### § 16. — Length of, required.

The act provides that "the courts of bankruptcy . . . are hereby invested . . . with such jurisdiction . . . as will enable them to exercise original jurisdiction . . . to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof." The corresponding provision in the act of 1867 was "resided or carried on business for the six months next immediately preceding the time of filing the petition, or for the longest period during such six months." The phraseology of the two provisions is plainly different. Under the act of 1867, it was properly held that a debtor might file his petition in the district in which he had resided or carried on business for the six months next immediately preceding the filing of the petition, or for the longest period during or within such six months that he had resided or carried on business in any district.<sup>10</sup>

An interpretation of the expression "the preceding six months or the greater portion thereof" is not altogether free from doubt. A construction that the word "greater" is synonymous with the

7—*Mitchell v. U. S.*, 22 L. ed. 584, 21 Wall. 350, 353; *In re Waxelbaum*, 97 Fed. 562, 3 A. B. R. 267; *In re Oldstein*, 182 Fed. 409, 25 A. B. R. 138.

8—*In re Clisdell*, 2 A. B. R. 424.

9—*In re Filer*, 108 Fed. 209, 5 A. B. R. 332, 3 N. B. N. R. 366; *In re Oldstein*, 182 Fed. 409, 25 A. B. R. 138.

Jurisdictional requisites being shown,

the personal movements of the bankrupt are immaterial. *Hills v. McKinniss Co.*, 188 Fed. 1012, 26 A. B. R. 329.

10—*In re Foster*, 3 N. B. R. 57, 3 Ben. 386, Fed. Cas. No. 4962; *In re Leighton*, 5 N. B. R. 95, 4 Ben. 457, Fed. Cas. No. 8221; *In re Goodfellow*, 1 Saw. 510, Fed. Cas. No. 5536.



word "longest" used in the act of 1867<sup>11</sup> is contrary to the express language of the statute; while the contention that bankrupt must have established his residence or domicile within the territorial jurisdiction at least six months preceding the filing of his petition, and not absented himself during said period for one-half of the time, and that although he may have resided in the district for the three and a half months immediately preceding the filing of the petition, but for a number of months or years previously in another state, the court would not have jurisdiction, is not tenable.<sup>12</sup> Such a construction fails to sufficiently consider the language. The use of the disjunctive "or" shows that the two portions of the provision are alternative. To give jurisdiction the prospective bankrupt must have his principal place of business, resided or be domiciled in the district for more than three months of the preceding six months, the residence of the creditors being immaterial. So that in order for jurisdiction to exist in bankruptcy, there must have been a residence or domicile for at least three months, and this three months need not be the three months immediately preceding the filing of the petition, but may be any three months of actual legal residence or domicile within the six months preceding the institution of bankruptcy proceedings.<sup>13</sup>

There is no provision in the statute for the case of an astute debtor, who, in his effort to defeat jurisdiction, changes his residence or domicile from one district to another before the three months' jurisdictional period is established, though the domicile will be presumed to continue at one place until it is shown to have changed.<sup>14</sup> If the residence, domicile or place of business is less than three months, it is not sufficient to make the jurisdictional period, to allege that the business was being conducted during the additional period by an assignee under a general assignment, where there is no evidence that he actually conducted business, or did anything more than close it out.<sup>15</sup>

11—In re Ray, 1 N. B. R. 336, 2 A. B. R. 158.

12—In re Stokes, 1 N. B. N. 106, 1 A. B. R. 35.

13—In re Berner, 2 N. B. N. R. 330, 3 A. B. R. 325; In re Plotke, 3 N. B. N. R. 122, 104 Fed. 964; 5 A. B. R. 171; In re Appel, 2 N. B. N. R. 907, 103 Fed. 931; In re Williams, 120 Fed. 38, 9 A.

B. R. 736; In re Harris, 11 A. B. R. 649; In re Tully, 156 Fed. 634, 19 A. B. R. 604.

14—Mitchell v. U. S., 22 L. ed. 584, 21 Wall. 350; In re Williams, 120 Fed. 38, 9 A. B. R. 737.

15—In re Plotke, 3 N. B. N. R. 122, 104 Fed. 964; 5 A. B. R. 171.

A bankrupt may reside and have his domicile in one state and have his principal place of business in another, and the court in either would have jurisdiction if the time be of sufficient length.<sup>16</sup> And it has been held that although out of the country for six years his domicile might be in the United States and he could institute proceedings without an actual residence of three months or more before filing the petition.<sup>17</sup>

### § 17. — Alien or nonresident.

A person without a principal place of business, residence or domicile within the United States, or who has been adjudged bankrupt by a foreign court of competent jurisdiction, is within the jurisdiction of the federal court of bankruptcy if he has property within the district of such court.<sup>18</sup>

### § 18. General powers.

A court of bankruptcy having jurisdiction of the person or the subject-matter may, under the section of the bankruptcy act<sup>19</sup> investing it with the power "to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act," compel anything which ought to be done for, or prevent anything which ought not to be done against, the enforcement of the law.<sup>20</sup> For such purposes the court has the plenary powers of a court of equity and can exercise the powers of such a court for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt.<sup>21</sup>

It has power to issue an injunction to restrain any one from removing, disposing of or otherwise interfering with bankrupt's property;<sup>22</sup> to appoint receivers whose duty it is to care for and

16—See *In re Mackey*, 110 Fed. 355, 6 A. B. R. 577; *In re Brice*, 93 Fed. 942, 2 A. B. R. 197; *In re Watson*, 4 N. B. R. 197, Fed. Cas. No. 12272.

17—*In re Williams*, 99 Fed. 544, 3 A. B. R. 677.

18—Act 1898, § 2, subd. 1.

19—Act 1898, § 2, subd. 15.

20—*In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 25 A. B. R. 282; *In re Donnelly*, 188 Fed. 1001, 26 A. B. R. 304;

*In re Hicks*, 133 Fed. 739, 13 A. B. R. 654.

Court has power to prevent the doing of anything that will, at any stage of the proceeding, tend to embarrass it in the equitable distribution of the bankrupt estate. *Virginia Iron, Coal & Coke Co. v. Olcott*, 197 Fed. 730, 28 A. B. R. 321.

21—*In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 25 A. B. R. 282.

22—*In re Jersey Island Packing Co.*,

protect the assets;<sup>23</sup> to issue orders requiring persons to surrender for cancellation instruments purporting to convey property of the bankrupt, which it is alleged never became effective,<sup>24</sup> or property of the bankrupt,<sup>25</sup> or property in the hands of an assignee under a general assignment;<sup>26</sup> and to issue a writ in the nature of a *ne exeat* and arrest the bankrupt whenever the facts warrant the belief that he is about to abscond, either with or without his property, to the embarrassment of the bankruptcy proceedings.<sup>27</sup> It has no power to summon before it by a rule to show cause third persons who are not parties to the record and who reside without the district and state;<sup>28</sup> nor to issue a warrant for the arrest of the bankrupt under subdivision 9b of the law where the purpose is that the warrant shall serve as a basis of extradition, when he resides in another state.<sup>29</sup> While the courts have no power to make general rules in bankruptcy,<sup>30</sup> they are not hampered by such technicalities as to prevent doing what is just and for the protection of the estate, even if it requires the revocation of an order already made.<sup>31</sup> They also have power and authority to order a bankrupt to deliver to the trustee any money or other property in his possession or under his control, but as the enforcing of such order may lead to the bankrupt's imprisonment for contempt, it should not issue if there be any doubt of his ability to comply therewith,<sup>32</sup> and person's holding bankrupt's property without

138 Fed. 625, 14 A. B. R. 689; *In re Pruschen*, 1 N. B. N. 526. See also cases under §§ 209, 210, 1043.

23—*In re Fixen & Co.*, 1 N. B. N. 568, 2 A. B. R. 822, 96 Fed. 748. See *post*, Chap. VII.

24—*In re Waukesha Water Co.*, 116 Fed. 1009, 8 A. B. R. 715.

25—*Mueller v. Nugent*, 46 L. ed. 405, 184 U. S. 1, 7 A. B. R. 224.

26—*Bryan v. Bernheimer*, 45 L. ed. 815, 181 U. S. 188, 5 A. B. R. 623.

27—*In re Lipke*, 2 N. B. N. R. 347, 98 Fed. 970, 3 A. B. R. 569; *Matter of Berkowitz*, 173 Fed. 1012, 22 A. B. R. 231, citing *In re Cohen*, 136 Fed. 999, 14 A. B. R. 355; *In re Fleischer*, 151 Fed. 82, 18 A. B. R. 194. See *post*, Chap. XIII.

28—*In re Waukesha Water Co.*, 116 Fed. 1009, 8 A. B. R. 715.

29—*In re Ketchum*, 108 Fed. 35, 5 A. B. R. 532. See *post*, Chap. XIII.

30—*In re Kennedy*, 7 N. B. R. 337, Fed. Cas. No. 7699.

31—*Samson v. Burton*, 6 N. B. R. 403.

32—*In re Purvine*, 1 N. B. N. 326, 96 Fed. 192, 2 A. B. R. 787; *In re Rosser*, 1 N. B. N. 469, 96 Fed. 305, 2 A. B. R. 755; *In re Tudor*, 1 N. B. N. 476, 96 Fed. 943, 2 A. B. R. 808; *In re McCormick*, 2 N. B. N. 104, 97 Fed. 566, 3 A. B. R. 340; *In re Schlesinger*, 2 N. B. N. 169, 97 Fed. 930, 3 A. B. R. 342; *In re Mayer*, 2 N. B. N. 257, 98 Fed. 839, 3 A. B. R. 533; *In re Deuell*, 2 N. B. N. 597, 100 Fed. 633, 4 A. B. R. 60; *In re Thiessen*, 2 N. B. N. 625. See *post*, Chap. XXXVI.

claim of title will be guilty of contempt on withholding it from the trustee and may be summarily proceeded against for its recovery.<sup>33</sup>

The court of bankruptcy has general power, like any other court, to amend its decrees, in its discretion, in the furtherance of justice, in the absence of any statutory prohibition.<sup>34</sup>

### § 19. Judgment of state court.

The court of bankruptcy has no jurisdiction to annul or correct, upon appeal or petition, a judgment rendered in a state court, nor can it question allegations made in pleadings in a state court prior to the filing of the judgment in the court of bankruptcy with a petition for injunction,<sup>35</sup> nor can the appointment of a receiver by a state court be attacked collaterally in the bankruptcy court.<sup>36</sup>

### § 20. Receivers in state courts.

Proceedings under the state insolvency laws being void, a receiver appointed pursuant thereto for the purpose of taking charge of the insolvent's property will be required to turn the custody of the same over to the receiver or trustee in the bankruptcy proceedings, subsequently instituted against the same insolvent, whose power and authority become paramount by virtue of the latter proceedings;<sup>37</sup> but where the receiver was appointed more than four months prior to the adjudication,<sup>38</sup> or

33—In re Moore, 104 Fed. 869.

34—In re Cuthbertson, 202 Fed. 266, 29 A. B. R. 823.

The court may modify orders previously made, provided in so doing it does not deprive the parties of the privilege of asserting any right to which they may have been entitled in the bankruptcy proceeding. *Virginia Iron, Coal & Coke Co. v. Olcott*, 197 Fed. 730, 28 A. B. R. 321.

35—In re Dunn, 11 N. B. R. 270, 2 Hughes 169, Fed. Cas. No. 4172; *McKinsey v. Harding*, 4 N. B. R. 10, Fed. Cas. No. 8866.

36—In re Benwood Brewing Co., 202 Fed. 326, 29 A. B. R. 759.

37—In re Knight, 125 Fed. 35, 11 A. B. R. 1; *Hooks v. Aldridge*, 145 Fed.

865, 16 A. B. R. 658; In re Matthews & Sons, 163 Fed. 127, 20 A. B. R. 570; *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 21 A. B. R. 474; In re Zeigler Co., 189 Fed. 259, 26 A. B. R. 761.

Is receiver's duty to turn property over to federal receiver. *Id.*

See In re Hercules Atkin Co., Ltd., 133 Fed. 813, 13 A. B. R. 369.

38—*Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36; *Pickens v. Dent*, 9 A. B. R. 47, aff'g 106 Fed. 653, 5 A. B. R. 644; In re English, 127 Fed. 940, 11 A. B. R. 674; rev'g 122 Fed. 113, 10 A. B. R. 133; In re Heckman, 140 Fed. 859, 15 A. B. R. 500; In re Sterlingworth Ry. Supply Co., 165 Fed. 267, 21 A. B. R. 342.

where he is appointed not for the purpose of taking charge of the insolvent's property but his appointment is merely incidental to other relief,<sup>39</sup> the federal court will not interfere. *Prima facie*, however, the trustee in bankruptcy is entitled to the property and those who dispute his right have the burden of showing the exception.<sup>40</sup> In this connection the word "judgment" as used in section 67 of the bankruptcy act has been held to be sufficiently broad to apply to a judgment of a state court appointing a receiver which is avoided by the adjudication.<sup>41</sup> In view of the comity existing between the federal and state courts, application should first be made to the state court of which the receiver is an officer.<sup>42</sup> The fact that such property is in the hands of a receiver is no ground for dismissing the petition.<sup>43</sup>

### § 21. Commencement of proceedings.

For jurisdictional purposes bankruptcy proceedings are commenced by the filing of the original petition, and the fact that the service of the subpoena, or other further proceedings, were delayed, is immaterial.<sup>44</sup> If counting from the day the petition is filed the act of bankruptcy was within the four months and the bankrupt has resided, had his domicile or principal place of business the requisite time in the district,<sup>45</sup> the bankruptcy court has full jurisdiction.<sup>46</sup>

### § 22. Want of sufficient jurisdiction, when raised.

Objections to the jurisdiction must be made as speedily as possible; and where a creditor was notified of the first meeting of creditors, appeared thereat, nominated the trustee, and

39—As in foreclosure of mortgage. *Merry v. Jones*, 119 Ga. 643, 11 A. B. R. 625.

40—*Merry v. Jones*, 119 Ga. 643, 11 A. B. R. 625.

41—*Mauran v. Carpet Lining Co.*, 6 A. B. R. 734; *In re Cameron Currie & Co.*, 20 A. B. R. 790.

42—*In re Längert Wagon Co.*, 110 Fed. 927, 6 A. B. R. 535; *Wilson v. Parr*, 8 A. B. R. 230; *In re Lesser*, 110 Fed. 433, 3 A. B. R. 815; *In re Price*, 92 Fed. 987, 1 A. B. R. 606; see *Tua v. Carriere*, 117 U. S. 201, 29 L. ed. 855.

43—*In re Green Pond R. R. Co.*, 13 N. B. R. 118, Fed. Cas. No. 5786.

44—Act 1898, § 1, subd. 10; *Shute v. Patterson*, 147 Fed. 509, 17 A. B. R. 99; *In re Stein*, 105 Fed. 749, 5 A. B. R. 288.

45—*In re Appel*, 2 N. B. N. R. 907, 103 Fed. 931; *In re Lewis*, 1 N. B. N. 556, 91 Fed. 532, 1 A. B. R. 548; *In re Kinott*, 2 N. B. N. R. 373, 98 Fed. 867, 3 A. B. R. 546.

46—*In re Schloerb*, 2 N. B. N. R. 234, 97 Fed. 326.

exhaustively examined the bankrupt, it is too late for him to raise an objection as to the jurisdiction of the person or thing for the first time on the application for discharge,<sup>47</sup> or on appeal;<sup>48</sup> but as jurisdiction over the subject-matter must be given by law, and cannot be given by consent, or be waived, the question may be raised at any time, or made by the court on its own motion.<sup>49</sup>

Where a petition is filed to set aside an adjudication on the ground of want of jurisdiction in the court to make it, although the petitioner may be a stranger to the proceedings and therefore not entitled to make it, it is in the discretion of the court to hear him as *amicus curiae*.<sup>50</sup>

### § 23. Collateral attack of decisions.

A bankruptcy proceeding is a proceeding in rem and all persons interested in the res are regarded as parties to such proceedings, including not only the bankrupt and trustee but all the creditors of the bankrupt;<sup>51</sup> and a decree therein is notice to all the world and cannot be attacked collaterally, but is conclusive as to the jurisdiction of the court and the regularity of the proceedings.<sup>52</sup> Hence in a collateral proceeding objection cannot be raised to the court's jurisdiction,<sup>53</sup> the adjudication,<sup>54</sup>

47—Hall v. Kinsell, 2 N. B. N. R. 745; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358.

48—In re Emrich, 2 N. B. N. R. 656, 101 Fed. 231, 4 A. B. R. 89.

49—In re Mason, 2 N. B. N. R. 425, 99 Fed. 256, 3 A. B. R. 599; Shutts v. Bank, 2 N. B. N. R. 320, 98 Fed. 705, 3 A. B. R. 492.

50—In re Columbia Real Estate Co., 101 Fed. 965, 4 A. B. R. 411.

51—Carter v. Hobbs, 92 Fed. 594, 1 A. B. R. 215; Southern L. & T. Co. v. Benbow, 96 Fed. 514, 3 A. B. R. 9; In re Hecox, 164 Fed. 823, 21 A. B. R. 314; In re Dempster, 172 Fed. 353, 22 A. B. R. 751.

A decree adjudging a corporation bankrupt is in the nature of a decree in rem, and if the court rendering it had jurisdiction it can only be assailed by a direct proceeding in a competent court, unless due notice of the petition was never given

or the decree is void in form. New Lamp Chimney Co. v. Ansonia Brass and Copper Co., 13 N. B. R. 385, 91 U. S. (1 Otto) 656, 23 L. ed. 336.

52—Shawhan v. Wherritt, 7 How. 627, 12 L. ed. 847; Michaels v. Post, 21 Wall. 398, 22 L. ed. 520; Morse v. Godfrey, 3 Story 364; In re Columbia Real Estate Co., 101 Fed. 965, 4 A. B. R. 411.

53—In re Clisdell, 101 Fed. 246, 4 A. B. R. 95; In re Mason, 99 Fed. 256, 3 A. B. R. 599; In re Columbia Real Estate Co., 101 Fed. 965, 4 A. B. R. 411; New Lamp Chimney Co. v. Brass & Copper Co., 13 N. B. R. 385, 91 U. S. (1 Otto) 656, 23 L. ed. 336.

54—Wilson v. Parr, 8 A. B. R. 230; see Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83; In re Goodale, 109 Fed. 783, 6 A. B. R. 493; Edelstein v. United States, 149 Fed. 636, 17 A. B. R. 649; In re First Nat. Bank of Belle Fourche, 152 Fed. 64, 18 A. B. R. 265; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 20 A. B. R.

the discharge,<sup>55</sup> the acts of the trustee<sup>56</sup> or his title for purposes of sale,<sup>57</sup> or the like.

#### § 24. Reopening estate.

The court has the power to reopen an estate whenever it appears that it was closed before being fully administered.<sup>58</sup>

#### § 25. Court always open—Term.

The court of bankruptcy, having no regular terms, is always open, and its adjudications, orders and decrees remain, at all times, subject to re-examination and correction upon application made in an appropriate form when discovered to be erroneous, provided rights have not become vested under them which such correction will disturb;<sup>59</sup> and, in the exercise of its exclusive original jurisdiction it may act in administrative matters or matters of mere discretion as well in vacation as in term time, and a judge sitting in chambers in such matters has the same power and jurisdiction as when sitting in court.<sup>60</sup> The proceedings in a pending suit are therefore continuous from the filing of the petition to the closing of the estate.<sup>61</sup>

#### § 26. Expedition in hearing.

It is the duty of the bankruptcy court to promptly determine the question of adjudication, proceed with the selection of a trustee and the administration and distribution of the estate.<sup>62</sup>

349; *In re Hecox*, 164 Fed. 823, 21 A. B. R. 314; *In re Dempster*, 172 Fed. 353, 22 A. B. R. 751.

See also *In re Billing*, 145 Fed. 395, 17 A. B. R. 80.

55—*Black v. Blayo*, 13 N. B. R. 195; *Alston v. Robinett*, 9 N. B. R. 74; *Corey v. Ripley*, 4 N. B. R. 163; *In re Shaffer*, 104 Fed. 982, 4 A. B. R. 728; *Custard v. Wigderson*, 130 Wis. 412, 17 A. B. R. 337.

56—*Morris v. Swartz*, 10 N. B. R. 305.

57—*Steele v. Moody*, 16 N. B. R. 558.

58—See *post*, c. XXXIII, § 1427.

59—*Mahoney v. Ward*, 100 Fed. 278, 2 N. B. R. 558, 3 A. B. R. 770; *Sandusky v. Bk.*, 12 N. B. R. 176, 23 Wall. 289, 23 L. ed. 155; *Matter of Henschel*, 114 Fed. 968, 8 A. B. R. 201.

60—*Shearman v. Bingham*, 7 N. B. R. 490.

61—*In re Ives*, 113 Fed. 911, 7 A. B. R. 692; reversing 111 Fed. 495, 6 A. B. R. 653; *In re Jemison Mercantile Co.*, 112 Fed. 966, 7 A. B. R. 588.

62—*Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 A. B. R. 262; *In re Lisk Mfg. Co.*, 167 Fed. 411, 21 A. B. R. 674; *In re Billing*, 145 Fed. 395, 17 A. B. R. 80.

Policy of law is to expedite matters. *In re Syracuse Paper & Pulp Co.*, 164 Fed. 275, 21 A. B. R. 174.

Policy of act is to secure equal and speedy distribution of property. *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 25 A. B. R. 282.

Litigants should be alert and active.

### § 27. Transfer of cases.

It is frequently the case that a person may reside in the jurisdiction of one court, do business in another, and have his domicile in still another; or, in the case of a partnership, each member of a firm may live in different judicial districts and transact business in still others, so that a number of courts may at the same time have jurisdiction to render an adjudication of bankruptcy. Under the law of 1867 the court whose jurisdiction was first invoked had entire control, and proceedings in other courts were stayed or dismissed.<sup>63</sup> Section 2, subdivision 19 of the bankruptcy act of 1898, empowers the several courts of bankruptcy to "transfer cases to other courts of bankruptcy," but does not prescribe the conditions or circumstances under or upon which such transfer may be made. The act further provides as follows: "In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest."<sup>64</sup> It follows from the above that where a court relinquishes jurisdiction under such circumstances, the case should be transferred to and be consolidated with the petition in that court which having concurrent jurisdiction can proceed with the case "for the greatest convenience of parties in interest."<sup>65</sup>

Under the general order relating to the transfer of cases where two petitions are filed against the same individual in different districts, the first hearing must be had in the district in which the debtor has his domicile; and where there are two or more petitions against or by different members of, the same partnership in different courts, each having jurisdiction, or the petitions by the different members shall be filed in the same court, the petition first filed shall be first heard, and in either case the

Blanchard v. Ammons, 183 Fed. 556, 25 A. B. R. 590.

63—In re Boston, H. & E. R. R. Co., 6 N. B. R. 209; 9 Blatchf. 101, Fed. Cas. No. 1678; Shearman et al. v. Bingham et al., 5 N. B. R. 34, 1 Lowell 575, Fed. Cas. No. 12733; In re Leland, 5 N. B. R. 222,

5 Ben. 168, Fed. Cas. No. 8228; *vide* especially as to partners, In re Smith, 3 N. B. R. 15.

64—Act 1898, § 32a.

65—In re United Button Co., 137 Fed. 668, 13 A. B. R. 454.



proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard, and the court which makes the first adjudication retains jurisdiction over all the proceedings until the same is closed. The court so retaining jurisdiction, if satisfied that it is for the greatest convenience of the parties in interest that another of said courts should proceed with the case, shall transfer it. Earlier petitions may be amended by inserting acts of bankruptcy in later ones.<sup>66</sup>

This general order is, of course, subject to the provisions of the bankruptcy law and the case may be transferred and consolidated for the convenience of parties if brought within the provisions of section 32, in spite of the direction in the general order that the court first adjudicating shall retain jurisdiction until the proceedings are closed.<sup>67</sup>

Under the general order where petitions are filed against an individual the first hearing is in the district of domicile; in the case of petitions filed against a partnership, the first filed has priority of hearing.<sup>68</sup>

"The effect of the general order in connection with the provisions of the bankruptcy act is, among other things, to make it the duty of the court retaining jurisdiction of the case by reason of the domicile of the alleged bankrupt, 'if satisfied that it is for the greatest convenience of parties in interest' that another court having concurrent jurisdiction should proceed with the case, to order it to be transferred to such other court."<sup>69</sup>

By the express provisions of the bankruptcy act, the case can only be transferred to another court "having jurisdiction" and a necessary part of the action of a court in transferring a case is to find that the court to whom the case is relinquished has jurisdiction of the bankruptcy proceeding.<sup>70</sup> A court which has jurisdiction of one of the partners may have jurisdiction of all

66—G. O. VI.

67—In re Isaacson, 161 Fed. 777, 779, 20 A. B. R. 430, 437.

68—In re United Button Co., 132 Fed. 378, 12 A. B. R. 761.

In re Sears, 112 Fed. 58, 7 A. B. R. 279.

"The true meaning of General Order 6 is that where petitions are filed in different districts the court whose ground of

jurisdiction is that the bankrupt's domicile has been in that district during the greater portion of the six months is the court in which the first hearing shall be had." In re Isaacson, 161 Fed. 777, 779, 20 A. B. R. 430, 437.

69—In re United Button Co., 137 Fed. 668, 13 A. B. R. 454.

70—Kyle Lumber Co. v. Bush, 133 Fed. 688, 13 A. B. R. 535.

the partners and of the administration of the partnership and individual property, but not to adjudge each member individually bankrupt, unless it has jurisdiction over him personally.<sup>71</sup>

“The bankruptcy act does not define or describe ‘greatest convenience’ or ‘parties in interest,’ as those phrases are used in section 32 and General Order VI. Both expressions are elastic and largely indefinite. It is manifestly too narrow a construction of the phrase ‘parties in interest’ to restrict it merely to unsecured creditors in bankruptcy. The bankrupt is not only literally but substantially a party in interest. A creditor holding security which is sought to be set aside by the trustee in bankruptcy is also a party in interest. And it probably may be stated with accuracy that all persons whose pecuniary interests are directly affected by proceedings in bankruptcy are, within the true meaning of section 32 and General Order VI, parties in interest. What may be for the greatest convenience of parties in interest does not necessarily depend upon only one factor or circumstance entering into the situation. Proximity of the place of business of the bankrupt to the court entertaining proceedings in bankruptcy, though a circumstance sometimes entitled to weight is by no means conclusive, and the same may be said with respect to proximity to the place of manufacture. Proximity of a majority of the creditors of the bankrupt in number or in the amount of their claims is a circumstance which should also be duly weighed. And the same may be said with at least equal force of a majority of the debtors of the bankrupt in number or in amount. Nor is the element of expedition or of economy in the administration of the estate in bankruptcy to be lost sight of.”<sup>72</sup>

71—Section 5, c, Act of 1898; In re Murray, 1 N. B. N. 570, 96 Fed. 600, 3 A. B. R. 601; see In re Sears, 112 Fed. 58, 7 A. B. R. 279.

72—In re United Button Co., 137 Fed. 668, 13 A. B. R. 454.

The term “parties in interest” covers every party having any interest in or connection with the case, including priority, secured and unsecured creditors as well as the bankrupts themselves, and the term “greatest convenience” depends upon all the circumstances, including proximity of a majority of creditors and of

the place of business of the bankrupt to the court, proximity of witnesses whose attendance is desired, in any hearing, and numerous other factors. In re Sterne & Levi, 190 Fed. 70, 26 A. B. R. 259.

When an involuntary petition was filed against bankrupt as a member of a firm at the place where the firm business had been conducted and where the corporation which succeeded the firm conducted its business retaining the bankrupt in its employ, although he claimed to live in another jurisdiction where he afterwards filed a voluntary petition, the

The word "individual" as used in the general order is equivalent to "person" as used in the bankruptcy act and as such includes a corporation.<sup>73</sup>

The court taking and retaining jurisdiction under general order 6 has exclusive jurisdiction to determine the question of a transfer under section 32.<sup>74</sup> The petition is directed to the discretion of the court,<sup>75</sup> the burden being upon the petitioners to satisfy the court by a fair preponderance of the evidence that it should transfer the case.<sup>76</sup>

### § 28. Judge; qualification, duty and conduct.

The same requirements as to qualification, duty and conduct of federal judges in the courts, apply with equal force to courts of bankruptcy. Thus a judge, who has been a depositor in an insolvent banking institution but who has sold his claim, is not thereby disqualified from sitting in the matter, although the motive on the part of the purchaser of his claim may have been to remove the disqualification,<sup>77</sup> though he would be disqualified from acting as the general adviser of trustees as to their acts.<sup>78</sup> In the discharge of his functions as a federal judge, his conduct and administration need not conform to the practice in the state courts.<sup>79</sup>

court held that the greatest convenience of all was subserved by hearing the case at the firm residence, where the debts were contracted and the facts might be most conveniently and effectively investigated, and stayed the bankrupt's voluntary petition until the question of the adjudication in the involuntary proceedings had been determined. *In re Waxelbaum*, 2 N. B. N. R. 228, 98 Fed. 589, 3 A. B. R. 392; compare *In re Elmira Steel Co.*, 109 Fed. 456, 5 A. B. R. 484.

73—*In re United Button Co.*, 137 Fed. 668, 13 A. B. R. 454; *In re United Button Co.*, 132 Fed. 378, 12 A. B. R. 761.

74—*In re Sterne & Levi*, 190 Fed. 70, 26 A. B. R. 259; *In re United Button Co.*, 132 Fed. 378, 12 A. B. R. 761; *In*

*re Tybo Mining & Reduction Co.*, 132 Fed. 697, 13 A. B. R. 68.

Case transferred for convenience of parties. *In re General Metals Co.*, 133 Fed. 84, 12 A. B. R. 770.

75—*In re Tybo Mining & Reduction Co.*, 132 Fed. 697, 13 A. B. R. 68.

76—*In re Sterne & Levi*, 190 Fed. 70, 26 A. B. R. 259; *In re Tybo Mining & Reduction Co.*, 132 Fed. 697, 13 A. B. R. 68.

77—*In re Sime*, 7 N. B. R. 407, 2 Sawy. 320, Fed. Cas. No. 12860.

78—*In re Sturgeon*, 1 N. B. R. 131, Fed. Cas. No. 1356.

79—*Nudd v. Burrows*, 13 N. B. R. 289, 91 U. S. (1 Otto) 426, 23 L. ed. 286.

## CHAPTER III

### CLERKS—MARSHALS—ATTORNEY GENERAL

- § 29. Clerks; duties.
- § 30. Duties in general.
- § 31. To collect fees.
- § 32. Inability or pauper affidavit.
- § 33. Custody of papers.
- § 34. Compensation of clerk.
- § 35. Marshal's fees.
- § 36. Attorney general—Statistics of bankruptcy proceedings for congress.

#### § 29. Clerk; duties.

“Clerks shall respectively

“(1) Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

“(2) Collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees;

“(3) Deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

“(4) And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.”<sup>1</sup>

The clerks of the district court are also required to “prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy hereto-

1—Act 1898, § 51a.

fore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.”<sup>2</sup>

These indexes should cover all petitions in bankruptcy filed as well as all discharges granted since the enactment of the act of July 1, 1898.

### § 30. Duties in general.

The clerk is required to keep a docket containing certain prescribed entries; to indorse on each paper filed with him the day and hour of filing, and a brief statement of its character;<sup>3</sup> to attest all process, summons and subpoenas issued out of the court, under the seal thereof,<sup>4</sup> and, on application, to furnish the referees blanks with the signature of the clerk and seal of the court.<sup>5</sup> In case the judge is absent from the district, the clerk has authority to make the order of reference,<sup>6</sup> a copy of which he should mail forthwith or deliver personally, or through some other officer of the court, to the referee.<sup>7</sup> It is also his duty to issue a certificate showing the absence of the judge, or his sickness or inability to act as authority for the referee to take possession or release bankrupt's property. He has no judicial powers, but is a ministerial officer, subject to the orders of the judge.<sup>8</sup>

A deputy clerk is not mentioned in the act, and his authority and power are confined to those conferred by statute.<sup>9</sup> He may perform ministerial duties.<sup>10</sup> The fact that bankrupt was a brother-in-law of the deputy clerk in whose office a petition was filed has been held sufficient cause for transferring the case and

2—Act 1898 § 71 added by Act Feb. 5, 1903.

3—G. O. III.

4—Cohen v. American Surety Co., 132 App. Div. (N. Y.) 917, 22 A. B. R. 909; G. O. III.

5—G. O. III.

Brandenburg—4

6—Act of 1898, §§ 18f & g.

7—G. O. XII.

8—Act of 1898, § 38a (3).

9—Section 558, U. S. Rev. Stat.

10—May make order of reference. Gilbertson v. United States, 168 Fed. 672, 22 A. B. R. 32.

record to another seat of the court in the same district, though this position seems questionable.<sup>11</sup>

### § 31. To collect fees.

The clerk is required to collect his own fees, \$10,<sup>12</sup> those of the referee, \$15,<sup>13</sup> and trustee, \$5,<sup>14</sup> in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees. A deposit of the statutory filing fee by a proposed voluntary bankrupt, not within the exception in favor of paupers, is a condition precedent to the filing of the petition. In the case of a firm the fee must be collected from each member, as well as the firm where the partnership applies as such, and separate petitions with separate schedules are filed for the several partners;<sup>15</sup> but it has been held that only one petition in the name of both the partnership and the individual partners, accompanied by schedule setting out the debts and assets of the firm and also of the partners, is necessary and both the joint and separate estates may be administered upon such petition; and it is but one proceeding requiring only one filing fee,<sup>16</sup> though on this point the courts do not agree.<sup>17</sup> Upon a petition in involuntary bankruptcy against one person as an individual, no adjudication can be made against other persons who were in partnership with him, even though the latter come in voluntarily and consent to be adjudged bankrupt; but they must file their individual petitions, deposit the fees required and proceed strictly according to law.<sup>18</sup>

Money belonging to the bankrupt, either in his hands or sub-

11—*Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102.

12—Act of 1898, § 52a.

13—Act of 1898, § 40a.

14—Act of 1898, § 48a.

15—*In re Barden*, 2 N. B. N. R. 741, 101 Fed. 553, 4 A. B. R. 31; *In re Farley & Co.*, 115 Fed. 359, 8 A. B. R. 266.

16—*In re Gay*, 98 Fed. 870, 3 A. B. R. 529; *In re Langslow et al.*, 1 N. B. N. 232, 1 A. B. R. 258, 98 Fed. 869.

Separate costs and fees need not be

paid by each insolvent partner who is adjudicated, except for the requirement from each such partner of a deposit of the customary amount to cover costs of advertising notices to individual creditors. *In re City Con. & Bldg. Co.*, 30 A. B. R. 133.

17—*In re Farley & Co.*, 115 Fed. 359, 8 A. B. R. 266; *In re Barden*, 101 Fed. 555, 4 A. B. R. 31.

18—*Mahoney v. Ward*, 100 Fed. 278, 2 N. B. N. R. 538, 3 A. B. R. 77.

ject to his order, is subject to an order for the payment of the statutory fees.<sup>19</sup>

The provision for the repayment of money advanced for expenses incurred in publishing or mailing notices, etc.,<sup>20</sup> does not apply to the filing fee of \$30 in voluntary cases, which is not returned to the bankrupt;<sup>21</sup> but, in involuntary cases, the filing fee of \$30, the marshal's charges and the indemnity deposit, are all returned to the petitioning creditors.<sup>22</sup>

### § 32. Inability or pauper affidavit.

A petitioner who has no means is exempt from paying the filing fee of \$30, and the statutory affidavit of a voluntary bankrupt is prima facie evidence of petitioner's inability and the bankrupt's petition being accompanied by the pauper's oath, it is the duty of the clerk to file the petition and take the action thereon prescribed by law,<sup>23</sup> subject, however, to investigation; and, if the inquiry is fairly answered respecting available means, and none appear to be held by petitioner when the proceedings were instituted, nor to be obtainable through his individual earnings or efforts, the exemption from such payment must be allowed.<sup>24</sup> It appearing, however, that the petitioner has money with which to pay the fees, the petition should be filed and an order made requiring the money to be paid into court for that purpose.<sup>25</sup> It has been held that if, upon a reference to the referee to take proof and report the facts showing whether bankrupt is unable to obtain the money, it appears that he is employed at a monthly salary though as low as \$30, he must pay the \$30,<sup>26</sup> for the liability of petitioner to pay the filing fee does not depend upon his having property not exempt<sup>27</sup> but on actual inability. He may be ordered to pay such fees out of pension money received from the United States and remaining

19—*In re Mason*, 181 Fed. 899, 25 A. B. R. 73.

20—G. O. X.

21—*In re Matthews*, 97 Fed. 772, 3 A. B. R. 265.

22—Act of 1898, § 64b (2); *In re Silverman et al.*, 2 N. B. N. R. 18, 3 A. B. R. 227, 97 Fed. 325.

23—*Sellers v. Bell*, 94 Fed. 801, 2 A. B. R. 529; *In re Mason*, 181 Fed. 899, 25 A. B. R. 73.

24—*In re Levy*, 101 Fed. 247, 4 A. B. R. 108.

25—*In re Mason*, 181 Fed. 899, 25 A. B. R. 73.

26—*In re Collier*, 1 N. B. 257, 1 A. B. R. 182, 93 Fed. 191.

27—*In re Hines*, 117 Fed. 790, 9 A. B. R. 27; *In re Mason*, 181 Fed. 899, 25 A. B. R. 73.

unchanged in his hands at the time of filing the petition,<sup>28</sup> though, according to the better view, he is not required to solicit loans from his friends for the purpose of paying this expense.<sup>29</sup> Where the petitioner's family lived in affluence in a house belonging to his wife, and it was evident that he had more or less control over her property, he was held not to be excused from paying the filing fee, since that privilege is granted only to paupers in fact.<sup>30</sup>

In any case in which the clerk's fees are not required by the act to be paid before filing the petition, the judge, at any time during the pendency of the proceedings, may order them paid out of the estate, or, after notice and proof of petitioner's ability, require him to pay them.<sup>31</sup> The petitioner must pay the necessary expenses as the case progresses, and, if he declines when able to pay, his discharge may be refused and his petition be dismissed or his discharge may be postponed until he pays the compensation allowed the clerk, referee and trustee, or else satisfy the court that by reason of ill health or peculiar misfortune he is a worthy object of charity;<sup>32</sup> but there is no rule or law authorizing the referee to make such order.<sup>33</sup>

### § 33. Custody of papers.

The clerk is entitled to one copy of the petition<sup>34</sup> and of the schedule,<sup>35</sup> and is required to deliver to the referees, upon application,<sup>36</sup> all papers which may be referred to him, or, if the offices of such referees are not in the same city or town as the office of the clerk, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used.<sup>37</sup> He must also receive and file the records and papers of each case after it is concluded,<sup>38</sup> together with the bonds of trustees, referees and designated depositories.<sup>39</sup>

28—*In re Bean*, 100 Fed. 262, 4 A. B. R. 53.

29—*In re Mason*, 181 Fed. 899, 25 A. B. R. 73; *Sellers v. Bell*, 94 Fed. 801, 2 A. B. R. 529; but see *In re Hines*, 117 Fed. 790, 9 A. B. R. 27.

30—*In re Williams*, 2 N. B. N. R. 206.

31—G. O. XXXV.

32—*Anon.* 1 N. B. N. 376, 2 A. B. R. 527, 95 Fed. 120; *In re Collins*, 1 N. B. N. 132; *In re Fininger*, *Id.*

33—*In re Plimpton*, 3 N. B. N. R. 14, 103 Fed. 775, 4 A. B. R. 614.

34—Act of 1898, § 59c.

35—Act of 1898, § 7 (8).

36—Act of 1898, § 39 (10).

37—Act of 1898, § 39 (8).

38—Act of 1898, § 39 (7).

39—Act of 1898, § 50h.



### § 34. Compensation of clerk.

Except when a fee is not required from a voluntary bankrupt, clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars.<sup>40</sup> This fee is in full compensation of all services in filing petitions or other papers required to be filed with the clerk, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money or otherwise, unless the clerk is able to specifically point out an exception; the allowance or disallowance of costs and fees is not a matter of equity or supposed hardship, but purely a matter of statutory provision.<sup>41</sup> It does not include the charge for copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers;<sup>42</sup> and, before incurring any expense of this nature or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk may require from the person, for whom the service is to be rendered, indemnity for such expense, and the money so advanced shall be repaid as part of the cost of administration.<sup>43</sup> Clerks of United States courts are entitled to charge ten cents a folio of one hundred words for making copies of papers on file, or of any entry or record, fifteen cents for each certificate, and twenty cents for affixing the seal of the court.<sup>44</sup> The clerk must issue the notice on the petition for a discharge and is allowed therefor his actual expenses such as postage, stationery and clerical work. This cannot be charged as a fee but should be itemized and charged as an expense.<sup>45</sup> The clerk is entitled to his per diem compensation for days on which voluntary petitions in bank-

40—Act 1898, § 52a. Analogous provision of act of 1867. "Sec. 47. . . . That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers." (Here follows the specification of fees.)

41—In re Durham, 2 N. B. N. R. 1104.

42—G. O. XXXV.

43—G. O. X.

44—Sec. 828, U. S. Rev. Stat.

45—In re Dunn Hardware & Furniture Co., 134 Fed. 997, 14 A. B. R. 186.

Though a voluntary bankrupt might furnish the filing fee, if there are no assets and he can truthfully swear he is unable to pay for the required notices to creditors, he is entitled to have that service performed by the clerk on the same conditions as a suit conducted in forma pauperis. In re Durham, 2 N. B. N. R. 1104 Id.

ruptcy, filed during the absence of the judge from the district, are referred.<sup>46</sup>

In any case in which the fee is not required by the act to be paid before filing the petition, the judge may at any time order it paid out of the estate, or, after notice and proof of bankrupt's ability to pay it, require him to do so.<sup>47</sup>

### § 35. Marshal's fees.

"Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals."<sup>48</sup> Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the marshal may require from the person in whose behalf the service is to be rendered indemnity for such expense; and the money so advanced shall be repaid to the person advancing it out of the estate as part of the cost of administering the same.<sup>49</sup> He is required to make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of the property, and other services, and other actual and necessary expenses incurred, with vouchers therefor whenever practicable, and also with a statement that the amounts

46—Sibley v. Nason, 196 Mass. 125, 22 A. B. R. 712.

47—G. O. XXXV.

48—Act 1898, § 52b. Analogous provision of Act of 1867. "Sec. 47. . . . Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more: (Here follows specification of fees.)

"For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

"The enumeration of the foregoing fees shall not prevent the judges, who

shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders."

As under the Act of 1867 marshals received compensation as such and also as messengers, the provision as to messengers' fees in the earlier act is inserted, although under the present law no provision is made for the service of messengers.

49—G. O. X.

charged by him are just and reasonable.<sup>50</sup> If he has two or more processes in his hands at the same time in the same proceeding, which may be served at the same time and place, mileage can be charged only once, but if additional travel is necessary such additional mileage may be charged.<sup>51</sup> It has been held that he is entitled to make a reasonable charge for the service of a petition upon which has been granted an order to show cause, in addition to the statutory fee for the service of the order, though the papers are bound together and served at the same time.<sup>52</sup>

When a taxation is made it is conclusive and the marshal is entitled to the fees taxed unless there is fraud or bad faith on his part.<sup>53</sup> By the act of May 28, 1896,<sup>54</sup> the marshals were put upon a salary and required to account for and turn into the Treasury of the United States all fees taxable under the law. The bankruptcy law and the general orders put whatever the marshal may earn or receive for services rendered in a bankruptcy proceeding upon the same plane as such other fees. Hence it becomes necessary to examine the law as to such fees. On a petition setting forth the facts under oath, a court is vested with discretion to allow such compensation as it may deem proper for the keeping of personal property attached on mesne process,<sup>55</sup> and the comptroller has held that in litigation between private individuals, where property has been seized by the marshal (treating the word "seized" as equivalent to "attached"), he should charge himself in his account for fees under the appropriation "salaries, fees and expenses of marshals," with all the expenses allowed him by the court for the keeping of said property under said paragraph, that are not as reimbursement for expenses paid to outsiders for such keeping, and as to expenses of the latter character, he should not charge himself or pay them to the clerk.<sup>56</sup> By the amendment of 1910 it is expressly provided that the marshal shall not in any form or guise receive, nor shall the court allow him, any other or further

50—G. O. XIX.

51—*In re Donohoe*, 8 N. B. R. 453, Fed. Cas. No. 3979.

52—*In re Damon*, 5 A. B. R. 133.

53—*In re Rein*, 13 N. B. R. 551, 8 Ben. 384, Fed. Cas. No. 11678.

54—Act of May 28, 1896, 29 Stat. L.

140; 2 Supp. R. S. 479; *In re Comstock*, 9 N. B. R. 88, Fed. Cas. No. 3075; *In re Lowenstein*, 3 N. B. R. 65, 3 Ben. 422, Fed. Cas. No. 3572.

55—2d par. § 829 U. S. Rev. Stat.

56—5 Comp. Dec. 871.

compensation for his services than that expressly authorized and prescribed in the act.<sup>57</sup>

A deputy marshal, when "engaged in service or attempted service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment, on official business, will be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence not to exceed \$2 per day and the necessary actual expenses in transporting prisoners;"<sup>58</sup> and a field deputy marshal "as compensation, three-fourths of the gross fees, including mileage as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition, shall be allowed his actual necessary expenses, not exceeding \$2 a day while endeavoring to arrest, under process, a person charged with or convicted of crime; provided, that a field deputy marshal may elect to receive actual expenses on any trip in lieu of mileage."<sup>59</sup>

The law<sup>60</sup> seems to require that if the marshal or his office deputy takes charge of property<sup>61</sup> they can be personally allowed only their actual expenses and any compensation that might be taxed by the court for such services must be turned into the treasury, since their compensation is restricted to their salary, and in addition only actual expenses while engaged in service. A field deputy marshal can receive nothing for this work, except what can be allowed under the law mentioned.<sup>62</sup> There is no precedent for the allowance by a judge under this paragraph and section to a marshal of anything but a lump sum for compensation, three-fourths of which the accounting officers allow the field deputy to retain if he performed the services.<sup>63</sup> If a court should allow compensation consisting of a per diem or sum as a fee and a schedule of actual expenses, a question would arise for the consideration of the comptroller of the treasury as to whether the expenses would be allowed in toto as in other expense accounts, or whether the allowance would

57—Act 1898, § 72, as amended June 25, 1910.

58—Sec. 10 of the Act of May 28, 1896, 29 Stat. L. 140; 2 Supp. R. S. 483.

59—Sec. 11, Act of May 28, 1896, supra.

60—Act of May 28, 1896.

61—Par. 2, § 829, U. S. Rev. Stat.

62—Par. 2, § 829, U. S. Rev. Stat.

63—Sec. 11, Act of May 28, 1896, supra.

be lumped and three-fourths of it only paid over to the deputy marshal. The marshal himself, and his office deputies, being salaried officers, are not entitled to compensation under paragraph 2, of section 829, U. S. Revised Statutes; but it has been held that where the petition and affidavits for an order to show cause are required by rule of court to be served with the order, and such service is made by a marshal, he is entitled to a reasonable fee in addition to his fee for serving the order under this subdivision, although the petition is not a writ;<sup>64</sup> and the fee fixed by the latter section for serving a writ is reasonable for the service.<sup>65</sup>

**§ 36. Attorney general—Statistics of bankruptcy proceedings for congress.**

The attorney general shall annually lay before congress statistical tables showing for the whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.<sup>66</sup>

Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney general, for statistical purposes, within ten days after being requested by him to do so.<sup>67</sup> The neglect of either the referee, trustee, receiver, marshal or clerk of court<sup>68</sup> to furnish such information as may be called for, renders such officer liable to removal. These reports are called for by the attorney general, for which purpose the department of justice furnishes the necessary blanks. It is entirely within his discretion as to when and what reports are called for.<sup>69</sup>

64—Sec. 829, U. S. Rev. Stat.

67—Act 1898, § 54a.

65—In re Damon, 104 Fed. 775, 5 A.

68—Act of 1898, § 1 (18).

B. R. 133.

69—Act of 1898, § 34a.

66—Act 1898, § 53a.

## CHAPTER IV

### ACTS OF BANKRUPTCY—INSOLVENCY

- § 37. Acts of bankruptcy, defined.
- § 38. Classes.
- § 39. Estoppel.
- § 40. Insolvency.
- § 41. When partnership insolvent.
- § 42. Transfers or concealment with intent to defraud.
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- § 44. Transfers or conveyances not acts of bankruptcy.
- § 45. — Conveyances of partnership property.
- § 46. — Conveyances to relatives.
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- § 48. — Mortgages.
- § 49. — Pledge.
- § 50. — Sales.
- § 51. Preference through legal proceedings.
- § 52. Assignment for benefit of creditors; receiver or trusteeship.
- § 53. Admitting in writing inability to pay debts and willingness to be adjudged bankrupt on that ground.
- § 54. Time for filing petition.
- § 55. Defense of solvency.
- § 56. Testimony on denial of insolvency.
- § 57. Practice in case of defense on the ground of solvency.

#### § 37. Acts of bankruptcy defined.

Acts of bankruptcy by a person shall consist of his having

(1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

(2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

(4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States;<sup>1</sup> or

(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.<sup>2</sup>

### § 38. Classes.

Acts of bankruptcy may, in general, be considered under two classes, i. e., those resulting from insolvency and those which are dishonest or fraudulent.

The first three definitions of the acts of bankruptcy, specified in the present law, follow closely those given in section 39 of the act of 1867, while the fourth and fifth definitions have no

1—Subdivision 4 was amended by the Act of February 5, 1903, by the enactment of the matter in the text in lieu of the following: “(4) Made a general assignment for the benefit of his creditors.”

2—Analogous provision in Act of 1867. Sec. 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, sale, conveyance or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory, within which such debtor resides or has property founded upon a demand in its nature provable

against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or has been actually imprisoned for more than seven days in a civil action, founded on contract, for the sum of one hundred dollars or upwards, or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment; or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy.

counterpart in that act. The law of 1867 specified three acts of bankruptcy which are omitted from the present statute, namely, the absconding or avoiding the service of process on part of the debtor, the arrest and holding in custody of a debtor, under process of execution for a period of seven days; and the fraudulent suspension of payment of commercial paper by a banker, merchant or trader for a period of fourteen days.

### § 39. Estoppel.

Any person conniving in the alleged act of bankruptcy whether it be actually fraudulent or only constructively so should be denied the relief asked if based on the ground of such act.<sup>3</sup>

### § 40. Insolvency.

Insolvency is not essential in voluntary proceedings.<sup>4</sup> The law expressly declares a person to be insolvent whenever the aggregate of his property, exclusive of any he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, is, at a fair valuation, insufficient in amount to pay his debts.<sup>5</sup> On the trial of a contested involuntary petition, in

3—In re Miner, 2 N. B. N. R. 1073, 104 Fed. 520; Simonson v. Sinsheimer, 95 Fed. 948; In re Romanow, 92 Fed. 510, 1 N. B. N. 213, 1 A. B. R. 461; Massachusetts Brick Co., 5 N. B. R. 408, Fed. Cas. No. 9259; Perry v. Langley, 1 N. B. R. 559, Fed. Cas. No. 11006; In re Williams, 4 N. B. R. 132, Fed. Cas. No. 17706. See General Assignments, *post* § —. In re Marks Bros., 15 A. B. R. 457.

4—In re Foster Paint & Varnish Co., 210 Fed. 652, 31 A. B. R. 548.

5—Act 1898, § 1, subd. 15.

Under the Act of 1867 it was held that insolvency consisted in the inability to pay debts according to the custom of the place of business, although the assets might be largely in excess of liabilities; that it was no excuse that he might have paid them if time was given, and that the words "insolvent" and "insolvency" were not synonymous with the words "bankrupt" and "bankruptcy," but less

restricted (*Ecfort v. Greely*, 6 N. B. R. 433, Fed. Cas. No. 4260; *Toof v. Martin*, 6 N. B. R. 49, 13 Wall. 40, 20 L. ed. 481, *Martin v. Toof*, 4 N. B. R. 158, Fed. Cas. No. 9164; *Stranahan v. Gregory*, 4 N. B. R. 142, Fed. Cas. No. 13522; In re Lewis, 2 N. B. R. 145; In re Kingsbury, 3 N. B. R. 84, Fed. Cas. No. 7816; *Merchants' Nat. Bk. v. Truax*, 1 N. B. R. 146, Fed. Cas. No. 9451; *Warren v. Bk.*, 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. No. 17202; *Jackson v. McCulloch*, 13 N. B. R. 283, 1 Woods 433, Fed. Cas. No. 7140; *Sawyer v. Turpin*, 5 N. B. R. 339, 2 Lowell 29, Fed. Cas. No. 12410; In re Woods, 7 N. B. R. 126, Fed. Cas. No. 17990; *Webb v. Sachs*, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. No. 17325; *Hall v. Wager*, 5 N. B. R. 181, 3 Biss. 28, Fed. Cas. No. 5951; In re Black, 1 N. B. R. 81, 2 Ben. 196, Fed. Cas. No. 1457; *Rison v. Knapp*, 4 N. B. R. 114, Fed. Cas. No. 11861); that debts could



determining the issue of the solvency or insolvency of the alleged bankrupt, all property available to the debtor to meet his liabilities within a reasonable time,<sup>6</sup> excluding such property as he may have transferred or concealed in fraud of creditors,<sup>7</sup> or conveyed without consideration immediately preceding his bankruptcy, and money upon his person,<sup>8</sup> should be considered in determining his assets. The fact, however, that the transfer may be preferential does not exclude the property from consideration, there being no fraud.<sup>9</sup> There is a conflict of opinion as to whether exempt property should be included in computing his assets.<sup>10</sup>

The term "fair valuation" is the equivalent of the present market value, and not what the debtor would have been able to realize therefor considering his situation, the number and amount of his obligations, and the like.<sup>11</sup> It means "a value

not be paid in full out of debtor's property by levy and sale on execution (In re Wells, 3 N. B. R. 95, Fed. Cas. No. 17388; In re Oregon Bull. etc. Co., 13 N. B. R. 503, Fed. Cas. No. 10559; but see Harrison v. McLaren, 10 N. B. R. 244, Fed. Cas. No. 6139); failure to keep promises to pay at a specific time made repeatedly to demands of payment (In re Armstrong, 16 N. B. R. 275, 9 Ben. 212, Fed. Cas. No. 539); being required by a banker to give collateral security for a draft cashed the day before (Merchants' Bk. v. Cook, 16 N. B. R. 391, 95 U. S. (5 Otto) 342, 24 L. ed. 412). The foregoing do not define insolvency under the present law, but the acts named may tend to show that the debtor's property, at a fair valuation, is insufficient to pay his debts.

6—Louisiana Nat. Life Assn. Society v. Segen, 196 Fed. 903, 28 A. B. R. 407.

7—In re Baumann, 96 Fed. 946, 3 A. B. R. 196; In re Shoesmith, 135 Fed. 684, 13 A. B. R. 645; Acme Food Co. v. Meier, 153 Fed. 74, 18 A. B. R. 550; In re Minard, 156 Fed. 377, 19 A. B. R. 485; In re Crenshaw, 156 Fed. 638, 19 A. B. R. 502; Utah Ass'n of Credit Men v. Boyle, Furn. Co., 39 Utah, 518, 26 A. B.

R. 867; In re Duke & Son, 28 A. B. R. 195.

8—In re Tudor, 1 N. B. N. 339.

9—"Where property is transferred in payment of or as security for a just debt, the mere fact that it may involve a preference in bankruptcy, . . . does not exclude it from consideration in determining the debtor's solvency." In re Doschen, 120 Fed. 408, 9 A. B. R. 547.

Where a mortgage does not convey the title to the property, the mortgagor's equity should be considered an asset even though the mortgage is claimed to be a preferential transfer. Lansing Boiler & Engine Works v. Ryerson & Son, 128 Fed. 701, 11 A. B. R. 558.

10—Excluded:

In re Duke & Son, 28 A. B. R. 195; Louisiana Nat. Life Assur. Society v. Segen, 196 Fed. 903, 28 A. B. R. 407.

Included: In re Hines, 144 Fed. 142, 16 A. B. R. 295; In re Crenshaw, 156 Fed. 638, 19 A. B. R. 502; Louisiana Nat. Life Assur. Society v. Segen, 196 Fed. 903, 28 A. B. R. 407.

See, also, Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah 518, 26 A. B. R. 867.

11—Duncan v. Landis, 106 Fed. 839, 5 A. B. R. 649.

that can be made promptly effective by the owner of property 'to pay his debts.' It excludes the sacrifice price obtainable on execution or foreclosure sale as well as the retail price obtainable in the slow process of trade. It means "such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property."<sup>12</sup> In making such estimate there should not be included prospective profits upon goods ordered but not paid for or delivered,<sup>13</sup> and in case of credits due the bankrupt on accounts, the estimate should be on their actual and not their nominal value.<sup>14</sup>

A corporation which has sufficient property to pay its debts does not become insolvent within the meaning of the law upon the appointment of a receiver in a state court.<sup>15</sup> In determining the solvency of a corporation, bonds which are, at most, irregular are to be considered a part of the indebtedness,<sup>16</sup> and contested claims of amounts claimed to be due from holders of bonus stock are not assets.<sup>17</sup>

Where a referee has twice examined the question and finds

Such valuation is not affected by any depreciation consequent upon the recovery of judgment against the debtor and a levy thereunder. In *re Hines*, 144 Fed. 142, 16 A. B. R. 295.

12—*Stern v. Paper*, 183 Fed. 228, 25 A. B. R. 451.

"Fair valuation" is the market value, that is "what the property will probably bring, or is worth in the general market, where everybody buys." In *re Hines*, 144 Fed. 142, 16 A. B. R. 295.

Property should be valued at a fair valuation at the time and in the situation it was at the time the alleged act of bankruptcy was committed. In *re Duke & Son*, 28 A. B. R. 195.

"Fair market value" is value debtor might have realized on assets. In *re Marine Iron Works*, 159 Fed. 753, 20 A. B. R. 390.

A fair valuation of the goods levied on should be taken, with reference to their actual situation and liability to sale on execution, and, if such sale is in all

respects a fair and reasonable one, the debtor is bound by the result as to the valuation and can not prove his solvency by a higher estimate based on their being free and sold at retail in the usual course of business. In *re Martin*, 1 N. B. N. 301.

13—In *re Bloch*, 109 Fed. 790, 6 A. B. R. 300.

14—In *re Coddington*, 118 Fed. 281, 9 A. B. R. 243.

Installment accounts against persons who, though doubtless honest and may eventually pay debts in full, are execution proof, should not be considered. *Louisiana Nat. Life Assur. Society v. Segen*, 196 Fed. 903, 28 A. B. R. 19.

15—In *re Henry Zeltner Brewing Co.*, 117 Fed. 799.

16—*First Nat. Bank of Wilkesbarre v. Wyoming Valley Ice Co.*, 136 Fed. 466, 14 A. B. R. 448.

17—*First Nat. Bank of Wilkesbarre v. Wyoming Valley Ice Co.*, 136 Fed. 466, 14 A. B. R. 448.

that the debtor's property at a fair valuation was insufficient to pay his debts the finding of insolvency should not be disturbed.<sup>18</sup>

### § 41. When partnership insolvent.

Under the act of 1867, a partnership was held insolvent if unable to pay its debts in the ordinary course of business. Under the present act, some courts, adhering to the entity doctrine, have held that the solvency or insolvency of a partnership depends solely on partnership debts and assets independent of the solvency of its individual members,<sup>19</sup> but the better rule, supported by a recent decision of the supreme court, is that the insolvency of the members of the firm as individuals is essential to the insolvency of the partnership, and that all the property which may be made liable for the firm debts must be considered in determining whether or not the co-partnership is solvent. Partners are liable in solido, and in order that a firm may be adjudged a bankrupt it must be shown not only that the co-partnership is insolvent, but that every one of its members is individually insolvent.<sup>20</sup> The inability of a partnership to meet its matured obligations, together with its dissolution, and the transfer of practically all of its property to creditors, either by way of payment or security, leaving other debts unpaid, are facts sufficient to establish its insolvency.<sup>21</sup>

### § 42. Transfers or concealment with intent to defraud.

The first act of bankruptcy specified in the bankruptcy act is committed when one conveys, transfers, conceals or removes,

18—In re Rowe Planing Mill, 99 Fed. 937, 2 N. B. R. 531, 3 A. B. R. 766.

19—In re McMurtrey & Smith, 142 Fed. 853, 15 A. B. R. 427; In re Bertenshaw, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 19 A. B. R. 577; In re Everybody's Grocery & Meat Market, 173 Fed. 492, 21 A. B. R. 925. In re Morgan & Williams, 184 Fed. 938, 25 A. B. R. 861, aff'd 192 Fed. 310, 27 A. B. R. 638.

20—Francis v. McNeal, 228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244, aff'g 186 Fed. 481, 26 A. B. R. 555; Davis v. Stevens, 104 Fed. 235, 3 N. B. N. R. 131; In re Blair, 99 Fed. 76, 2 N. B. N. R. 364, 3 A. B. R. 588; Vaccaro v. Bank, 103 Fed. 436, 2 N. B. N. R. 1037, 4 A. B. R. 474; In re Bennett,

12 N. B. R. 181, 2 Low. 400; In re Perley 138 Fed. 927, 15 A. B. R. 54; Francis v. McNeal, 186 Fed. 481, 26 A. B. R. 555, aff'd 228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244; Washington Cotton Co. v. Morgan & Williams, 192 Fed. 310, 27 A. B. R. 638, aff'g 184 Fed. 938, 25 A. B. R. 861; In re Duke & Son, 28 A. B. R. 195.

All parties must be insolvent to adjudge partnership. In re Perlhefter & Shatz, 177 Fed. 299, 25 A. B. R. 576.

See, also, Tumlin v. Bryan, 165 Fed. 166, 21 L. R. A. (N. S.) 960, 21 A. B. R. 319; Worrell v. Whitney, 179 Fed. 1014, 24 A. B. R. 749.

21—In re Miller, 104 Fed. 764.

or permits to be concealed or removed, any part of his property, with the intent to hinder, delay or defraud his creditors, or any of them.<sup>22</sup> "The fraudulent intent which the law requires need not necessarily involve moral obliquity. The ancient phrase 'to hinder delay or defraud' has always been in the disjunctive and an intent to hinder or delay is adequate, even if it be not an intent to defraud."<sup>23</sup> This section makes those conveyances which by the common law and the statute of Elizabeth were held void, because fraudulent, a ground for adjudicating the grantor a bankrupt.<sup>24</sup> Its language is the familiar language of statutes against fraudulent conveyances and congress clearly intended that as used in the bankruptcy act such words should have the same construction and effect as has, for a long period of time, been given them in such statutes.<sup>25</sup> As so construed the test of the conveyances reached by this section is the bona fides of the transfer.<sup>26</sup>

It follows that an actual<sup>27</sup> intent to hinder, delay or defraud creditors,<sup>28</sup> as distinguished from an intent to prefer,<sup>29</sup> must exist on the part of the grantor; and, such intent existing, the innocence of the transferee,<sup>30</sup> or the fact that a full and fair consideration was received,<sup>31</sup> may be immaterial. If a creditor is intentionally to be hindered or delayed, an intent to defraud is unnecessary.<sup>32</sup>

To "conceal" means "to hide or withdraw from observation; to cover or keep from sight"; it has to do "with what concerns others and implies an act done or procured to be done which is

22—Act 1898, § 3a, subd. 1.

23—In re Condon, 198 Fed. 947, 29 A. B. R. 907.

24—Lansing Boiler & Engine Works v. Ryerson & Son, 128 Fed. 701, 11 A. B. R. 558.

25—Lansing Boiler & Engine Works v. Ryerson & Son, 128 Fed. 701, 11 A. B. R. 558.

See, also, Cordes v. Arts, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 18 A. B. R. 513.

26—Lansing Boiler & Engine Works v. Ryerson & Son, 128 Fed. 701, 11 A. B. R. 558.

27—In re McLoon, 162 Fed. 575, 20 A. B. R. 719.

28—Lansing Boiler & Engine Works v. Ryerson & Son, 128 Fed. 701, 11 A. B. R. 558; In re Belknap, 129 Fed. 646, 12 A. B. R. 326; Hoffschlaeger Co., Ltd., v. Young Nap, 12 A. B. R. 521; Merchants Nat. Bank v. Cole, 149 Fed. 708, 18 A. B. R. 44; In re Minard, 156 Fed. 377, 19 A. B. R. 485; In re McLoon, 162 Fed. 575, 20 A. B. R. 719.

29—In re Belknap, 129 Fed. 646, 12 A. B. R. 326.

30—In re Drummond, 1 N. B. R. 10, Fed. Cas. No. 4093.

31—See In re Smith, 176 Fed. 426, 23 A. B. R. 864.

32—In re Hughes, 183 Fed. 872, 25 A. B. R. 556.

intended to prevent or hinder.”<sup>33</sup> Whether the debtor has any right to or control of the property during the time of concealment is not the criterion by which the effect of the act is to be determined.<sup>34</sup>

While this intent to hinder, delay or defraud, must be established by proof,<sup>35</sup> still one is presumed to intend the natural and probable consequences of his acts,<sup>36</sup> and all the surrounding circumstances and conditions under which the transfer is made are to be considered in determining the existence of the intent to hinder, delay or defraud creditors.<sup>37</sup> The intent may be inferred from the acts done and the circumstances surrounding the transactions,<sup>37a</sup> it having been held that the conveyance itself may afford a presumption of a fraudulent intent so far as existing creditors are concerned.<sup>38</sup>

The following have been held to be acts of bankruptcy and accordingly void; transfers made to defeat the operation of the bankrupt law so far as they stand in the way of enforcing its provisions, where the proceedings are instituted within the prescribed time;<sup>39</sup> or the transfer of property for an inadequate consideration;<sup>40</sup> or any act the effect of which is to evade the provisions of the law;<sup>41</sup> or the absconding of an insolvent, carry-

33—*In re Glazier*, 195 Fed. 1020, 28 A. B. R. 391.

34—*In re Glazier*, 195 Fed. 1020, 28 A. B. R. 391.

35—The intent must be established by proof, fraud must be shown and the good faith of the transaction must be successfully impeached. *Merchants Nat. Bank v. Cole*, 149 Fed. 708, 18 A. B. R. 44.

36—*In re Salmon & Salmon*, 143 Fed. 395, 16 A. B. R. 122; *Bean-Chamberlain Mfg. Co. v. Standard Spoke & Wiffle Co.*, 131 Fed. 215, 12 A. B. R. 610.

37—*In re Larkin*, 168 Fed. 100, 21 A. B. R. 711; *In re Bellah*, 116 Fed. 69, 8 A. B. R. 310.

38—*In re Alexander*, 4 N. B. R. 45, Fed. Cas. No. 161; *In re Gilbert*, 112 Fed. 951, 8 A. B. R. 101.

The giving of a chattel mortgage for \$25 more than the actual amount borrowed or received by the mortgager held not to constitute the conveyance of property with intent to hinder, delay or de-

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fraud creditors. *In re Hallin*, 199 Fed. 806, 28 A. B. R. 708.

Where, as under the laws of Missouri, in the absence of actual fraud, the constructive fraud implied from a conveyance to the use of the mortgagor is purged away even as to creditors, by the mortgagee taking possession of the property before the creditors seize same or take any action to enforce their rights to it, no act of bankruptcy is committed by the giving of such mortgage where the mortgagee afterwards takes possession. *Johansen Bros. Shoe Co. v. Alles*, 197 Fed. 274, 28 A. B. R. 299.

39—*Stevenson v. McLaren*, 14 N. B. R. 403; *Beattie v. Gardner*, 4 N. B. R. 106, Fed. Cas. No. 1195; *In re Cowles*, 1 N. B. R. 42, Fed. Cas. No. 3927.

40—See *Citizens Bank of Salem v. DePauw Co.*, 105 Fed. 926, 5 A. B. R. 345.

41—*Webb v. Sachs*, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. No. 17325.

ing with him money or property not exempt, which constitutes both a concealment as well as a removal of property with intent to defraud;<sup>42</sup> or the giving of a mortgage for a present consideration the funds realized being used to prefer certain creditors;<sup>43</sup> conveyances not made in the usual and ordinary course of business of the debtor;<sup>44</sup> and in determining whether a transaction is so made the question is not whether it is usual in the general conduct of business throughout the community, but whether it is according to the usual course of business of the particular person whose conveyance is in question.<sup>45</sup>

The conveyance of all of one's property in trust to sell the same and pay first the expenses, second the debts of a preferential character under the state laws, third the creditors, all of whom, with the respective amounts due each, were set out in the conveyance, and fourth to pay any balance to the grantor, has been held not to work a preference and upon that ground not an act of bankruptcy; nor, if the defeasance and reservation to the grantor after satisfaction of the beneficiaries is bona fide, is it a general assignment under the bankruptcy act; but it must be regarded as a deed given with intent to hinder, delay and defraud creditors within the meaning of the law and so an act of bankruptcy, because it puts the administration of an estate in the hands of a person chosen by the debtor instead of his creditors, as directed by the bankrupt law, though there is no fraud of the kind requisite to avoid conveyances at common law, or under the statute of frauds.<sup>46</sup> Having in mind that intent to hinder, delay or defraud creditors must exist, the selling of goods at a sacrifice to raise money to ward off threatened criminal proceedings<sup>47</sup> or the failure to take legal proceedings looking to the recovery of goods removed by a creditor, there being no evidence of collusion,<sup>48</sup> have been held not to constitute acts of bankruptcy. Under the entity theory a transfer by a partner of indi-

42—*In re Filer*, 108 Fed. 209, 5 A. B. R. 332.

43—*In re Pease*, 129 Fed. 446, 12 A. B. R. 66.

44—*Rison v. Knapp*, 4 N. B. R. 114, Fed. Cas. No. 11861; *Babbitt v. Walbran & Co.*, 4 N. B. R. 30, Fed. Cas. No. 694.

45—*Rison v. Knapp*, 4 N. B. R. 114, Fed. Cas. No. 11861.

46—*In re Rumsey & Sikemier Co.*, 2 N. B. N. R. 128, 99 Fed. 699, 3 A. B. R. 704.

47—*In re Belknap*, 129 Fed. 646, 12 A. B. R. 326.

48—*In re Belknap*, 129 Fed. 646, 12 A. B. R. 326.

vidual property with intent to defraud his own and partnership creditors is not an act of bankruptcy by the firm.<sup>49</sup> A transfer made after dissolution of a partnership may constitute an act of bankruptcy of the partnership, if it was of firm funds.<sup>50</sup>

The first act of bankruptcy defined may be committed by the person charged when perfectly solvent. If a solvent person conveys or transfers, conceals or removes, or permits to be concealed or removed, any part of his property with the intent to hinder, delay, or defraud his creditors, or any of them, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, and a petition is thereupon filed against him, such petition may allege such acts as the act of bankruptcy, and the person may be adjudicated a bankrupt accordingly.<sup>51</sup> So, also, in the absence of an intent to hinder, delay or defraud, the fact that one is insolvent when the transfer is made does not render it an act of bankruptcy.<sup>52</sup> It follows that, except as it bears on the issue of good faith,<sup>53</sup> solvency or insolvency of the debtor at the time of the transfer is immaterial. While, as stated, insolvency is not an element in the first act of bankruptcy still solvency at the time of the filing of the petition is a complete defense to the proceedings,<sup>54</sup> the burden being on the debtor, however, to prove that he was solvent at that time.<sup>55</sup>

### § 43. Transfers with intent to prefer.

The second act of bankruptcy specified in the act of 1898 consists of a person having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."<sup>56</sup> It should be noted that all preferences given by an insolvent within four months prior to the filing of the petition are acts of bank-

49—In re Stovall Grocery Co., 161 Fed. 882, 20 A. B. R. 537.

50—In re Mitchell & Co., 211 Fed. 778, 31 A. B. R. 814.

51—In re Larkin, 168 Fed. 100, 21 A. B. R. 711; In re Pease, 129 Fed. 446, 12 A. B. R. 66.

52—In re McLoon, 162 Fed. 575, 20 A. B. R. 719; Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 19 A. B. R. 717, aff'g 147 Fed. 659, 16 A. B. R. 842.

53—Lansing Boiler & Engine Works

v. Ryerson & Son, 128 Fed. 701, 11 A. B. R. 558.

54—Act 1898, § 3c; In re Hughes, 183 Fed. 872, 25 A. B. R. 556; Acme Food Co. v. Meier, 153 Fed. 74, 18 A. B. R. 550.

55—Act 1898, § 3c; In re Crenshaw, 156 Fed. 638, 19 A. B. R. 502; Louisiana Nat. Life Assur. Society v. Segen, 196 Fed. 903, 28 A. B. R. 407.

56—Act 1898, § 3, subd. 2; Troy Wagon Works v. Vastbinder, 130 Fed. 232, 12 A. B. R. 352.

ruptcy if given with an intent to prefer, whether they can or cannot be set aside by the trustee, and hence it is not necessary that the creditor benefited have had reasonable cause to believe that it was intended to give a preference.<sup>57</sup> Payments, sales, or transfers of any character, declared void by the bankrupt law, are only void against persons claiming under proceedings in bankruptcy or in the course of administration of a bankrupt's estate in a court of bankruptcy;<sup>58</sup> but if made by a person so unsound in mind as to be wholly incapable of managing his affairs they cannot be made the basis of proceedings in bankruptcy against the objections of his guardian.<sup>59</sup> The purpose of the bankrupt act being to secure the equal distribution of the bankrupt's estate among his creditors, every act of an insolvent which tends to defeat that purpose should be construed strictly against him.<sup>60</sup> A creditor who relies on the commission of the second act of bankruptcy must show affirmative action on the debtor's part and must prove that it was taken with intent to prefer the creditor.<sup>61</sup>

The word "transfer" is here used in its most comprehensive sense and is intended to include every means and manner by which property can pass from the possession and ownership of another,<sup>62</sup> and includes sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.<sup>63</sup> It includes the payment of money,<sup>64</sup> the transfer of valuable accounts,<sup>65</sup> the giving of a mortgage,<sup>66</sup> the assignment of money to become due<sup>67</sup> as well as allowing a judgment to be taken and docketed, thereby creating a lien and a security for the debt,<sup>68</sup> or any act by which some creditors are

57—In re Donnelly, 193 Fed. 755, 27 A. B. R. 505.

58—Berryman v. Allen, 15 N. B. R. 113.

59—In re Funk, 101 Fed. 244, 4 A. B. R. 96.

60—Hall v. Wager, 5 N. B. R. 181, 3 Biss. 28, Fed. Cas. No. 5951.

61—In re Truitt, 203 Fed. 550, 29 A. B. R. 570.

62—Carson et al. v. Trust Co., 182 U. S. 438, 45 L. ed. 1171, 5 A. B. R. 814.

63—Act of 1898, § 1a (25).

64—Boyd v. Lemon & Gale Co., 114 Fed. 647, 8 A. B. R. 81.

65—In re McGee, 105 Fed. 895, 5 A. B. R. 262.

66—In re Riggs Restaurant Co., 130 Fed. 691, 11 A. B. R. 508; In re Edelman, 130 Fed. 700, 12 A. B. R. 238.

67—In re O'Donnell, 131 Fed. 150, 12 A. B. R. 621.

68—In re Tupper, 163 Fed. 766, 20 A. B. R. 824; In re Truitt, 203 Fed. 550, 29 A. B. R. 570.

Confessing judgment that levies and



intentionally preferred over others.<sup>69</sup> It is immaterial whether the transfer is made directly or indirectly to the creditor whose claim is preferentially paid;<sup>70</sup> and the same is true of a transfer to several creditors under an agreement that they should surrender the notes they held and have the property fairly appraised, and, if its value exceeded the aggregate of their debts, the debtor was to receive the excess.<sup>71</sup>

This section of the bankruptcy act deals only with transfers made while insolvent<sup>72</sup> to creditors<sup>73</sup> with intent to prefer<sup>74</sup> such creditors over other creditors, with a resultant depletion of the estate.<sup>75</sup> The word "creditor" includes indorsers and sureties;<sup>76</sup> but, under the doctrine that where a broker buys stock for a customer, on margin, title is in the customer, the latter is not a creditor.<sup>77</sup> An agent doing his principal's business in his own name may commit an act of bankruptcy by making a preferential payment though such payment is really for his principal.<sup>78</sup> As stated there must be an intent on the part of

sales might be made held an act of bankruptcy. *In re Nusbaum*, 152 Fed. 835, 18 A. B. R. 598.

69—*In re Edelstein*, 1 N. B. N. 168.

70—*Goldman v. Smith*, 1 A. B. R. 266, 1 N. B. N. 160, 93 Fed. 182; *In re Grant*, 106 Fed. 496, 5 A. B. R. 837.

71—*In re Norcross*, 1 N. B. N. 257, 1 A. B. R. 644.

72—*Troy Wagon Works v. Vastbinder*, 130 Fed. 232, 12 A. B. R. 352; *Acme Food Co. v. Meier*, 153 Fed. 74, 18 A. B. R. 550; *In re Kassel*, 195 Fed. 492, 28 A. B. R. 233; *Johansen Brös. Shoe Co. v. Alles*, 197 Fed. 274, 28 A. B. R. 299; *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, 141 Fed. 518, 15 A. B. R. 804.

73—The preference must be over other creditors existing at the time of the transfer. *Brake v. Callison*, 129 Fed. 201, 11 A. B. R. 797.

74—*Richmond Standard Steel Spike & Iron Co. v. Allen*, 148 Fed. 657, 17 A. B. R. 583; *Merchants' Nat. Bank v. Cole*, 149 Fed. 708, 18 A. B. R. 44; *In re Flint Hill Stove & Const. Co.*, 149 Fed. 1007, 18 A. B. R. 81; *Goodlander-Robertson Lumber Co. v. Atwood*, 152

Fed. 978, 18 A. B. R. 510; *In re McLoon*, 162 Fed. 575, 20 A. B. R. 719; *Wilson v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 7 A. B. R. 142; but see *The Grifin Pants Factory v. The Nelms Racket Store Co.*, 2 N. B. N. R. 630; *Johnson v. Wald*, 2 A. B. R. 84, 93 Fed. 640.

Giving chattel mortgage for purchase of piece of goods, covering both new and old stock, held not an act of bankruptcy. *Martin v. Hulen & Co.*, 149 Fed. 982, 17 A. B. R. 510.

75—The payment by the attorney of the bankrupt out of his own funds, of a claim against the bankrupt amounts only to a substitution of creditors and is not an act of bankruptcy. *In re Kerlin*, 209 Fed. 42, 31 A. B. R. 12, rev'g 30 A. B. R. 816.

76—An accommodation indorser, even before payment of note, is a creditor. *In re O'Donnell*, 131 Fed. 150, 12 A. B. R. 621.

One who signs or indorses as surety for the debtor is a creditor. *Crandall v. Coats*, 133 Fed. 965, 13 A. B. R. 712.

77—*Richardson v. Shaw & Davidson*, 147 Fed. 659, 16 A. B. R. 842.

78—*J. W. Calnan Co. v. Doherty*, 174 Fed. 222, 23 A. B. R. 297.

the debtor to prefer the favored creditor but this intent may be presumed from circumstances,<sup>79</sup> for every person of a sound mind is presumed to intend the necessary, natural and legal consequences of his deliberate acts.<sup>80</sup> It follows that if a debtor, with knowledge of his insolvency, does an act which operates as a preference to one of his creditors, he is presumed to have so intended,<sup>81</sup> though this rule does not apply to payments of an infinitesimal sort working no injury of which the law would take account,<sup>82</sup> in the absence of surrounding circumstances showing an intent to prefer.<sup>83</sup>

In the case of a transfer of all<sup>84</sup> or, under certain circumstances, the transfer of a large part of one's property,<sup>85</sup> or the payment of substantial sums to certain creditors,<sup>86</sup> a strong presumption of an intent to prefer arises. The size of the payment, however, makes no difference if the requisite intent existed; it is of importance merely in determining whether or not the intent did exist.<sup>87</sup> "Intent to prefer" involves a knowledge of the existence of other creditors,<sup>88</sup> but there is a strong presumption

79—Intent to prefer will be presumed from payment of antecedent debt with knowledge of insolvency. *In re Condon*, 209 Fed. 800, 31 A. B. R. 754, aff'g 198 Fed. 947, 29 A. B. R. 907.

Fact that mortgage given to secure antecedent debt was not recorded for several months held sufficient to warrant finding of intent to prefer. *In re Edelman*, 130 Fed. 700, 12 A. B. R. 238.

Intent to prefer presumed where debtor gave creditor mortgage after rendition of verdict against him in favor of another creditor, judgment not having been entered. *In re Smith*, 176 Fed. 426, 23 A. B. R. 864.

80—*Macon Grocery Co. v. Beach*, 156 Fed. 1009, 19 A. B. R. 558; *Rex Buggy Co. v. Hearick*, 132 Fed. 310, 12 A. B. R. 726.

81—*Macon Grocery Co. v. Beach*, 156 Fed. 1009, 19 A. B. R. 558.

82—*Macon Grocery Co. v. Beach*, 156 Fed. 1009, 19 A. B. R. 558.

Three dollar payment a week before filing of petition held not an act of bankruptcy. *In re Stovall Grocery Co.*, 161 Fed. 882, 20 A. B. R. 537.

Intent to prefer not presumed from small payments to creditors in usual course of business. *In re Douglass Coal & Coke Co.*, 131 Fed. 769, 12 A. B. R. 539; *In re Columbia Real Estate Co.*, 205 Fed. 980, 30 A. B. R. 471.

83—*In re Ball*, 156 Fed. 682, 19 A. B. R. 609; *Naylon & Co. v. Christiansen Harness Mfg. Co.*, 158 Fed. 290, 19 A. B. R. 789.

84—*In re Gilbert*, 112 Fed. 951, 8 A. B. R. 101; *In re Waite*, 1 Law. 207, Fed. Cas. No. 17044.

85—*Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481.

86—Intent presumed where substantial sums were paid certain creditors in full for their accounts while denying payments to other creditors. *Rex Buggy Co. v. Hearick*, 132 Fed. 310, 12 A. B. R. 726.

87—*In re Perlhefter & Shatz*, 177 Fed. 299, 25 A. B. R. 576; *In re Condon*, 198 Fed. 947, 29 A. B. R. 907.

88—*Merchants' Nat. Bank v. Cole*, 149 Fed. 708, 18 A. B. R. 44; *In re Pangborn*, 185 Fed. 673, 26 A. B. R. 40.

that one knows of his debts.<sup>89</sup> The fact that a debtor is unable to pay all his debts does not render the payment of current expenses an act of bankruptcy.<sup>90</sup>

#### § 44. Transfers or conveyances not acts of bankruptcy.

An insolvent debtor may sell or incumber his estate for a present and sufficient consideration, if the transaction is bona fide,<sup>91</sup> without committing an act of bankruptcy,<sup>92</sup> and no concealment can be implied where he shows good faith in respect to the care of the money received.<sup>93</sup> The following transfers have been held not to operate as a preference and, therefore do not constitute acts of bankruptcy: a transfer of property by an insolvent, when there is no other creditor having a provable debt against such debtor;<sup>94</sup> the payment by an insolvent of the back rent, water charges and other incidental expenses necessary to effect the sale of a leasehold;<sup>95</sup> the conveyances of one's property, which exceeds in value his debts to another who agrees to pay all the debts and support the grantor during the rest of his life;<sup>96</sup> an unexecuted agreement by a railroad company to transfer certificates of stock;<sup>97</sup> the assignment of book accounts as collateral security for the payment of present loans and advances to the bankrupt;<sup>98</sup> or any transfer of one's property when entirely solvent.

#### § 45. — Conveyances of partnership property.

A transfer of firm property from one member to another is not ordinarily a fraud on creditors, nor does it hinder or delay them, nor constitute a fraudulent preference, and is not an act of bankruptcy,<sup>99</sup> but if made to enable the individual creditors of the

89—In re Pangborn, 185 Fed. 673, 26 A. B. R. 40; In re Morgan & Williams, 184 Fed. 938, 25 A. B. R. 861, aff'd 192 Fed. 310, 27 A. B. R. 638.

90—Payment of president's current salary. Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 17 A. B. R. 583.

91—Gattman & Co. v. Honea, 12 N. B. R. 493, Fed. Cas. No. 5271; In re Foster, 126 Fed. 1014, 11 A. B. R. 131.

92—Githens v. Shiffler, 112 Fed. 505, 7 A. B. R. 453.

93—Fox v. Eckstein, 4 N. B. R. 123, Fed. Cas. No. 5009.

94—Beers v. Hanlin, 99 Fed. 695; In re Johann, 4 N. B. R. 143, Fed. Cas. No. 7331. See, also, *ante*, § 43n, 73.

95—In re Pearson, 1 N. B. N. 402, 2 A. B. R. 482, 95 Fed. 425.

96—In re Cornwell, 6 N. B. R. 305, Fed. Cas. No. 3250.

97—Winter v. I. M. & N. P. Ry. Co., 7 N. B. R. 289, 2 Dill. 287, Fed. Cas. No. 17390.

98—Young v. Upson, 8 A. B. R. 377.

99—In re Munn, 7 N. B. R. 468, 3 Biss. 442, Fed. Cas. No. 9925.

transferee to secure a preference, it is.<sup>1</sup> Nor does it constitute an act of bankruptcy to transfer the whole stock of a dissolved partnership to the one solvent partner to settle the affairs, even though a sale is made by such partner in gross.<sup>2</sup>

#### § 46. — Conveyances to relatives.

A voluntary conveyance made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors on the ground of its being voluntary, but must be shown to be fraudulent or made with a view to future debts;<sup>3</sup> but it will be fraudulent as to creditors and an act of bankruptcy if the grantor be indebted at the time to such extent that the settlement will embarrass him in the payment of his debts, although the debts due may be subsequently paid in the course of business.<sup>4</sup>

A conveyance by a father to his son in consideration of support by the son has been held to be fraudulent as to creditors and an act of bankruptcy;<sup>5</sup> so is any transfer on the part of an insolvent, to a relative, which results in a concealment of assets or a fraud on the creditors;<sup>6</sup> or where an insolvent father lends money to his son, who makes a gift of the amount of the loan to his mother by purchasing a house in her name;<sup>7</sup> or the transfer of property to a relative in payment of an antecedent debt.<sup>8</sup>

#### § 47. — Chattel mortgages.

The giving of a chattel mortgage is a disposition of property out of the usual course of business,<sup>9</sup> and when given by an insolvent upon all his personal property, authorizing the mortgagee to sell the same at private sale,<sup>10</sup> or when given, pursuant to a previous oral agreement, to secure an existing debt,<sup>9</sup> it creates a preference and is an act of bankruptcy.<sup>11</sup> When given on bankrupt's stock of goods to secure an alleged debt, the pur-

1—Collins v. Hood, 4 McLean 186.

2—In re Weaver, 9 N. B. R. 132, Fed. Cas. No. 17307.

3—Barker v. Smith, 12 N. B. R. 474, 2 Woods 87.

4—Antrines v. Kelly, 4 N. B. R. 189.

5—In re Johann, 4 N. B. R. 143, Fed. Cas. No. 7331.

6—In re Rathbone, 2 N. B. R. 89, 3 Ben. 50, Fed. Cas. No. 11581.

7—In re Eldred, 3 N. B. R. 61, Fed. Cas. No. 4328.

8—In re Grant, 106 Fed. 496, 5 A. B. R. 837.

9—U. S. v. Bayer, 13 N. B. R. 88, Fed. Cas. No. 14548.

10—The Griffin Pants Factory v. Nelms Racket Store Co., 2 N. B. R. 630.

11—In re Smith, 176 Fed. 426, 23 A. B. R. 864.

pose being to hinder, delay, or defraud the creditors, it is an act of bankruptcy;<sup>12</sup> as is a chattel mortgage which permits the mortgagor to dispose of the goods in due course of trade, without reference to the good faith of the mortgage debt, or the intention of the mortgagor as to fraud,<sup>13</sup> or where one gives a bill of sale of personalty in which there is no change in the possession of the property, the first owner taking back a writing in the nature of a lease.<sup>14</sup> Neither the giving of a chattel mortgage for a present bona fide consideration<sup>15</sup> nor the renewal of chattel mortgage<sup>16</sup> constitutes an act of bankruptcy.

### § 48. — Mortgages.

A debtor may give a mortgage for a present consideration to enable him to carry on his business, if there is no intent to delay creditors,<sup>17</sup> and the sale of a mortgage for its cash value is a transfer in the usual and ordinary course of business and not an act of bankruptcy.<sup>18</sup> The giving by a debtor, knowing himself to be insolvent, of a mortgage or deed of trust to secure a creditor on a pre-existing debt, is a preference, and therefore an act of bankruptcy, irrespective of whether the creditor knew or had reasonable ground to believe that a preference was intended.<sup>19</sup>

### § 49. — Pledge.

It is not a fraud upon creditors and therefore not an act of bankruptcy for a debtor to receive collateral from his pledgee for collection,<sup>20</sup> nor to pledge one's property for a present fair consideration, when the purpose is not to hinder, delay or defraud creditors. There is a conflict as to whether a pledge of property pursuant to a previous agreement constitutes an act of bankruptcy.<sup>21</sup>

12—In re McKibben, 12 N. B. R. 97, Fed. Cas. No. 3859.

13—In re Foster, 18 N. B. R. 64, Fed. Cas. No. 4964.

14—In re Gurney, 15 N. B. R. 373, 7 Biss. 414, Fed. Cas. No. 5873.

15—In re Cutting, 145 Fed. 388, 16 A. B. R. 751.

16—In re Cutting, 145 Fed. 388, 16 A. B. R. 751.

17—In re Sanford, 7 N. B. R. 352, Fed. Cas. No. 12310.

18—Judson v. Kelty, 6 N. B. R. 165, 5 Ben. 348, Fed. Cas. No. 7567.

19—In re Ed. W. Wright Lumber Co., 114 Fed. 1011, 8 A. B. R. 345.

20—Clark v. Iselin, 11 N. B. R. 337, 21 Wall. 360, 22 L. ed. 568; Jones v. Coates, 196 Fed. 860, 28 A. B. R. 249.

21—Assignment, within four month period, of insurance policies pursuant to previous oral agreement making them collateral security is not an act of bankruptcy. Wilder v. Watts, 138 Fed. 426, 15 A. B. R. 57.

### § 50. — Sales.

The law does not contemplate that all sales or transfers of goods by an insolvent shall constitute preferences and therefore be deemed acts of bankruptcy, but only such as are made within four months of the filing of the petition, with the ulterior purpose of hindering, delaying, or defrauding some or all of his creditors, or while insolvent making a transfer to a creditor with the intent to prefer such creditor. Although a sale is made in contemplation of bankruptcy, it is not *prima facie* fraudulent, and an act of bankruptcy, unless surrounded by unusual circumstances, and is not then void as to purchasers in good faith,<sup>22</sup> since the law does not forbid an insolvent from selling, exchanging or otherwise disposing of his property at any time prior to the filing of the petition, provided such action leaves his estate in as good condition as formerly.<sup>23</sup>

A merchant in embarrassed circumstances may sell his goods at less than cost price to raise money to pay debts, the purchaser knowing of his insolvency;<sup>24</sup> or he may continue to sell his stock at retail while endeavoring to compromise with his creditors, in the absence of a fraudulent intent;<sup>25</sup> or raise money to defray expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice and the sum raised is reasonable;<sup>26</sup> or he may exchange goods covered by a warehouse receipt in a warehouse for others of less or equal value.<sup>27</sup> An adjudication will not be made where debtor sells his stock for the purpose of going into a new business, although to prevent seizure of the proceeds on state process, he does not put them into tangible shape,<sup>28</sup> there being no evidence of vendor's insolvency.<sup>29</sup>

A sale will be held to be an act of bankruptcy where the

Transfer of accounts pursuant to an agreement to pledge held act of bankruptcy. *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.*, 125 Fed. 974, 11 A. B. R. 200.

22—*In re Hunt*, 2 N. B. R. 166, Fed. Cas. No. 6881.

23—*Cook v. Tullis*, 9 N. B. R. 433, 18 Wall. 332, 21 L. ed. 933; *Clark v. Iselin*, 11 N. B. R. 337, 21 Wall. 360, 22 L. ed. 568. See *Githens v. Shiffler*, 112 Fed. 505, 7 A. B. R. 453.

24—*Sedgwick v. Lynch*, 8 N. B. R. 289, Fed. Cas. No. 12615.

25—*In re Munger v. Champlin*, 4 N. B. R. 90, Fed. Cas. No. 9923.

26—*In re Keefer*, 4 N. B. R. 126, Fed. Cas. No. 7636.

27—*Sharp v. Phila. Warehouse Co.*, 19 N. B. R. 378.

28—*Fox v. Eckstein*, 4 N. B. R. 123, Fed. Cas. No. 5009.

29—*In re Valliquette*, 4 N. B. R. 92, Fed. Cas. No. 16823.

purpose is to hinder, delay or defraud the creditors, as where household furniture in a dwelling inhabited by the owner and another person is transferred to such other person by a bill of sale without any other circumstances to indicate the actual possession;<sup>30</sup> or a sale by an insolvent of his stock with intent to prefer some of his creditors;<sup>31</sup> or a conveyance, absolute on its face, in which the grantor secretly reserves the right to retain possession for a limited period, under a parol agreement, as part of the consideration;<sup>32</sup> or a sale of a stock of goods in gross, out of the usual and ordinary course of business of a retail dealer;<sup>33</sup> or a sale shortly before bankruptcy where vendor and vendee conspired to defraud creditors;<sup>34</sup> or a sale of an entire stock below cost, the purchaser selling it at an advance and the last purchaser being informed at the time of the circumstances of the first purchase;<sup>35</sup> or where a purchaser of goods assumes debts of the vendor as part consideration, and sells the goods leaving the debts unpaid, which the vendor is obliged to discharge, commits an act of bankruptcy, and is liable to the vendor for the amount of such debts.<sup>36</sup>

### § 51. Preference through legal proceedings.

One commits an act of bankruptcy if, while insolvent, he suffers or permits any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.<sup>37</sup> "The concluding part of the clause, with reference to the sale or final disposition, is connected with what precedes, in respect to preference through legal proceedings, by the word 'and,' thus rendering a failure to vacate or discharge such preference an essential of every act of bankruptcy under this section."<sup>38</sup> It is essential that the debtor

30—Allen v. Massey, 4 N. B. R. 75, Fed. Cas. No. 231.

31—In re Morgan, 101 Fed. 982, 2 N. B. N. R. 846, 4 A. B. R. 402.

32—Lukins v. Aird, 2 N. B. R. 2, 6 Wall. 78, 18 L. ed. 750.

33—In re Deane & Garret, 2 N. B. R. 29, Fed. Cas. No. 3700.

34—Dickinson v. Adams, 17 N. B. R. 380, 4 Sawy. 257, Fed. Cas. No. 3896.

35—Walbrun v. Babbitt, 9 N. B. R. 1, 16 Wall. 577, 21 L. ed. 489.

36—Phelps v. Clasen, 3 N. B. R. 22, Fed. Cas. No. 11074.

37—Act 1898, § 3, sub. 3; In re McCarty, 188 Fed. 815, 26 A. B. R. 548.

38—In re Vetterman, 135 Fed. 443, 14 A. B. R. 245; In re Vostbinder, 126 Fed. 417, 11 A. B. R. 118; In re Duddy Jourdan & Co., 127 Fed. 771, 11 A. B. R. 344; In re R. L. Radke Co., 193 Fed. 735, 27 A. B. R. 950; Folger v. Putnam, 194 Fed. 793, 28 A. B. R. 173.

Mere suing out of attachment and

be insolvent,<sup>39</sup> but his intent is of no vital importance,<sup>40</sup> nor is it necessary to show that the debtor did or tried to do anything,

levying same insufficient. In *re Vetterman*, 135 Fed. 443, 14 A. B. R. 245.

39—*Acme Food Co. v. Meier*, 153 Fed. 74, 18 A. B. R. 550; *Johansen Bros. Shoe Co. v. Alles*, 197 Fed. 274, 28 A. B. R. 299.

40—*Bradley Timber Co. v. White*, 121 Fed. 779, 10 A. B. R. 329, aff'g 119 Fed. 989, 9 A. B. R. 441; *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 7 A. B. R. 142; In *re Rome Planing Mill Co.*, 96 Fed. 812, 3 A. B. R. 123.

The result obtained by the creditor and not the specific intent of the debtor is the essential fact. In *re Rung Furniture Co.*, 139 Fed. 526, 14 A. B. R. 12.

INTENT NECESSARY UNDER THE ACT OF 1867—That act provided that a person should be deemed to have committed an act of bankruptcy who had "procured or suffered his property to be taken on legal process, with intent to give a preference to one or more of his creditors," thus making the "intent" an essential element. The act of 1898 provides that the act of bankruptcy shall consist in his having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference," making the effect of the act without regard to the intention of the parties the test. Hence the decisions under the act of 1867 are not controlling nor even very valuable under the present act; though some (In *re Black*, 1 N. B. R. 81, 2 Ben. 196, Fed. Cas. No. 1457; In *re Wells*, 3 N. B. R. 95 Fed. Cas. No. 17388; *Warren v. Bk.*, 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. No. 17202, 96 U. S. (6 Otto) 539, 24 L. ed. 640; *Wilson v. Bk.*, 5 N. B. R. 270, 17 Wall. 473, 21 L. ed. 723; In *re Craft*, 1 N. B. R. 89, 2 Ben. 214, Fed. Cas. No. 3316; *Vogel v. Lathrop*, 4 N. B. R. 146, Fed. Cas. No. 16985; *Bk. v. Campbell*, 6 N. B. R. 353, 14 Wall. 87,

20 L. ed. 832; *Webb v. Sachs*, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. No. 17325; In *re Dibble*, 2 N. B. R. 185, 3 Ben. 203, Fed. Cas. No. 3884; *Haughey v. Albin*, 2 N. B. R. 129, 2 Bond 244, Fed. Cas. No. 6222; In *re Leeds*, 1 N. B. R. 138, Fed. Cas. No. 8205; In *re Woods*, 7 N. B. R. 126, Fed. Cas. No. 17990), may be usefully consulted, in so far as they hold that the facts imply intent; but others (*Wright v. Filley*, 4 N. B. R. 197, Fed. Cas. No. 18077; *Wilson v. Bk.*, 9 N. B. R. 97, 17 Wall. 473, 21 L. ed. 723; *Rankin v. Florida R. R. Co.*, 1 N. B. R. 196, Fed. Cas. No. 11567; *Louchheim Bros. v. Henzey*, 18 N. B. R. 173; *Bk. v. Warren*, 17 N. B. R. 75, 96 U. S. 539, 24 L. ed. 640; *Shimer v. Huber*, 19 N. B. R. 414, Fed. Cas. No. 12787; In *re King*, 10 N. B. R. 103, Fed. Cas. No. 7783), so far as they hold that mere passivity on the debtor's part is not sufficient, do not state the law under the present act, which is just the reverse, that passive non-resistance to proceedings which will work a preference is sufficient (In *re Meyers*, 1 N. B. R. 207, 1 A. B. R. 1). Under the former act the entry of a judgment upon a warrant of attorney was held to constitute an act of bankruptcy where the creditors had reasonable cause to believe the debtor insolvent, even though at the time of the execution of the bond there was no reason to so believe (In *re Lord*, 5 N. B. R. 318, Fed. Cas. No. 8503); and, where a debtor had committed no act of bankruptcy and would not voluntarily petition, a creditor might sue him so as to force him to commit an act of bankruptcy and then himself proceed against him in involuntary bankruptcy. *Warren v. Bk.*, 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. No. 17202; *Coxe v. Hale*, 8 N. B. R. 562, Fed. Cas. No. 3310); but the confession of a judgment as security for a loan of money made contemporaneously with such confession was held not to be an act of bankruptcy (*Clark v. Iselin*, 9 N. B.



or even that he had given the matter a thought.<sup>41</sup> It follows that it is immaterial that debtor resisted proceeding in which judgment was obtained<sup>42</sup> or that the debt on which the judgment rests is valid, due at the time the action was commenced and that the judgment was entered and levy made without any collusion between the bankrupt and the creditor, or without the former having intended to give a preference, the effect of the act rather than the intent of the parties being regarded, insolvency being admitted.<sup>43</sup>

The attempted enforcement while insolvent, within four months next before the filing of an involuntary petition, of a lien on the property of the alleged bankrupt validly created and subsisting for more than that period, coupled with an omission by him to secure, at least five days before the sale or final disposition of such property, the vacation or discharge of such lien, is not an act of bankruptcy. "Mere failure, while insolvent, to vacate and discharge the lien within the statutory period of five months, and at least five days before a sale or final disposition of the property affected, does not constitute an act of bankruptcy. Priority is obtained when a lien attaches, and not when it is enforced. The date of the sale is immaterial in this respect; whenever it takes place, it relates back to the time when the lien attached."<sup>44</sup>

It is essential that the transaction result in a preference<sup>45</sup> to a "creditor," that is, one who owns a demand or claim provable against the bankrupt.<sup>46</sup>

There seems to be a conflict as to whether the act of bank-

R. 19, 10 Blatch. 204, Fed. Cas. No. 2825; *In re Leeds*, 1 N. B. R. 138, Fed. Cas. No. 8205).

41—*In re Truitt*, 203 Fed. 550, 29 A. B. R. 570.

42—*Bradley Timber Co. v. White*, 121 Fed. 779, 10 A. B. R. 329, aff'g 119 Fed. 989, 9 A. B. R. 441.

43—*Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 7 A. B. R. 142; *In re Meyers*, 1 N. B. R. 207, 1 A. B. R. 1; *Wilson v. Bank*, 17 Wall. 473, 21 L. ed. 723, distinguished and held no longer controlling. See *In re Bamberger*, 2 N. B. R. 95.

44—*Colston v. Austin Run Min. Co.*,

194 Fed. 929, 28 A. B. R. 92; *In re Deer Creek Water & Water Power Co.*, 205 Fed. 205, 29 A. B. R. 356.

45—Preference by legal proceedings does not include a levy upon a judgment of foreclosure of a lien which affects only the property bound by the lien. *In re Deer Creek Water & Water Power Co.*, 205 Fed. 205, 29 A. B. R. 357.

46—*In re Crafts-Riordan Shoe Co.*, 185 Fed. 931, 26 A. B. R. 449; *In re Windt*, 177 Fed. 584, 24 A. B. R. 536.

Surety on construction bond held a creditor. *United Surety Co. v. Iowa Mfg. Co.*, 179 Fed. 55, 24 A. B. R. 726.

ruptcy contemplated by this section is definitely consummated five days before a sale or final disposition of the property,<sup>47</sup> or whether while the failure to discharge a levy five days before a sale is an act of bankruptcy, such failure four, three and two days and one day before the sale and on the day of the sale are not also distinct acts of bankruptcy.<sup>48</sup> The "five days" means the day of the sale and the four preceding days.<sup>49</sup>

A day must be fixed for a sale or final disposition of the property.<sup>50</sup> The phrase "final disposition" is broader than the word "sale"<sup>51</sup> and covers "every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others, either absolutely or as security to the preferred creditor to the exclusion of his other creditors."<sup>52</sup>

The dominant fact in this provision of the law is the actual result that has been attained by the creditor. If through legal proceedings he has succeeded in obtaining a preference, the debtor is required to vacate or discharge it within the specified time, and if he fails so to do he commits an act of bankruptcy. How he is to vacate or discharge a preference is not specified, but whatever the nature of the legal proceedings employed by the creditor may be, if the result thereof gives such creditor a preference over others, it must be discharged by the debtor within the time allotted. It has been held that if he has a defense to the debt he must set it up; or, if he can overthrow the preference because of defects in creditors' procedure he should pursue that method, and if neither of these weapons is available he may file his petition in voluntary bankruptcy. His failure

<sup>47</sup>—In re National Hotel & Cafe Co., 138 Fed. 947, 15 A. B. R. 69.

<sup>48</sup>—In re Nusbaum, 152 Fed. 835, 18 A. B. R. 598.

<sup>49</sup>—Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 18 A. B. R. 756.

Allegation that corporation had allowed an attachment to issue and which has "not to the present time been vacated," is insufficient. Seaboard Steel Casting Co. v. Trigg Co., 124 Fed. 75, 10 A. B. R. 594.

<sup>50</sup>—In re Vetterman, 135 Fed. 443, 14 A. B. R. 245; In re Vostbinder, 126 Fed. 417, 11 A. B. R. 118; In re Duddy Jour-

dan & Co., 127 Fed. 771, 11 A. B. R. 344.

Where a third person gave an attaching officer security, known as an "officer's receipt," and returned property to debtor, taking back a mortgage, failure to discharge attachment within four months not an act of bankruptcy. In re Windt, 177 Fed. 584, 24 A. B. R. 536.

<sup>51</sup>—Folger v. Putnam, 194 Fed. 793, 28 A. B. R. 173; In re Tupper, 163 Fed. 766, 20 A. B. R. 824.

<sup>52</sup>—In re Tupper, 163 Fed. 766, 20 A. B. R. 824; Folger v. Putnam, 194 Fed. 793, 28 A. B. R. 173.

to move may be regarded as a confession that he is hopelessly insolvent and is conclusive proof that he consents to the preference that he declines to strike down.<sup>53</sup> The levy must be valid.<sup>54</sup>

This section is limited to such acts as by construction of law and in view of the bankruptcy law work an injury to other creditors by securing to them a preference which the law is designed to prevent. It does not apply therefore to such levies and liens as are acquired long before the passage of the act and more than four months prior to the petition, which it is not the purpose of the law to affect or disallow,<sup>55</sup> nor to a judgment for the foreclosure of a lien in the nature of a mortgage to secure a note, and a levy on the land conveyed, where the note and mortgage were given before the enactment of the bankruptcy law and for a valid debt, although the creditor may recover a general judgment as well as the judgment of foreclosure, the levy made affecting only the property bound by the lien.<sup>56</sup>

The failure of an insolvent to discharge an attachment levied by a creditor five days before the day of sale thereunder, although he may not actively procure or participate in the bring-

53—In *re Moyer*, 1 N. B. N. 260, 1 A. B. R. 577, 93 Fed. 188; In *re Reichman*, 91 Fed. 624, 1 N. B. N. 556, 1 A. B. R. 17.

Failure to vacate or discharge a preference obtained by legal proceedings, either by payment or by voluntary petition in bankruptcy five days before the expiration of the four months from the date of preference, after which such preference becomes assailable, consummates an act of bankruptcy initiated in allowing the preference to be obtained. *Ravenna Nat. Bank v. Curtiss*, 30 A. B. R. 818.

Permitting attachment to remain undisturbed until sale warrants finding of insolvency five days before sale. In *re Crafts-Riordan Shoe Co.*, 185 Fed. 931, 26 A. B. R. 449.

54—In *re Samuel Bodek*, 188 Fed. 817, 26 A. B. R. 476.

55—In *re Ferguson*, 95 Fed. 429, 2 A. B. R. 586.

The phrase "sale or final disposition" does not include sales which merely sub-

stitute money for property without affecting the rights of the parties. In *re Crafts-Riordan Shoe Co.*, 185 Fed. 931, 26 A. B. R. 449.

Priority is obtained when lien attaches not when enforced. Attempted enforcement during four month period of lien acquired prior to four month period, held not an act of bankruptcy. *Colston v. Austin Run Min. Co.*, 194 Fed. 929, 28 A. B. R. 92.

Enforcing a valid lien through legal proceeding is not an act of bankruptcy, the creditor not thereby obtaining a preference to which he was not otherwise entitled. *Richmond Standard Steel Spike & Iron Co. v. Allen*, 148 Fed. 657, 17 A. B. R. 583.

Distrain of goods under landlord's warrant. In *re Belknap*, 129 Fed. 646, 12 A. B. R. 326.

Livery stable keeper's statutory lien. In *re Mero*, 128 Fed. 630, 12 A. B. R. 171.

56—In *re Chapman*, 99 Fed. 395, 3 A. B. R. 607.

ing of the attachment suit,<sup>57</sup> or the sale under a judgment execution,<sup>58</sup> is an act of bankruptcy. So, also, failure to stay a judgment sale pending appeal may be an act of bankruptcy under this section.<sup>59</sup>

The creditors need not wait until an actual levy is made before filing a petition, but if money is paid by the bankrupt or another by his direction, or other property is transferred to the sheriff holding an execution, its application on the execution completes the preference.<sup>60</sup> Nor need they wait until a sale has taken place, but if five days before the day advertised the debtor has not discharged the preference, they may file a petition against him.<sup>61</sup>

Where a debtor, while solvent, gives judgment notes or a warrant of attorney and subsequently when he has become insolvent, judgment is entered and execution is levied pursuant thereto, the debtor commits an act of bankruptcy, since the preference complained of is obtained by issuing the execution and the subsequent sale, and not by giving the judgment notes.<sup>62</sup> The entry of judgment on a warrant of attorney, or otherwise, there being no actual execution thereon or sale thereunder, would not constitute an act of bankruptcy<sup>63</sup> under the third subdivision of the law, but would constitute acts of bankruptcy either as an illegal preference on the part of the insolvent, or as hindering and delaying other creditors;<sup>64</sup> or if the property is actually taken, though there be no sale, it would come within the spirit of

57—In re Reichman, 1 N. B. N. 556, 1 A. B. R. 17, 91 Fed. 624; In re Ferguson, 95 Fed. 429, 2 A. B. R. 586; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 523, 94 Fed. 793; s. c. 1 N. B. N. 532, 2 A. B. R. 188, 93 Fed. 953, 89 Fed. 691; Folger v. Putman, 194 Fed. 793, 28 A. B. R. 173, aff'g 193 Fed. 464, 27 A. B. R. 923; In re Putman, 193 Fed. 464, 27 A. B. R. 923.

58—In re Moyer, 93 Fed. 188, 1 N. B. N. 260, 1 A. B. R. 577; In re Whalen, 1 N. B. N. 228; In re Storm, 103 Fed. 618, 4 A. B. R. 601; In re Tupper, 163 Fed. 766, 20 A. B. R. 824.

59—In re Rung Furniture Co., 139 Fed. 526, 14 A. B. R. 12.

60—In re Miller, 104 Fed. 764, 5 A. B. R. 140.

61—In re Rome Planing Mill Co., 3 A. B. R. 123, 96 Fed. 812; In re Elmira Steel Co., 109 Fed. 456, 5 A. B. R. 484.

62—Wilson v. Nelson, 183 U. S. 191, 46 L. ed. 147, 7 A. B. R. 142; rev'g 98 Fed. 76, 1 N. B. N. 567, 1 A. B. R. 63; In re Moyer, 93 Fed. 188, 1 N. B. N. 260, 1 A. B. R. 577; In re Thomas, 103 Fed. 272, 2 N. B. N. R. 1021, 4 A. B. R. 571; In re Reichman, 91 Fed. 624, 1 A. B. R. 17; In re American Brewing Co., 112 Fed. 752, 7 A. B. R. 463; contra, Duncan v. Landis, 106 Fed. 839, 5 A. B. R. 649.

63—In re Anderson, 2 N. B. N. R. 1000.

64—Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 7 A. B. R. 384. See *ante*, § 43n 68.

subdivision 3 of the law,<sup>65</sup> as would also be the case where money due the bankrupt is turned over to the sheriff by the party from whom it is due to be applied on the execution although there is no actual levy or sale.<sup>66</sup> The same is true where executions on confessed judgments were levied but subsequently at the instance of creditors' attorney withdrawn to await further orders, and a year later but within four months of the bankruptcy proceedings other executions on the same judgments were levied on the same property, the first judgments were held to be dormant and only the lien under the latter executions was valid, which, not having been discharged within five days before sale, was an act of bankruptcy.<sup>67</sup> A debtor allowing a creditor to secure judgment and levy thereunder "suffers and permits" the same to be done.<sup>68</sup>

Failure to discharge, as required by the act, an insolvent partnership after its dissolution, constitutes an act of bankruptcy as to the firm and individual parties.<sup>69</sup>

## § 52. Assignment for benefit of creditors; receiver or trusteeship.

Since the time of George II and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of a debtor to an assignee of his own choosing, though without preference, is itself an act of bankruptcy, a fraud upon the act and hence a fraud upon creditors as respects their rights in bankruptcy and voidable at the trustee's option, even without any express provision to that effect in the statute, on the principle that it defeats the rights of creditors secured by the bankrupt law to the choice of a trustee, to the summary jurisdiction of the bankruptcy court, and to the ample control which the law intended to give them over the estate of their insolvent debtors.<sup>70</sup>

Following this rule the bankruptcy act has provided that a general assignment for the benefit of creditors is an act of bank-

65—In re Harper, 105 Fed. 900, 5 A. B. R. 567.

66—In re Miller, 5 A. B. R. 140.

67—In re Ferguson, 95 Fed. 429, 2 A. B. R. 586.

68—Bogen & Trummell v. Protter, 129 Fed. 533, 12 A. B. R. 238.

69—Holmes v. Baker & Hamilton, 160 Fed. 922, 20 A. B. R. 252.

70—In re Gutwillig, 90 Fed. 475, affirmed 92 Fed. 337; West v. Lea, 174 U. S. 590, 43 L. ed. 1098, 2 A. B. R. 463.

ruptcy,<sup>71</sup> although made without preferences, without actually intending to defraud creditors, and without insolvency.<sup>72</sup> To be an act of bankruptcy, the assignment must be a general assignment for benefit of creditors.<sup>73</sup> "A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration for the grantee of substantially all his property to a party in trust to collect the amounts owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor."<sup>74</sup> A conveyance direct to a creditor or to

71—Act 1898, § 3a, subd. 4. In re Knight, 125 Fed. 35, 11 A. B. R. 1; Whittlesey v. Becker & Co., 142 App. Div. (N. Y.) 313, 25 A. B. R. 672.

72—In re Meyer, 98 Fed. 976, 3 A. B. R. 559; In re Sievers, 1 N. B. N. 68, 1 A. B. R. 117, 91 Fed. 366; s. c. as Davis v. Bohle, 1 N. B. N. 216, 1 A. B. R. 412, 92 Fed. 325; Lea Bros. v. West Co., 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237; s. c. 1 N. B. N. 409, 2 A. B. R. 463, 174 U. S. 590, 43 L. ed. 1098; Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 Fed. 637; In re Gutwillig, 1 N. B. N. 40, 1 A. B. R. 8, 90 Fed. 475, s. c. 1 N. B. N. 554, 1 A. B. R. 388, 92 Fed. 337; In re Simonson, White-son & Co., 1 N. B. N. 230, 1 A. B. R. 197, 92 Fed. 904; Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102; In re Smith, 1 N. B. N. 356, 2 A. B. R. 9, 92 Fed. 135; In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626, 95 Fed. 634; Day v. Beck & Gregg Hardware Co., 114 Fed. 834; Green River Deposit Bank v. Craig, 110 Fed. 137, 6 A. B. R. 381; In re Salmon & Salmon, 143 Fed. 395, 16 A. B. R. 122; In re Richardson, 192 Fed. 50, 27 A. B. R. 590; In re Farthing, 202 Fed. 557, 29 A. B. R. 732.

It is not necessary to aver or prove that the debtor was insolvent at the time of the assignment or at the time of filing the petition. [Leidigh Car Co. v. Stengel, 95 Fed. 637, 1 N. B. N. 387, 2 A. B. R. 383; Lea Bros. v. West Co., 91 Fed. 237, 1 N. B. N. 79, 1 A. B. R. 261, 174 U. S. 590, 43 L. ed. 1098, 1 N. B. N. 409,

2 A. B. R. 463; Simonson v. Sinsheimer et al., 100 Fed. 426, 3 A. B. R. 824.] Nor is it a defense to deny the insolvency where an assignment is the act charged. [Lea Bros. v. Geo. M. West Co., 91 Fed. 237, 1 N. B. N. 79, 1 A. B. R. 261; 174 U. S. 590, 43 L. ed. 1098, 1 N. B. N. 409, 2 A. B. R. 463; Bray v. Cobb, 91 Fed. 102, 1 N. B. N. 209, 1 A. B. R. 153.]

73—Act 1898, § 3a, subd. 4. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 21 A. B. R. 270.

74—Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 21 A. B. R. 270.

If the legal effect of the transaction is a transfer of all the debtor's property to a trustee for the benefit of all creditors, share and share alike, who shall come in and prove their claims and thus accept its terms, it constitutes a general assignment. Courtenay Mercantile Co. v. Finch, 194 Fed. 368, 27 A. B. R. 688, aff'g 186 Fed. 352, 26 A. B. R. 365.

The phrase "general assignment" as here used is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the assignor share and share alike. In re Tomlinson Co., 154 Fed. 834, 18 A. B. R. 691.

So called "bill of sale" held a general assignment. *Id.*

Where copartnership private bank was

creditors for his or their benefit creates no general assignment for benefit of creditors because it raises no trust.<sup>75</sup> A transfer of property is essential,<sup>76</sup> but it is not necessary that the assignment be valid according to the state law,<sup>77</sup> or that it should be valid for all purposes, as, for instance, that the creditors should assent thereto.<sup>78</sup> It follows from the above that an assignment by a debtor of a part of his property to his largest creditor in payment of the latter's debt and the creditor agreeing to pay all the other creditors of the debtor out of the proceeds of the property assigned is not an assignment for the benefit of creditors within the meaning of the bankruptcy act.<sup>79</sup> Where one of the members of a firm, who was insolvent, as liquidating partner, makes a general assignment for the benefit of creditors, which purported to convey all the firm's property, the question of the validity of such assignment as to the partners not joining is immaterial, for the language of the act applies to any instrument which is or purports to be a general assignment and such assignment is an act of bankruptcy by the firm and the executing partner, but not of the other partner, though he knew of and made no attempt to prevent such assignment;<sup>80</sup> and if made by the partnership and the individuals composing it, the act of bankruptcy is committed by all.<sup>81</sup> But, if one of two persons

being wound up by special agent under state law, transfer by partners of non-exempt individual property for firm debts held to render entire transaction one transaction and to be a general assignment for benefit of creditors. In re Salmon & Salmon, 143 Fed. 395, 16 A. B. R. 122.

Adoption of resolution by stockholders authorizing board of directors to appoint a committee to advertise and sell at public auction the property of the corporation and if sold the board of directors to wind up and settle debts of corporation held not an assignment for benefit of creditors. In re Hartwell Oil Mills, 165 Fed. 555, 21 A. B. R. 586.

75—Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 21 A. B. R. 270; Anniston Iron Supply Co. v. Anniston Rolling Mill Co., 125 Fed. 974, 11 A. B. R. 200.

76—Stockholders merely voting to make an assignment insufficient. In re Federal Lumber Co., 185 Fed. 926, 26 A. B. R. 438.

77—Courtenay Mercantile Co. v. Finch, 194 Fed. 368, 27 A. B. R. 688, aff'g 186 Fed. 352, 26 A. B. R. 365.

78—Griffin v. Dutton, 165 Fed. 626, 21 A. B. R. 449; Canner v. Webster Tapper Co., 168 Fed. 519, 21 A. B. R. 872.

79—Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 21 A. B. R. 270.

80—In re Meyer, 1 A. B. R. 565, 98 Fed. 976.

Assignment by a partner constitutes an act of bankruptcy as to the firm though the other partner does not participate therein. Yungbluth v. Slipper, 185 Fed. 773, 26 A. B. R. 265.

81—In re Green, 106 Fed. 313, 5 A. B. R. 848.

jointly and severally liable for a debt, who are not partners, does an act which would subject him to adjudication in bankruptcy, such act does not affect his associate.<sup>82</sup> The confession of judgment to a trustee for the benefit of all creditors has been held in Pennsylvania to be the equivalent of a general assignment.<sup>83</sup> An application by a corporation to a state court for its dissolution and the appointment of a receiver upon the ground of its insolvency is not equivalent to a general assignment, and hence is not an act of bankruptcy upon that ground.<sup>84</sup> But where the officers of a corporation, acting under authority of a resolution of the board of directors, and in pursuance of a vote taken at a meeting of the stockholders, though against the objection of a minority of the stockholders, make a general assignment, it is an act of bankruptcy on which a petition in involuntary bankruptcy against the corporation may be maintained.<sup>85</sup>

Under the provision of the act of 1867 which provided that to "procure or suffer his property to be taken on legal process with

82—James v. Atlantic Delaine Co., 11 N. B. R. 390, Fed. Cas. No. 7179.

83—Green River Deposit Bank v. Craig, 110 Fed. 137, 6 A. B. R. 381.

84—In re Empire Metallic Bedstead Co., 1 N. B. N. 386, 2 A. B. R. 329, 2 N. B. N. R. 304, 95 Fed. 957, 98 Fed. 981, reversing 1 N. B. N. 301; In re Harper Bros., 2 N. B. N. R. 605, 100 Fed. 266, 3 A. B. R. 804; In re Baker-Ricketson Co., 2 N. B. N. R. 133, 97 Fed. 489, 4 A. B. R. 605. But see *post* this section making such action an act of bankruptcy.

The making of a general assignment for the benefit of creditors being expressly made an act of bankruptcy by the act of 1898, the decisions under the act of 1867, which did not contain this express provision, are rendered useless, though, under the provisions of that act such assignments were held acts of bankruptcy as being intended to interfere with the operation of the bankrupt law (In re Kasson, 18 N. B. R. 379, Fed. Cas. No. 7617; Rowe v. Page, 13 N. B. R. 366; In re Langley, 1 N. B. R. 155; In re Mandelsohn, 12 N. B. R. 533, 3 Sawy.

342, Fed. Cas. No. 9420; Ins. Co. v. Ins. Co., 14 N. B. R. 311, Fed. Cas. No. 5486; McDonald v. Moore, 15 N. B. R. 26, 8 Ben. 579, Fed. Cas. No. 8763; Platt v. Preston, 19 N. B. R. 241, Fed. Cas. No. 11219, 5046; Pool v. McDonald, 15 N. B. R. 560, Fed. Cas. No. 11268; Cragin v. Thompson, 12 N. B. R. 81, 2 Dill. 513, Fed. Cas. No. 3320; In re Smith, 3 N. B. R. 98, 4 Ben. 1, Fed. Cas. No. 12974; In re Crofts Bros., 17 N. B. R. 324, 8 Biss. 188, Fed. Cas. No. 3404; Jones v. Clifton, 18 N. B. R. 125, Fed. Cas. No. 7453; In re Lawrence, 18 N. B. R. 516, Fed. Cas. No. 8133; Jackson v. McCullough, 13 N. B. R. 283, 1 Woods 433, Fed. Cas. No. 7140; contra, In re Hawkins, 2 N. B. R. 122; Farrin v. Crawford, 2 N. B. R. 181, Fed. Cas. No. 4686; Sedgwick v. Place, 1 N. B. R. 204, Fed. Cas. No. 12622; Langley v. Perry, 2 N. B. R. 180, Fed. Cas. 8067; In re Marter, 12 N. B. R. 185, Fed. Cas. No. 9143; In re Kimball, 16 N. B. R. 188, Fed. Cas. No. 7770).

85—Clark v. Mfg. Co., 101 Fed. 962, 4 A. B. R. 351.



intent to defeat or delay the operation of this act," the procurement of a receivership was held to be an act of bankruptcy.<sup>86</sup> In the absence of an equivalent provision under the act of 1898, prior to the amendment of 1903, it was held that the failure to resist a bill for receivership was neither a conveyance, transfer, concealment or removal of property by the respondent, and if it should be held to be a transfer, it was a transfer permitted rather than made, on failing to oppose the bill therefor, which was not forbidden; nor was it a general assignment for the benefit of creditors;<sup>87</sup> nor such an admission as would bring it within the purview of subdivision 5 of this section, although it might be the unanimous and voluntary act of the members of the corporation.<sup>88</sup> The Act of February 5, 1903, amending the Act of 1898, added a provision to the fourth act of bankruptcy providing two additional acts of bankruptcy, viz.: (1) Being insolvent applied for a receiver or trustee for his property. (2) Because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States.<sup>89</sup> In both cases insolvency is essential,<sup>90</sup> and in the second of the above subdivisions the receiver must have been put in charge of the debtor's property because of insolvency.<sup>91</sup> And this fact is not established merely by proof that

86—Sec. 39, act of 1898; In re Binger, Fed. Cas. No. 1420.

87—In re Baker-Ricketson Co., 2 N. B. N. R. 133, 97 Fed. 489, 4 A. B. R. 605; Empire Metallic Bedstead Co., 2 N. B. N. R. 304, 98 Fed. 981; Vaccaro v. Bk., 2 N. B. N. R. 1037, 103 Fed. 436, 4 A. B. R. 474; Davis v. Stevens, 104 Fed. 235; In re Henry Zeitner Brewing Co., 117 Fed. 799, 9 A. B. R. 63; In re Gilbert, 112 Fed. 951, 8 A. B. R. 101.

88—In re Baker Ricketson Co., 2 N. B. N. R. 133, 97 Fed. 489, 4 A. B. R. 605.

89—The amendment to 3a (4) when introduced read "Being insolvent, applied for or was put in the hands of a receiver." In the Senate its language was changed to read as finally enacted.

90—In re Edward Ellsworth Co., 173 Fed. 699, 23 A. B. R. 284; In re Zeitner Brewing Co., 117 Fed. 799, 9 A. B. R. 63; Lowenstein v. McShane Mfg. Co., 130

Fed. 1007, 12 A. B. R. 601; In re Boston & Oaxaca Mining Co., 181 Fed. 422, 24 A. B. R. 923.

Where the application for a receiver has been made by the debtor himself, the commission of an act of bankruptcy depends solely upon the issue of solvency *vel non*. Blackstone v. Everybody's Store, 207 Fed. 752, 30 A. B. R. 497.

Appointment of a receiver for insolvent corporation by consent under Georgia Code (1895), § 2716, held act of bankruptcy. In re Pickens Mfg. Co., 158 Fed. 894, 20 A. B. R. 202.

Receiver appointed for insolvent corporation in dissolution proceedings under New York Code of Civil Procedure held act of bankruptcy. In re The Edward G. Milbury Co., Ltd., 11 A. B. R. 523.

91—In re Douglass Coal & Coke Co., 131 Fed. 769, 12 A. B. R. 539; In re Spalding, 139 Fed. 244, 14 A. B. R. 129, rev'g 134 Fed. 507, 13 A. B. R. 223;

insolvency existed when the court acted;<sup>92</sup> nor does the fact that the debtor is insolvent when the petition in bankruptcy is filed prove insolvency as of the date of the appointment of the receiver.<sup>93</sup> "Insolvency" need not be the sole ground,<sup>94</sup> and being the real ground it is not material that it is not the expressed ground.<sup>95</sup> While the judge appointing the receiver cannot by parol evidence give the grounds for his written order,<sup>96</sup> still, if the order does not recite the grounds upon which

*Zugalla v. International Mercantile Agency*, 142 Fed. 927, 16 A. B. R. 67, rev'g 13 A. B. R. 725; *Blue Mountain Steel Co. v. Partner*, 131 Fed. 57, 12 A. B. R. 559; *Moss Nat. Bank of Sandusky v. Arend*, 146 Fed. 351, 16 A. B. R. 867; *In re Perry Aldrich Co.*, 165 Fed. 249, 21 A. B. R. 244.

Appointment of receiver on ground other than that of insolvency is not an act of bankruptcy. *In re Columbia Real Estate Co.*, 205 Fed. 980, 30 A. B. R. 471.

Appointment of receiver *pendente lite* on application of minority stockholders to prevent mismanagement by board of directors held not an act of bankruptcy. *In re Boston & Oaxaca Mining Co.*, 181 Fed. 422, 24 A. B. R. 923; *In re Gold River Mining & Tunnel Co.*, 200 Fed. 162, 29 A. B. R. 563.

Appointment of temporary receiver for corporation in equity action on allegations of insolvency, etc., which are denied, held not an act of bankruptcy. *In re Hudson River Electric Power Co.*, 173 Fed. 934, 23 A. B. R. 191, aff'd 183 Fed. 701, 33 L. R. A. (N. S.) 454, 25 A. B. R. 504.

"The bankruptcy act has not superseded the right and power of a court of equity to take charge of the property of an insolvent corporation for the protection of stockholders and creditors, marshal the same, recognize and enforce valid liens and priorities and equitably distribute the surplus proceeds among its creditors." *In re Edward Ellsworth Co.*, 173 Fed. 699, 23 A. B. R. 284.

<sup>92</sup>—*In re Boston & Oaxaca Mining Co.*, 181 Fed. 422, 24 A. B. R. 923.

The appointment of a receiver for the

purpose of preserving assets and conducting the alleged bankrupt's business as a going concern is not an act of bankruptcy in the absence of proof of insolvency; *Schumert & Warfield, Ltd., v. Security Brewing Co.*, 199 Fed. 358, 28 A. B. R. 676.

The fact that the petition for the appointment of a receiver alleged insolvency which is denied in the answer is not conclusive that insolvency was the ground upon which the receiver was appointed. *Id.*

<sup>93</sup>—*In re Boston & Oaxaca Mining Co.*, 181 Fed. 422, 24 A. B. R. 923.

<sup>94</sup>—If a substantial ground it is sufficient. *In re Kennedy Tailoring Co.*, 175 Fed. 871, 23 A. B. R. 656; *In re Beatty*, 150 Fed. 293, 17 A. B. R. 738; *Hooks v. Aldridge*, 145 Fed. 865, 16 A. B. R. 658.

<sup>95</sup>—*In re Electric Supply Co.*, 175 Fed. 612, 23 A. B. R. 647.

Appointment of receiver of a corporation under statute not specifying insolvency as a ground for receivership held act of bankruptcy. *In re Belfast Mesh Underwear Co.*, 153 Fed. 224, 18 A. B. R. 620.

Held an act of bankruptcy where receiver was appointed on petition alleging that owing to gross mismanagement corporation could not continue business, could not raise necessary capital to meet matured and maturing obligations and that it was threatened with suits, etc. *In re Electric Supply Co.*, 175 Fed. 612, 23 A. B. R. 647.

<sup>96</sup>—*Blue Mountain Steel Co. v. Partner*, 131 Fed. 57, 12 A. B. R. 559.

it is based, the record may be referred to or the grounds shown by evidence aliunde;<sup>97</sup> but the grounds being recited they cannot be impeached.<sup>98</sup> The fact that a decree of a state court appointing a receiver upon the recital of a finding of insolvency is modified after the filing of the petition in bankruptcy so as to recite the appointment of a receiver on other grounds than insolvency will not prevent an adjudication if the debtor is shown to have been insolvent at the time.<sup>99</sup> Under the first of the above subdivisions, the commission of the act of bankruptcy is not dependent upon the record in the court to which the application for a receiver is made,<sup>1</sup> but the determination of such question rests with the bankruptcy<sup>2</sup> court, and this includes the question as to whether the alleged bankrupt was insolvent at the time of the application for the receiver.<sup>3</sup> If it appears from the record in the receivership proceeding and is established by proof that the application is made under some statutory authority or general equity jurisdiction having no relation to insolvency, the application for a receiver does not constitute an act of bankruptcy.<sup>4</sup> But if it appears that the alleged bankrupt was insolvent at the time and that the purpose of the proceeding is to have the debtor's property distributed among creditors and, in the case of a corporation, its dissolution brought about, an act of bankruptcy is committed.<sup>5</sup>

97—*In re Spalding*, 139 Fed. 244, 14 A. B. R. 129, rev'g 134 Fed. 507, 13 A. B. R. 223; *In re Kennedy Tailoring Co.*, 175 Fed. 871, 23 A. B. R. 656.

Judge before whom the receivership proceedings are had is competent to testify upon which of several grounds appearing in the record of the state court the receiver was appointed. *Schumert & Warfield, Ltd. v. Security Brewing Co.*, 199 Fed. 358, 28 A. B. R. 676.

98—*In re Spalding*, 139 Fed. 244, 14 A. B. R. 129, rev'g 134 Fed. 507, 13 A. B. R. 223.

Where from the record in receivership proceedings in a state court it appears that the ground of the appointment of a receiver was insolvency, parol evidence is inadmissible to show that insolvency was not the ground of the appointment. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk*

*Trading Co.*, 206 Fed. 813, 30 A. B. R. 604.

99—*In re Wenatchee Heights Orchard Co.*, 204 Fed. 674, 30 A. B. R. 401.

1—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

2—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

3—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

4—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

5—So held where petition for receivership was based on depressed condition in business and danger of assets being wasted through attachment and litigation. *Exploration Mercantile Co. v. Pa-*

Under the second subdivision above named, however, the commission of the act of bankruptcy is dependent upon the record in the case before the court making the appointment of a receiver.<sup>6</sup>

The questions of insolvency at the time of the appointing of the receiver, and at the time of the filing of the bankruptcy petition, and whether the receivers were appointed because of insolvency, may properly be submitted to the jury.<sup>7</sup>

Receivers are "put in charge" within the meaning of this section when the decree appointing them is entered, and the petition must be filed within four months from that date.<sup>8</sup> Consenting to receivership is not an application for receivership.<sup>9</sup>

In the case of a party who is solvent, the appointment of a receiver would not be an act of bankruptcy under this subdivision of the law, but might be held to be a transfer with intent to hinder, delay or defraud creditors through the substitution of the procedure of the state court for the more expeditious and economic method provided by the bankruptcy law,<sup>10</sup> or result in a preference through the payment, on certain claims entitled to priority under the state law, an amount greater than would be allowed under the bankruptcy law.<sup>11</sup>

This subdivision does not mean that the trustee must be put in charge by the order of a court but embraces all other methods whereby the property of an insolvent is committed to a trustee for the creditors or the laws of a state, territory, or of the United States.<sup>12</sup> So, too, the receiver need not be appointed under the

cific Hardware & Steel Co., 177 Fed. 825, 24 A. B. R. 216.

6—In re Douglass Coal & Coke Co., 12 A. B. R. 539; In re Spalding, 139 Fed. 244, 14 A. B. R. 129, rev'g 134 Fed. 507, 13 A. B. R. 223; In re Edward Ellsworth Co., 173 Fed. 699, 23 A. B. R. 284.

To be put in charge "because of insolvency" requires that the court making the appointment determine the question of insolvency. *Zugalla v. International Mercantile Agency*, 142 Fed. 927, 16 A. B. R. 67, rev'g 13 A. B. R. 725.

7—Act 1898, § 19, subd. a. *Blue Mountain Iron & Steel Co. v. Partner*, 131 Fed. 57, 12 A. B. R. 559.

8—Fact that receivers did not qualify

until later is material. *In re Perry Aldrich Co.*, 165 Fed. 249, 21 A. B. R. 244.

9—In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 A. B. R. 563.

10—See *In re Metallic Bedstead Co.*, 2 N. B. N. R. 304, 98 Fed. 981; *In re Harper Bros.*, 2 N. B. N. R. 605, 100 Fed. 266, 3 A. B. R. 804; *In re Henry Zeltner Brewing Co.*, 117 Fed. 799, 9 A. B. R. 63; contra *In re Burrell et al.*, 9 A. B. R. 178.

11—See *Mather v. Coe*, 1 N. B. N. 554, 92 Fed. 333, 1 A. B. R. 504.

12—*In re Hercules Atkin Co., Ltd.*, 133 Fed. 813, 13 A. B. R. 369.

Held act of bankruptcy where property

authority of a state statute but may be appointed by a state court acting under its general equity powers.<sup>13</sup> It is not essential that the application for a receiver be a lawful application conforming to the laws of the state.<sup>14</sup>

It is not necessary that the person placed in charge be designated a receiver if in fact he performs the same functions.<sup>15</sup>

An application for a receiver of a corporation made by an agent or creditor will not be held an application by the corporation in the absence of proof of the agent's or creditor's authority.<sup>16</sup>

The filing in a state court of a petition by a corporation for a receiver which is signed by the president, and secretary of the corporation as well as by the principal stockholders will be held to be an act of the corporation,<sup>17</sup> and a court of bankruptcy, being a court of equity,<sup>18</sup> will look through the form to the substance of the proceeding, and the fact that the application for a receiver is made in the name of a stockholder, the corporation appearing and consenting to the appointment, does not prevent the transaction from being an act of bankruptcy on the part of the corporation.<sup>19</sup>

A decree in receivership proceeding determining who the applicant for a receivership was, is, in the absence of fraud or collusion, conclusive upon the question as to whether the alleged bankrupt was the applicant or not.<sup>20</sup>

of joint stock association was placed in hands of liquidating trustees. *Id.*

Stockholders of insolvent corporation putting property in hands of directors as trustees under Connecticut law held act of bankruptcy. *In re C. H. Bennett Shoe Co.*, 140 Fed. 687, 15 A. B. R. 497.

13—*In re Kennedy Tailoring Co.*, 175 Fed. 871, 23 A. B. R. 656.

14—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

The commission of this act of bankruptcy is not dependent on the regularity or legality of the proceedings for a receiver. *Exploration Mercantile Co. v. Pacific Hardware and Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

Surviving partner having no right under Ohio statutes to join with administrator of deceased partner in applying

for a receiver held not to commit act of bankruptcy by so doing. *Moss Nat. Bank of Sandusky v. Arend*, 146 Fed. 351, 16 A. B. R. 867.

15—Sheriff put in charge to sell property and distribute proceeds to creditors. *In re International Coal Mining Co.*, 143 Fed. 665, 16 A. B. R. 309 (*dicta*).

16—*Butler & Co. v. Palmenberg*, 207 Fed. 705, 30 A. B. R. 502.

17—*Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, 206 Fed. 813, 30 A. B. R. 604.

18—See *ante*, § 10.

19—So held where conspiracy on the part of the stockholder and officers of corporation was alleged. *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

20—*Butler & Co. v. Palmenberg*, 207 Fed. 705, 30 A. B. R. 502.

The "insolvency" for which a receiver is appointed or put in charge of the debtor's property must be "insolvency" as defined in the bankruptcy act,<sup>21</sup> and the appointment of a receiver upon the ground of inability of the debtor to meet his obligations as they mature, will not sustain an adjudication, though the debtor was actually insolvent at the time.<sup>22</sup> A state court may, even after the filing of a petition in bankruptcy against the debtor, amend its order so as to show that the "insolvency" dealt with by it was not such "insolvency" as is contemplated by the bankruptcy act.<sup>23</sup>

The bankruptcy act makes no distinction between temporary and permanent receivers.<sup>24</sup> The appointment of an auxiliary receiver as constituting an act of bankruptcy depends upon the appointment of the primary receiver.<sup>25</sup> The receiver has a right to contest the adjudication in bankruptcy.<sup>26</sup>

Although a corporation has been dissolved and a receiver appointed, it might nevertheless be adjudged bankrupt if the petition is filed within four months after the act of bankruptcy.<sup>27</sup>

It has been held that the amendment of 1903 must be strictly construed,<sup>28</sup> and is not retroactive and does not apply to receivership appointed prior to its passage though they continue after the amendment took effect.<sup>29</sup> The application for a receiver being made after the amendment was passed, it is an act of bankruptcy though proceedings had been commenced prior thereto.<sup>30</sup>

### § 53. Admitting in writing inability to pay debts and willingness to be adjudged bankrupt on that ground.

Three things are essential to constitute this act of bankruptcy:

21—In re Golden Malt Cream Co., 164 Fed. 326, 21 A. B. R. 36; In re Perry Aldrich Co., 165 Fed. 249, 21 A. B. R. 244.

22—Butler & Co. v. Palmenberg, 207 Fed. 705, 30 A. B. R. 502.

23—In re Golden Malt Cream Co., 164 Fed. 326, 21 A. B. R. 36.

24—Butler & Co. v. Palmenberg, 207 Fed. 705, 30 A. B. R. 502. In re Kennedy Tailoring Co., 175 Fed. 871, 23 A. B. R. 656; Blue Mountain Steel Co. v. Partner, 131 Fed. 57, 12 A. B. R. 559.

25—In re Boston & Oaxaca Mining Co., 181 Fed. 422, 24 A. B. R. 923.

26—In re Hudson River Electric Power Co., 173 Fed. 934, 23 A. B. R. 191, aff'd 183 Fed. 701, 33 L. R. A. (N. S.) 454, 25 A. B. R. 504.

27—In re Storek Lumber Co., 114 Fed. 360, 8 A. B. R. 86. See *post*, § 83.

28—In re Edward Ellsworth Co., 173 Fed. 699, 23 A. B. R. 284.

29—Seaboard Steel Casting Co. v. Trigg Co., 124 Fed. 75, 10 A. B. R. 594.

30—In re The Edward G. Milbury Co., Ltd., 11 A. B. R. 523.

first, it must be written;<sup>31</sup> second, it must contain an unqualified<sup>32</sup> admission either expressly or of so strong an implication as to leave no question of doubt; and third, a willingness to be adjudged bankrupt.<sup>33</sup>

The force of the statement is in no wise impaired by setting forth the reasons for such inability,<sup>34</sup> nor by the fact that the debtor requests creditors to file a petition in bankruptcy.<sup>35</sup> The act made the basis of the bankruptcy proceeding must not, however, be in violation of an injunction or order of a court of competent jurisdiction.<sup>36</sup>

Insolvency, as defined by the bankruptcy act, is immaterial.<sup>37</sup> The law requires no technical form of proof of assent by a corporation any more than by an individual, but only that the admission and consent be in writing and made by an officer having authority.<sup>38</sup> It would seem that the power to make the admission for a corporation could be exercised by the same officers who have the power to make a general assignment, and, in the absence of statute or by-law regulating the subject, such power resides in the directors,<sup>39</sup> acting as such;<sup>40</sup> but where by the

31—*Conway v. German*, 166 Fed. 67, 21 A. B. R. 577.

32—*In re Southern Steel Co.*, 169 Fed. 702, 22 A. B. R. 476.

33—Willingness to be adjudged a bankrupt may be inferred from answer in involuntary proceeding admitting insolvency. *Brinkley v. Smithwick*, 126 Fed. 686, 11 A. B. R. 500.

34—*In re Kersten*, 110 Fed. 929, 6 A. B. R. 516.

35—*In re Duplex Radiator Co.*, 142 Fed. 906, 15 A. B. R. 324; *In re Moench & Sons*, 130 Fed. 685, 12 A. B. R. 240, *aff'g* 123 Fed. 965, 10 A. B. R. 656.

36—Corporation being enjoined from commencing or prosecuting any proceeding involving in any way its property or property rights, a resolution by the board of directors admitting inability to pay debts and be adjudged bankrupt held not available as an act of bankruptcy. *In re Hudson River Electric Power Co.*, 173 Fed. 934, 23 A. B. R. 191, *aff'd* 183 Fed. 701, 33 L. R. A. (N. S.) 454, 25 A. B. R. 504.

37—*In re American Guarantee & Se-*

*curity Co.*, 192 Fed. 405, 27 A. B. R. 640; *In re Duplex Radiator Co.*, 142 Fed. 906, 15 A. B. R. 324; *In re Moench & Sons Co.*, 130 Fed. 685, 12 A. B. R. 240, *aff'g* 123 Fed. 965, 10 A. B. R. 656; *In re McNally Co.*, 29 A. B. R. 772.

38—*In re Southern Steel Co.*, 169 Fed. 702, 22 A. B. R. 476.

39—*In re Marine Machine & Conveyor Co.*, 91 Fed. 630, 1 A. B. R. 91; *Rollins Gold & Silver Mining Co.*, 102 Fed. 982, 2 N. B. N. R. 988, 4 A. B. R. 327; *In re Mutual Mercantile Agency*, 111 Fed. 152, 6 A. B. R. 607; *In re Kelly Dry Goods Co.*, 102 Fed. 748, 4 A. B. R. 528; *In re Peter Paul Book Co.*, 104 Fed. 786, 5 A. B. R. 105; *In re Moench & Sons Co.*, 130 Fed. 685, 12 A. B. R. 240, *aff'g* 123 Fed. 965, 10 A. B. R. 656; *In re Lisk Mfg. Co.*, 167 Fed. 411, 21 A. B. R. 674; *In re American Guarantee & Security Co.*, 192 Fed. 405, 27 A. B. R. 640; *Cresson & Clearfield Coal & Coke Co. v. Stauffer*, 148 Fed. 981, 17 A. B. R. 573, *aff'g* 143 Fed. 665, 16 A. B. R. 309; *Home Powder Co. v. Geis*, 204 Fed. 568, 29 A. B. R. 580.

laws of the state under which the corporation is formed, defining and limiting the power of the officers and directors, a written admission of the corporation's inability to pay its debts and willingness to be adjudged bankrupt on that ground is in excess of their authority, such an act does not constitute an act of bankruptcy, nor will a subsequent ratification by the stockholders have a retroactive effect to sustain the petition and cut off the rights of creditors who opposed the adjudication.<sup>41</sup> The fact that directors voting in favor of resolution admitting inability to pay debts are creditors and intend to file a petition in bankruptcy against the corporation does not disqualify them from voting.<sup>42</sup>

A legal meeting of the corporation has power to admit willingness to be adjudged.<sup>43</sup> The admission may be made by de facto officers,<sup>44</sup> and proceedings under state insolvency laws do not terminate corporate existence so as to prevent commission of the act of bankruptcy.<sup>45</sup>

Where a resolution is unanimously passed by stockholders authorizing one of its officers to appear in court in event of a petition being filed against it and to admit in writing its inability to pay its debts and willingness to be adjudged a bankrupt

40—Admission of inability to pay debts and willingness to be adjudged signed by the majority of directors in their individual capacity held not a corporate act and not an act of bankruptcy. In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 A. B. R. 563.

41—In re Bates Mach. Co., 1 N. B. N. 135, 1 A. B. R. 129, 91 Fed. 625.

Admission by treasurer ineffective though board of directors attempted ratification. In re Burbank Co., 168 Fed. 719, 21 A. B. R. 838.

Under Oregon laws, in the absence of authority from stockholder, board of directors cannot commit act of bankruptcy under Act 1898, § 3, subd. 5. In re Quartz Gold Min. Co., 157 Fed. 243, 19 A. B. R. 667.

An unqualified admission made by resolution adopted by the directors and stockholders is sufficient. "There is nothing in this language (section 3a) which indicates that the admission must be fol-

lowed in case of a corporation by any overt act, that it should be made to any particular person, or that further expression of a resolution by directors and stockholders must be made by an officer of a corporation in order to give effect to the admission. True, such a method has been employed in a number of cases and held sufficient to support an adjudication." In re American Guarantee & Security Co. of California, 192 Fed. 405, 27 A. B. R. 640.

42—Home Powder Co. v. Geis, 204 Fed. 568, 29 A. B. R. 580.

43—In re Eureka Anthracite Coal Co., 197 Fed. 216, 28 A. B. R. 758.

44—By directors holding over, no successors being elected. In re Riley, Talbot & Hunt, 15 A. B. R. 159.

45—Under Penn Act. April 7, 1870 (P. L. 59). Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981, 17 A. B. R. 573, aff'g 143 Fed. 665, 16 A. B. R. 309.



on that ground, it is not an act of bankruptcy since it is merely a qualified authority to admit, and, if after such petition has been filed, such officer appears and makes the admission, the petitioner cannot avail himself of it since it was not executed until after the petition was filed.<sup>46</sup> The bankruptcy law is paramount and the state courts are without power by the appointment of receiver or by injunction to prevent stockholders and officer of a corporation from admitting inability to pay debts.<sup>47</sup>

A statement signed by one of two partners, which purports to be made in behalf of both, is undoubtedly binding in case of express authority, and the authority may be presumed from acquiescence or failure to disaffirm when the opportunity for such issue is presented.<sup>48</sup>

The application in a state court by a corporation for its dissolution and the appointment of a receiver of its property, though a written admission of its inability to pay its debts, does not also amount to a willingness to be adjudged bankrupt on that ground and is not an act of bankruptcy.<sup>49</sup>

#### § 54. Time for filing petition.

“A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.”<sup>50</sup>

46—In re Baker Ricketson Co., 2 N. B. N. R. 133, 97 Fed. 489, 4 A. B. R. 605.

47—In re McNally Co., 29 A. B. R. 772.

48—In re Kersten & Kersten, 110 Fed. 929, 6 A. B. R. 516.

49—In re Empire Bedstead Co., 1 N. B. N. 386, 2 A. B. R. 329, 95 Fed. 957, 2 N. B. N. 304, 98 Fed. 981, rev'g 1 N.

B. N. 301; In re Baker-Ricketson Co., 97 Fed. 489, 2 N. B. N. R. 133, 4 A. B. R. 605.

50—Act 1898, § 3b. Analogous provision in act of 1867. Sec. 39. . . . he . . . shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose

The commission of an act of bankruptcy simply renders it optional with creditors to have their debtor declared a bankrupt,<sup>51</sup> and the purpose of this section is to remove all incentive to the dishonest debtor of secretly committing acts of bankruptcy in the hope that the time within which proceedings might be instituted will elapse before the creditors obtain knowledge thereof, and extends the time for instituting proceedings four months from the date the creditor obtains knowledge of the offense.

The bankruptcy proceedings are commenced and jurisdiction acquired by the filing of the petition<sup>52</sup> within four months of the act of bankruptcy relied on, and the delay until the expiration of this time in issuing the subpoena does not validate the act of bankruptcy or vitiate the proceedings.<sup>53</sup> Subject to the exceptions stated in the act,<sup>54</sup> the four month period commences to run with the commission of the act of bankruptcy.<sup>55</sup>

The words "takes notorious, exclusive or continuous possession" as applied to intangible forms of personal property, must be construed to mean such possession as the property is susceptible of, and such as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership.<sup>56</sup> The petition must be filed within four months after receiving actual knowledge of the commission of the act of bankruptcy irrespective of the character of the possession taken by the transferee;<sup>57</sup> and an instrument being properly recorded, creditors may be held to notice thereof.<sup>58</sup> In computing the four months, the day of the commission of the act is excluded and the day of filing the petition included, provided the latter is not Sunday or a holi-

debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

51—*Summers v. Abbott*, 122 Fed. 36, 10 A. B. R. 254.

52—*In re Appel*, 2 N. B. N. R. 907, 103 Fed. 931. See *ante*, § 9.

53—*In re Lewis*, 1 N. B. N. 135, 556, 1 A. B. R. 458, 91 Fed. 632.

54—Petition filed in time if filed within four months of recording mortgage though latter was executed before four months' period. *In re Edelman*, 130 Fed. 700, 12 A. B. R. 238.

55—Under Act 1898, § 3, subd. 3, act is consummated five days before a sale. *In re National Hotel & Cafe Co.*, 138 Fed. 947, 15 A. B. R. 69.

56—*In re Bogen*, 134 Fed. 1019, 13 A. B. R. 529.

Assignment of insurance policies. *Jones v. Coates*, 196 Fed. 860, 28 A. B. R. 249.

57—*Jones v. Coates*, 196 Fed. 860, 28 A. B. R. 249.

58—Assignment of chattel mortgage. *In re Bogen*, 134 Fed. 1019, 13 A. B. R. 529.

day.<sup>59</sup> The time of beginning the proceedings for a lien on bankrupt's property, as an attachment, and not the beginning of the action in which the lien proceedings were had and which may have been long pending, fixes the time when the four months begin,<sup>60</sup> or the execution and delivery of a deed, and not the date named therein.<sup>61</sup> A failure to file a duplicate petition within such four months is fatal and the error cannot be corrected.<sup>62</sup> Amendments relating to the number of petitioning creditors, etc., relate back to the date of the filing of the original petition and do not advance that date,<sup>63</sup> but where a petition which as originally filed is fatally defective, is subsequently amended, the date of the amendment must be taken as the date from which the four months period of section 3b is to be calculated.<sup>64</sup>

Acts which took place more than four months before the petition was filed are not acts of bankruptcy,<sup>65</sup> consequently where prior to that period bankrupt transfers property, the possession of the party to whom it was transferred being as notorious as it was susceptible or as notorious, exclusive and continuous as the nature of the property permitted, the transfer is not an act of

<sup>59</sup>—Act 1898, § 31. Regardless of time of day. In re Warner, 144 Fed. 987, 16 A. B. R. 519 (attachment lien dissolved).

See also In re Hill, 140 Fed. 984, 15 A. B. R. 499; Dutcher v. Wright, 94 U. S. 553, 24 L. ed. 130.

Thus a petition filed February 20, 1899, based on a confession of judgment October 20, 1898, is in time; [In re Stevenson, 94 Fed. 111, 1 N. B. R. 313, 2 A. B. R. 66]; or a petition filed December 30 based on a preference effected by a debtor discounting his own notes at his own bank with his individual checks and thereby paying certain creditors, the checks being dated August 27 and 29 but charged, when paid, September 1; [In re Edelstein, 1 N. B. N. 168]; or a petition filed February 1, 1899, based on a failure to vacate an execution, the sale having been fixed for October 27, though the attachment was made July 5, judgment entered September 21 and execution levied October 15. [Parmenter Mfg. Co. v. Stoeve, 2 N. B. N. R. 174, 3 A. B. R.

220, 97 Fed. 330.] In the last case the failure to vacate the execution before sale was the act of bankruptcy, and hence the four months' period ran not from the attachment, but from a date connected with the proceedings after judgment. [See also In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 Fed. 121.]

<sup>60</sup>—In re Higgins, 2 N. B. N. R. 115, 3 A. B. R. 364, 97 Fed. 775.

<sup>61</sup>—In re Rodney, 6 N. B. R. 165, Fed. Cas. No. 12032.

<sup>62</sup>—In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 Fed. 110; In re Dupre, 1 N. B. N. 513; see In re Tonawanda Street Planing Mill Co., 6 A. B. R. 38.

<sup>63</sup>—First State Bank v. Haswell, 174 Fed. 209, 23 A. B. R. 330.

<sup>64</sup>—In re Condon, 209 Fed. 800, 31 A. B. R. 754, aff'g 198 Fed. 947, 29 A. B. R. 907.

<sup>65</sup>—In re Richards, 2 N. B. N. R. 38, 96 Fed. 935, 3 A. B. R. 145; In re Knight, 125 Fed. 35, 11 A. B. R. 1.

bankruptcy.<sup>66</sup> An insolvent corporation sold its real estate and used the proceeds in paying some of its creditors to the exclusion of others, such payments being set up as transfers with intent to prefer and that the conveyance was with the intent to delay and defraud, the petition being filed more than four months after the payment, though within four months of the record of the deed, it was held not to be within the required time.<sup>67</sup>

### § 55. Defense of solvency.

The language of the bankruptcy act that a petition may be filed against one who has committed an act of bankruptcy and "who is insolvent"<sup>68</sup> does not add any other or further requirement to those contained in paragraph "a" of section 3 as to what should constitute act of bankruptcy,<sup>69</sup> and hence, except as hereinafter noted, insolvency as an element of an act of bankruptcy depends upon the language of that portion of section 3.<sup>70</sup> The making of a general assignment for the benefit of creditors is an act of bankruptcy or insolvency in fact, and hence a denial of insolvency is not a good plea in bar in such case.<sup>71</sup> In the case of one adjudged bankrupt upon his own petition, the adjudication cannot be assailed by proof that he was not, in fact, insolvent; nor can the question of solvency be examined on a motion to set aside an adjudication of bankruptcy against a corporation procured by petition of a trustee.<sup>72</sup>

As a part of section 3 the bankruptcy act provides that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said

66—*In re Woodward*, 1 N. B. N. 352, 2 A. B. R. 233.

67—*In re Mingo Val. Creamery Ass'n*, 2 N. B. N. R. 679, 100 Fed. 282.

68—Act 1898, § 3, subd. b.

69—*West Co. v. Lea Bros. & Co.*, 174 U. S. 590, 43 L. ed. 1098, aff'g 91 Fed. 237, 1 A. B. R. 261, 2 A. B. R. 463. But see *In re Pickens Mfg. Co.*, 158 Fed. 894, 20 A. B. R. 202; *Knittel v. McGowan*, 134 Fed. 498, 14 A. B. R. 209.

70—See, *ante*, sections dealing with specific acts of bankruptcy.

71—*West Co. v. Lea Bros. Co.*, 174 U. S. 590, 43 L. ed. 1098, 2 A. B. R. 463, aff'g 91 Fed. 237, 1 A. B. R. 261; *Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102.

72—*In re Ins. Co.*, 16 N. B. R. 541, 9 Ben. 270, Fed. Cas. No. 628.

subdivision one the burden of proving solvency shall be on the alleged bankrupt.”<sup>73</sup> The words “first subdivision of this section” refer to the first numerical subdivision of paragraph “a.”<sup>74</sup> This paragraph places the burden upon the debtor to prove his solvency at the time the petition was filed in case the act of bankruptcy charged is that he has conveyed, transferred, concealed or removed any part of his property with intent to hinder, delay or defraud his creditors, and if successful in such proof, the petition will be dismissed.<sup>75</sup>

### § 56. Testimony on denial of insolvency.

The bankruptcy act provides that “whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.”

This paragraph is restricted to the second and third acts of bankruptcy specified in section 3a,<sup>76</sup> and places the burden of proof upon the creditors<sup>77</sup> unless the bankrupt fails to appear in court on the hearing with his books, papers and accounts and submits to an examination giving testimony as to all matters tending to establish solvency or insolvency, when it is shifted

73—Act 1898, § 3, subd. c.

Analogous provision of act of 1867. Sec. 41. . . . and if upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

74—West Co. v. Lea Bros. & Co., 174 U. S. 590, 43 L. ed. 1098, 2 A. B. R. 463, aff'g 91 Fed. 237, 1 A. B. R. 261.

75—Lea Bros. v. West Co., 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237, s. c. 1 N.

Brandenburg—7

B. N. 298, 2 A. B. R. 463, 174 U. S. 590, 43 L. ed. 1098; In re Schenkein, 113 Fed. 421; In re West, 108 Fed. 940, 5 A. B. R. 724; Elliott v. Treppner, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50; Acme Food Co. v. Meier, 153 Fed. 74, 18 A. B. R. 550; In re Ward, 161 Fed. 755, 20 A. B. R. 482; In re Hughes, 183 Fed. 872, 25 A. B. R. 556; Louisiana Nat. Life Assur. Society v. Segen, 196 Fed. 903, 28 A. B. R. 407; In re Crenshaw, 156 Fed. 638, 19 A. B. R. 502.

76—West Co. v. Lea Bros. & Co., 174 U. S. 590, 43 L. ed. 1098, 2 A. B. R. 463, aff'g 91 Fed. 237, 1 A. B. R. 261.

77—Elliott v. Toepfner, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50.

to him,<sup>78</sup> and insolvency will be presumed to have existed on the earliest date claimed in the involuntary petition.<sup>79</sup> Under this provision the bankrupt may be called and cross-examined for the purpose of establishing his insolvency.<sup>80</sup>

The books, papers and accounts referred to are those material in determining the alleged bankrupt's financial condition.<sup>81</sup> In the case of a merchant he is required to produce such books, invoices, etc., as should properly be kept in his business and which are necessary to show the amount of his assets and liabilities.<sup>82</sup> Failure on the part of the bankrupt to do so, without satisfactory explanation, casts upon him the burden of proving his solvency.<sup>83</sup> To have this effect, his failure to produce need not be willful or contumacious.<sup>84</sup> The respondent's default puts the burden of proving his solvency on him, but does not convert the proceeding into one of voluntary bankruptcy.<sup>85</sup>

### § 57. Practice in case of defense on the ground of solvency.

The general rules relating to practice and such questions as the right to a jury trial, etc., arising under the defense of solvency, are treated elsewhere.<sup>86</sup>

The word "insolvency" as used in the above provisions means insolvency as defined by the bankruptcy act.<sup>87</sup> Therefore, where it is shown that bankrupt's assets, at a fair valuation, exceed his liabilities, the petition must be dismissed,<sup>88</sup> but where the valuation is greatly inflated, as demonstrated by subsequent appraisal and sale, the total value being less than the liabilities, the finding of insolvency will not be disturbed.<sup>89</sup> That one is insolvent at the time a petition in bankruptcy is filed against

78—In re Coddington, 118 Fed. 281, 9 A. B. R. 243; In re Edelman, 130 Fed. 700, 12 A. B. R. 238; Knittel v. McGowan, 134 Fed. 498, 14 A. B. R. 209.

79—In re Donnelly, 193 Fed. 755, 27 A. B. R. 504.

80—In re Coddington, 118 Fed. 281, 9 A. B. R. 243.

81—Cummins Grocery Co. v. Talley, 187 Fed. 507, 26 A. B. R. 484.

82—Bogan & Trummell v. Protter, 129 Fed. 533, 12 A. B. R. 288; Cummins Grocery Co. v. Talley, 187 Fed. 507, 26 A. B. R. 484.

83—Bogan & Trummell v. Protter, 129

Fed. 533, 12 A. B. R. 288; Cummins Grocery Co. v. Talley, 187 Fed. 507, 26 A. B. R. 484.

84—Cummins Grocery Co. v. Talley, 187 Fed. 507, 26 A. B. R. 484.

85—In re Taylor, 2 N. B. N. R. 929, 102 Fed. 728, 4 A. B. R. 515.

86—See, *post*, c. VIII, § 261.

87—In re Golden Malt Cream Co., 164 Fed. 326, 21 A. B. R. 36.

See *ante*, § 40.

88—In re Rogers Milling Co., 2 N. B. N. R. 973, 102 Fed. 687, 4 A. B. R. 540.

89—In re Rome Planing Mill Co., 2 N. B. N. R. 531, 99 Fed. 937, 3 A. B. R. 766.

him does not prove insolvency at the time of the commission of the alleged act of bankruptcy.<sup>90</sup> The bankrupt's books are evidence on the question of insolvency but while important evidence and entitled to much weight they are not conclusive.<sup>91</sup>

90—In re Boston & Oaxaca Mining Co.,  
181 Fed. 422, 24 A. B. R. 923.

91—In re Docker-Foster Co., 123 Fed.  
190, 10 A. B. R. 584.

## CHAPTER V

### WHO MAY BECOME BANKRUPTS

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## C. BANKRUPTCY OF PARTNERSHIP AND MEMBERS THEREOF

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## A. VOLUNTARY BANKRUPTS.

## § 58. In general.

The act provides that any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of the act as a voluntary bankrupt.<sup>1</sup>

The uniformity required in bankrupt laws is geographical, not personal, and the question of the classes of persons to be affected is one largely, if not wholly, within the discretion of

1—Act of 1898, § 4a, as amended June 25, 1910.

The act was amended in 1910 by the substitution of the matter in the text for the following: "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

Act of 1867. Sec. 11. And be it further enacted, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of the filing of such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate

and effects for the benefit of his creditors and his desire to obtain the benefit of this act, and shall annex to his petition a schedule . . . (here follows contents of schedule) the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt. Sec. 37. And be it further enacted, That the provisions of this act shall apply to all moneyed business or commercial corporations and joint-stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors.

congress,<sup>2</sup> and the operation of the act being uniform throughout the United States and the classification imposed by congress reasonable, having regard to the proper objects of such law, the act is constitutional.<sup>3</sup>

A state court has no authority to abridge the right to apply for the benefits of the act by proceedings to enjoin one from applying for its benefits.<sup>4</sup>

It is not necessary to the maintenance of a voluntary petition that the petitioner admit insolvency or the commission of an act of bankruptcy, or that he be actually insolvent,<sup>5</sup> nor does the pendency or dismissal of involuntary proceedings constitute a bar to voluntary proceedings.<sup>6</sup>

A debtor having but one debt and no assets to which the trustee can take title may nevertheless be adjudged a voluntary bankrupt;<sup>7</sup> but if the bankrupt owes no debt, or the only debt scheduled is one that is not released by a discharge, the court would have no right to entertain the petition, or if such fact is discovered by a creditor after the adjudication, on proper motion it will be set aside and the petition dismissed.<sup>8</sup> If he is unable to pay the necessary filing fees, he may be relieved therefrom, upon submitting an affidavit with his petition stating that he is without and cannot obtain the money with which to pay such fees.<sup>9</sup> If, however, it subsequently develops during the pendency of proceedings that the bankrupt has or can obtain the money to pay these fees, or money comes to the estate, the court will order them paid, and, on default, dismiss the petition.<sup>10</sup>

A creditor wishing to force a debtor into bankruptcy must resort to the provisions relating to involuntary proceedings and cannot compel the debtor to take the initiative.<sup>11</sup>

2—*Sturgis v. Crowninshield*, 4 Wheat. 122, 194, 4 L. ed. 529, 547.

3—*Leidigh Car Co. v. Stengel*, 1 N. B. N. 387, 2 A. B. R. 383, 95 Fed. 637; *In re Cal. Pac. R. R. Co.*, 11 N. B. R. 193, 3 Sawy. 240, Fed. Cas. No. 2315; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; *In re Smoke*, 2 N. B. N. R. 831, 4 A. B. R. 477.

4—*Fillingen v. Thornton*, 12 N. B. R. 92.

5—*In re Foster Paint & Varnish Co.*, 210 Fed. 652, 31 A. B. R. 548.

6—*In re Lachnemaier*, 203 Fed. 32, 29 A. B. R. 325. See also *post*, § 113.

7—*In re Schwaninger*, 144 Fed. 555, 16 A. B. R. 427.

8—*In re Yates*, 114 Fed. 365, 8 A. B. R. 69; *In re Maples*, 105 Fed. 919, 5 A. B. R. 426.

9—Act of 1898, § 51 (2).

10—G. O. XXXIV.

11—*Richmond Standard Steel Spike &*

## § 59. Aliens.

Citizenship is not a prerequisite to jurisdiction by courts of bankruptcy, hence an alien may become either a voluntary or involuntary bankrupt.<sup>12</sup> If residing within the United States in order to become a voluntary bankrupt he must have had the same length of residence, domicile or principal place of business as any other resident of the United States, but if residing abroad, a voluntary petition may be filed in his behalf with the single requirement that he have property within the jurisdiction of the United States.

The Chinese exclusion act does not prevent a Chinaman from taking advantage of the bankruptcy law.<sup>13</sup>

## § 60. Corporations.

Prior to the amendment of 1910, corporations could not become voluntary bankrupts, but there was nothing to prevent them from authorizing their officers to admit their inability to pay their debts and willingness to be adjudged involuntary bankrupts.<sup>14</sup>

The amendment of 1910, however, extends the right to become a voluntary bankrupt to corporations other than municipal, railroad, insurance, and banking corporations.<sup>15</sup>

Under the act as amended, the board of directors of a corporation at a duly called meeting ordinarily has the power to put the corporation into bankruptcy, by authorizing the filing of a voluntary petition.<sup>16</sup> A creditor has no standing to object to an adjudication of a corporation on a voluntary petition on the ground that the corporation is solvent or that the directors had no power to file the petition.<sup>17</sup>

Iron Co. v. Allen, 148 Fed. 657, 17 A. B. R. 583.

12—In re Goodfellow, 2 N. B. R. 114, 1 Low 510, Fed. Cas. No. 5536.

13—In re Kai Y. Chung, 1 N. B. N. 33.

14—See *ante*, § 53; *post*, § 84.

15—Section 4a, as amended June 25, 1910.

16—In re Kenwood Ice Co., 189 Fed. 525, 26 A. B. R. 499.

Directors of Pennsylvania corporations have power to authorize the filing of a voluntary petition by the corporation without the consent of the stockholders.

In re Foster Paint & Varnish Co., 210 Fed. 652, 31 A. B. R. 548.

In the absence of statute or charter provisions to the contrary, the power of the board of directors to petition for voluntary adjudication is presumed. In re Guanacevi Tunnel Co., 201 Fed. 316, 29 A. B. R. 229.

Resolution of two directors in absence and without notice to third held sufficient. Dodge v. Kenwood Ice Co., 204 Fed. 577, 29 A. B. R. 586.

17—In re Guanacevi Tunnel Co., 201 Fed. 316, 29 A. B. R. 229.

### § 61. Farmers.

A person engaged chiefly in farming or the tillage of the soil may become a voluntary bankrupt, but cannot be adjudicated an involuntary bankrupt.<sup>18</sup>

### § 62. Indians.

Citizenship is not a prerequisite to the adjudication of one a bankrupt, but it is only necessary that he be a person with the necessary residence or domicile. While an Indian is a person within the meaning of the constitution and laws of the United States,<sup>19</sup> a court of bankruptcy would certainly have no jurisdiction over one who retained his nomadic life and tribal relations. Furthermore, all agreements or contracts for the payment or delivery of money or other thing of value made by an Indian, without compliance with the statute as to approval by the Secretary of the Interior and Commissioner of Indian Affairs, are absolutely null and void,<sup>20</sup> and subject the other party to a severe penalty.<sup>21</sup> Hence, a claim against an Indian for a debt contracted in contravention of this statute could not support an involuntary petition and would not be the basis of a voluntary petition. But an Indian who has become a citizen is equally liable as any other person to the provision of the law. Where, however, an Indian has not become a citizen but has adopted the habits and manners of civilized people, and such an agreement has been approved in conformity with the statute, a court of bankruptcy would have jurisdiction so far as such claim or claims only are concerned, and which would support a voluntary petition, or an involuntary petition if sufficient in amount, but to that extent only,<sup>22</sup> as the weight of authority supports the right of an Indian off his reservation to institute proceedings in the United States courts.<sup>23</sup>

### § 63. Infants.

If a minor is liable for his contracts, or for what are commonly understood to be his debts, as for necessities, judgments

18—See *post*, § 95.

19—U. S. v. Crook, 5 Dill. 453, Art. 1, Const. § 2; Elk v. Wilkins, 112 U. S. 112, 28 L. ed. 650.

20—U. S., R. S. § 210.

21—U. S., R. S. § 2105.

22—See *In re Rennie*, 1 N. B. N. 335, 2 A. B. R. 182; *In re Russie*, 96 Fed. 608, 3 A. B. R. 6.

23—*Fellows v. Blacksmith*, 19 Howard 366, 15 L. ed. 684; *Elk v. Wilkins*, 112 U. S. 112, 28 L. ed. 650.

in actions for torts, and the like, he is included within the provisions of the bankrupt act,<sup>24</sup> at least as to voluntary bankruptcy. A debt contracted by him during infancy may be acknowledged on reaching his majority when it would support a petition in bankruptcy. An infant member of a partnership cannot join in a voluntary petition by the firm.<sup>25</sup>

#### § 64. Insane persons.

As a lunatic, or person non compos mentis, is unable to perform the duties and assume the burden and obligations imposed, which accompany the benefits to be derived from the law, neither he nor his committee or guardian would be authorized to file a voluntary petition.<sup>26</sup> But if the bankrupt becomes non compos mentis after the filing of the petition, the proceedings are conducted and concluded the same as though he had not become insane.<sup>27</sup>

#### § 65. Married women.

Formerly married women were only in a very restricted way capable of contracting debts and so were not included within the bankruptcy laws, but the married women acts have now generally emancipated them from such restrictions. Wherever and to whatever extent they may contract debts, there and to that extent they are within the present act, and may become voluntary bankrupts or be made involuntary bankrupts.<sup>28</sup>

### B. INVOLUNTARY BANKRUPTS

#### § 66. Historical.

Though English bankruptcy acts were in existence from the time of Henry VIII, they applied only to traders until 1860, when they were extended to other persons.

The original American act, that of 1800,<sup>29</sup> applied only to traders, bankers, brokers and underwriters. The act of 1841<sup>30</sup>

24—In re Brice, 1 N. B. N. 310, 2 A. B. R. 197, 93 Fed. 942; In re Duguid, 100 Fed. 274, 2 N. B. N. R. 607, 3 A. B. R. 794; see In re Penzansky, 8 A. B. R. 99; In re Walrath, 175 Fed. 243, 24 A. B. R. 541.

25—See *post*, § 88.

26—In re Eisenberg, 117 Fed. 786, 8 A. B. R. 551.

27—See *post*, Chap. XI.

28—See cases, *post*, § 91.

29—2 Stat. at L. 19, c. 19.

30—5 Stat. at L. 440, c. 9.

added merchants. The act of 1867<sup>31</sup> applied to all persons guilty of certain acts of bankruptcy as well as to bankers, merchants, and traders, and to all money, business or commercial corporations or joint-stock companies. The original act of 1898 provided that: "Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of one thousand dollars or over," as well as private bankers, might be adjudged involuntary bankrupts. The amendment of 1903 added mining corporations.

In 1910 the whole act was again changed very materially as to corporations by an amendment which provided that: "Any natural person, except a wage-earner or a person engaged chiefly in farming or tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt."<sup>32</sup>

### § 67. Amount of assets and liabilities.

To authorize an adjudication in involuntary proceedings, the amount of debts owed by the debtor must equal or exceed one thousand dollars. A "debt" is defined by the act as any debt, demand or claim provable in bankruptcy.<sup>33</sup>

The amount of debts owing is to be computed as of the date of the commission of the act of bankruptcy, and the fact that by the assent of creditors to a general assignment constituting the act of bankruptcy the amount of actual indebtedness is reduced below one thousand dollars is immaterial.<sup>34</sup> It is not necessary to an adjudication that the alleged bankrupt have any non-exempt assets.<sup>35</sup>

### § 68. Burden of proof.

The burden of proof is upon the petitioners to prove that the alleged bankrupt was engaged principally in a business render-

31—14 Stat. at L. 517, c. 176; Bankruptcy Act of 1867, § 37.

32—Act of 1898, § 4b as amended June 25, 1910.

33—Act of 1898, § 1 (11).

34—In re Jacobson, 181 Fed. 870, 24 A. B. R. 927.

35—In re Ceballos & Co., 161 Fed. 445, 20 A. B. R. 459; In re Pinson, 180 Fed. 787, 24 A. B. R. 804.

ing him subject to adjudication,<sup>36</sup> and was not within the classes expressly excepted from the operation of the act.<sup>37</sup>

### § 69. Aliens.

An alien may be adjudged an involuntary bankrupt.<sup>38</sup> To give jurisdiction in an involuntary proceeding there need be neither residence, domicile nor place of business, but it is only necessary that the debtor has committed an act of bankruptcy and has property within the jurisdiction of the court of bankruptcy or that he has been adjudged bankrupt by a court of competent jurisdiction without the United States and has property within the United States.

### § 70. Banks and bankers.

National banks and banks incorporated under the state and territorial laws cannot be adjudged involuntary bankrupts under this law, but their liquidation when insolvent is expressly provided for by the United States, state and territorial laws.<sup>39</sup>

The laws of the United States provide that, when any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section 5239 of the Revised Statutes of the United States, and when any creditor of any national banking association shall have obtained a judgment against it in any court of record, on proper showing, or whenever the comptroller of currency shall become satisfied of the insolvency of a national banking association, he may, after due examination of the affairs, in either case, appoint a receiver, who shall proceed to close up such association and enforce the personal liability of the stockholders, as provided for in section 5234 of the Revised Statutes of the United States.<sup>40</sup>

The various states and territories wherein state and territorial

36—Walker Roofing, etc., Co. v. Merchant & Evans Co., 173 Fed. 771, 23 A. B. R. 185; Philpot v. O'Brien, 126 Fed. 167, 11 A. B. R. 205, aff'g 121 Fed. 139, 10 A. B. R. 424; In re Hudson River Electric Power Co., 173 Fed. 934, 23 A. B. R. 191, aff'd 183 Fed. 701, 25 A. B. R. 504.

37—In re Leland, 185 Fed. 830, 25 A. B. R. 209; In re Duke & Son, 28 A. B. R. 195.

38—In re Goodfellow, 2 N. B. R. 114, 1 How. 510, Fed. Cas. No. 5536.

39—Smith v. Mfr. Nat. Bank, 9 N. B. R. 122, Fed. Cas. No. 13076; In re Manufacturers Nat. Bank, Fed. Cas. No. 9051, 5 Biss. 499.

40—See Act of June 30, 1876, 1 Supp. R. S. 107, c. 156, as amended by Act of August 3, 1892, 2 Supp. R. S. 63, c. 360, and by Act of March 2, 1897, 2 Id. 565, c. 354.

banks have been organized have prescribed special provisions of law applicable to such institutions on becoming insolvent, and providing for their liquidation.<sup>41</sup>

The act as it read prior to the amendment provided that private bankers could be adjudged involuntary bankrupts. While such provision is not to be found in the amended law, yet, private bankers are not within the exceptions contained therein, and may be adjudicated. A "private banker" is a person or firm, engaged in banking without having special privileges or authority from the state.<sup>42</sup> The term has a definite signification and has been held to apply to individuals or to a firm only, and not to comprehend a corporation. Accordingly a corporation could not be adjudged a bankrupt as a "private banker,"<sup>43</sup> and the same has been held true of an unincorporated banking company.<sup>44</sup>

## § 71. Corporations prior to amendment of 1910.

### § 72. — In general.

Under the law as it existed prior to the amendment of 1910, a corporation could not become a voluntary bankrupt, but if engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, it could be adjudged an involuntary bankrupt. The term corporation as used comprehended all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and included limited or other partnership associations

41—Under the Act of 1867 it was held that the court had no jurisdiction to adjudge a national bank bankrupt for suspension of payments (*Smith v. Mfr. Nat. Bk.*, 9 N. B. R. 122, Fed. Cas. No. 13076); but that it might adjudge private bankers involuntary bankrupts, the bank being a private corporation, though its object was of a public nature and the government shares with the corporators in the stock. (*Sweatt v. Boston, etc., R. R.*, 5 N. B. R. 234, 3 Cliff. 339, Fed. Cas. No. 13684). An incorporated society doing a general banking business, which had ceased in 1862 on account of the war and resumed in 1865 for the purpose of

liquidation only, but was hampered by stay laws and adjudged a bankrupt in 1872, was not to be regarded as a bank or trader as against persons with whom settlements were made within four months of bankruptcy. (*Harmanson, Ass. v. Bain et al.*, 15 N. B. R. 173, 1 Hughes, 188 Fed. Cas. No. 6072.)

42—*People v. Doty*, 80 N. Y., 225, 228; *Perkins v. Smith*, 116 N. Y. 441, 448.

43—*In re Surety & Guarantee Co. Trust Co.*, 9 A. B. R. 129; see *Davis v. Stevens*, 104 Fed. 235, 4 A. B. R. 763.

44—*Burkhart v. German-American Bank*, 137 Fed. 958, 14 A. B. R. 222.



organized under laws making the capital subscribed alone responsible for the debts of the association.<sup>45</sup> The fact that the language of the act of 1898 was originally much narrower than that of the act of 1867 which applied to "all moneyed, business and commercial corporations and joint stock companies," and the fact that it was amended in 1903 by inserting the word "mining" was relied on by the courts as showing an intent on the part of congress that the words of the act should be construed in their ordinary significance and not extended beyond the plain language of the act.<sup>46</sup> The supreme court, however, held that doubtful words and terms should be given a liberal rather than a narrow meaning.<sup>47</sup>

The act referred to the time of the filing of the petition and a reasonable time prior thereto, and not to some prior time in the history of the corporation,<sup>48</sup> though it was held that where a corporation had been engaged in one of the enumerated pursuits it could be proceeded against in bankruptcy regardless of the period of time between its cessation of operation and the filing of the petition in bankruptcy, and regardless of the fact that the claims of the petitioning creditors did not arise during the period in which the corporation was so engaged.<sup>49</sup>

What constituted the chief or principal occupation of a corporation where it was engaged in more than one kind of business was so largely a question of fact that it was necessary to determine each case upon the particular facts and circumstances thereof.<sup>50</sup> The purpose of the corporation as expressed by its charter was held to be of no consequence except in so far as it had a bearing upon the business in which it was actually

45—Act of 1898, § 1 (6). In re Hercules Atkin Co., Ltd., 133 Fed. 813, 13 A. B. R. 369.

46—White Mountain Co. v. Morse & Co., 127 Fed. 643, 11 A. B. R. 633, aff'g 127 Fed. 180, 11 A. B. R. 491; In re Concord Motor Car Co., 173 Fed. 445, 23 A. B. R. 73; First Nat. Bank of Wilkesbarre v. Wyoming Valley Ice Co., 136 Fed. 466, 14 A. B. R. 448; Zugalla v. International Mercantile Agency, 142 Fed. 927, 16 A. B. R. 67, rev'g 13 A. B. R. 725; In re Wentworth Lunch Co., 159 Fed. 413, 20 A. B. R. 29; Walker Roof-

ing, etc., Co. v. Merchant & Evans Co., 173 Fed. 771, 23 A. B. R. 185; In re Surety & Guarantee Trust Co., 121 Fed. 73, 9 A. B. R. 129.

47—Friday v. Hall & Kaul Co., 216 U. S. 449, 54 L. ed. 562, 23 A. B. R. 610, rev'g 158 Fed. 593, 19 A. B. R. 841.

48—In re Interstate Paving Co., 171 Fed. 604, 22 A. B. R. 572.

49—Robertson v. Union Potteries Co., 177 Fed. 279, 22 A. B. R. 121.

50—See In re Excelsior Cafe Co., 175 Fed. 294, 23 A. B. R. 701.

engaged,<sup>51</sup> and there was no judicial presumption that the corporate name of a corporation denoted the business in which it was principally engaged.<sup>52</sup> Accordingly, a water company empowered "to buy, sell, use and deal in water for power, manufacturing and hydraulic purposes" where it confined itself entirely to obtaining and furnishing water for cities and municipal boroughs and their inhabitants, was held not to be engaged principally in trading or mercantile pursuits.<sup>53</sup>

To determine in which pursuit the bankrupt was principally engaged, the volume of business done in each pursuit was considered and often held determining.<sup>54</sup> Where the statutes of the state permitted the corporation to be organized to carry on two distinct lines of business, one within the act and the other not within it, neither of which could be termed its principal business, and both of which stood on the same footing for the purpose of ascertaining what was its principal business, it was held that the corporation could not be adjudicated.<sup>55</sup>

A corporation must have been actively engaged in one of the pursuits enumerated before the commission of the act of bankruptcy. It was not sufficient that it was organized for the purpose of engaging therein,<sup>56</sup> or that it had authorized its directors to make and endeavor to get contracts.<sup>57</sup> However, the fact that a corporation had not done all of the acts which constituted the whole of its business did not prevent it from being engaged in that business. If it had begun upon the execution of a part of the work laid out, it was held to be engaged in

51—Walker Roofing, etc., Co. v. Merchant & Evans Co., 173 Fed. 771, 23 A. B. R. 185; In re Reisler Amusement Co., 171 Fed. 283, 22 A. B. R. 501; Columbia Iron Works v. National Lead Co., 127 Fed. 99, 11 A. B. R. 340; In re New York & New Jersey Ice Lines, 14 A. B. R. 61; In re Kingston Realty Co., 160 Fed. 445, 19 A. B. R. 845; rev'g 157 Fed. 299, 19 A. B. R. 465; Friday v. Hall & Kaul Co., 216 U. S. 449, 54 L. ed. 562, 23 A. B. R. 610, rev'g 158 Fed. 593, 19 A. B. R. 841; Toxaway Hotel Co. v. Smathers & Co., 216 U. S. 439, 54 L. ed. 558, 23 A. B. R. 626; In re Concord Motor Car Co., 173 Fed. 445, 23 A. B. R. 73; In

re Tontine Surety Co., 116 Fed. 401, 8 A. B. R. 421.

52—United States v. Freed, 179 Fed. 236, 25 A. B. R. 89.

53—In re N. Y. & Westchester Water Co., 2 N. B. N. R. 414, 98 Fed. 711, 3 A. B. R. 508.

54—See Toxaway Hotel Co. v. J. L. Smathers & Co., 216 U. S. 439, 54 L. ed. 558, 23 A. B. R. 622.

55—In re Humphery Advertising Co., 177 Fed. 187, 24 A. B. R. 41.

56—In re Toledo Portland Cement Co., 156 Fed. 83, 19 A. B. R. 117, rev'g 17 A. B. R. 375.

57—In re Coolidge Refrigerator & Car Co., 190 Fed. 908, 27 A. B. R. 209.

that business, although it had not proceeded far enough to do all the things which constituted its business.<sup>58</sup>

Nor would a temporary suspension of business deprive it of the character of a trading, mercantile, manufacturing or mining corporation.<sup>59</sup>

### § 73. — Trading corporations.

A "trader" is defined as one who makes it his business to buy merchandise or goods and chattels, and to sell the same again for the purpose of making a profit, the quantum of dealing being immaterial when the intention to deal generally exists,<sup>60</sup> as a baker, who buys flour and makes it into bread for sale,<sup>61</sup> a butcher,<sup>62</sup> a stair builder,<sup>63</sup> a corporation engaged in cutting ice, purchasing ice from third parties and selling same,<sup>64</sup> one engaged in the manufacture of lumber,<sup>65</sup> and the like. The buying and selling of grain, stock, bonds and other securities,<sup>66</sup> or the engaging in the insurance,<sup>67</sup> theatrical,<sup>68</sup> or hotel business,<sup>69</sup> and the like,<sup>70</sup> were held not trading pursuits within the meaning of the law.

58—In re Reisler Amusement Co., 171 Fed. 283, 22 A. B. R. 501; White Mountain Co. v. Morse, 127 Fed. 643, 11 A. B. R. 633, aff'g 127 Fed. 180, 11 A. B. R. 491; In re Duquesne Brew. Co., 177 Fed. 609, 24 A. B. R. 44; In re Bloomsburg Brewing Co., 172 Fed. 174, 22 A. B. R. 625.

59—In re Georgia Manufacturing & Public Service Co., 166 Fed. 964, 21 A. B. R. 878.

60—3 Camp. 233, Bouv. Law. Dict.; In re New York & Westchester Water Co., 98 Fed. 711, 3 A. B. R. 508; In re Surety & Guaranty Co., 9 A. B. R. 129; In re Cowles, 1 N. B. R. 42, Fed. Cas. No. 3297, 3 Starkie, 56, 2 Car. & P. 135, 1 Term R. 572; First Nat. Bank of Wilkesbarre v. Wyoming Valley Ice Co., 136 Fed. 466, 14 A. B. R. 448.

61—In re Cocks, 3 Ben. 260, Fed. Cas. No. 2933; In re Anketell, 19 N. B. R. 268, Fed. Cas. No. 394.

62—In re Bassett, 8 Fed. 266.

63—In re Garrison, 7 N. B. R. 287, 5 Ben. 430, Fed. Cas. No. 5254.

64—First Nat. Bank of Wilkesbarre v.

Wyoming Valley Ice Co., 136 Fed. 466, 14 A. B. R. 448. But see, In re New York & New Jersey Ice Lines, 147 Fed. 214, 16 A. B. R. 832, aff'g 14 A. B. R. 61.

65—In re Cowles, 1 N. B. R. 42, Fed. Cas. No. 3297.

66—In re Surety & Guaranty Co., 9 A. B. R. 129; In re Cleland, L. R. 2, Ch. App. 465.

67—In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., 96 Fed. 756, 2 A. B. R. 372.

68—In re Oriental Society, 104 Fed. 975, 5 A. B. R. 219.

69—In re United States Hotel Co., 134 Fed. 225, 13 A. B. R. 403; In re Barton Hotel Co., 12 A. B. R. 335.

70—The following were held under the Act of 1867 not to be included within the term "tradesmen" or "merchants": One who merely makes up the product of his own land (In re Chandler, 4 N. B. R. 213, 1 Lowell 478, Fed. Cas. No. 2591); a firm owning and operating a farm, the members of which owned stock in and were officers of a solvent manufacturing corporation (In re Stickney, 17

### § 74. — Mercantile corporations.

"Mercantile" is defined as pertaining to merchants, or the business of merchants,<sup>71</sup> a merchant being one whose business it is to buy and sell merchandise, including all those things merchants sell, either wholesale or retail, as dry goods, hardware, groceries, drugs, etc.;<sup>72</sup> or one who keeps a livery, or boards horses belonging to other persons;<sup>73</sup> a saloon-keeper who buys cigars and liquors in quantities and sells them at retail<sup>74</sup> or one whose business is the gathering of information and printing and publishing a book of ratings with reference to the standing of merchants.<sup>75</sup>

The terms "trading" or "mercantile pursuits" were restricted to dealing in the ordinary subjects of commerce, and incidental purchases or sales by a person not otherwise so engaged were held not to constitute such dealing. The court was held to have no jurisdiction of a corporation organized for the purpose of giving theatrical performances, and engaged chiefly in such business;<sup>76</sup> nor a club organized principally for social intercourse;<sup>77</sup> a real estate company;<sup>78</sup> a building and

N. B. R. 305, Fed. Cas. No. 13439); a person who owned oil lands which he divided into leaseholds and received rent in oil, however extensive his transactions and credits (In re Woods, 7 N. B. R. 126, Fed. Cas. No. 17990); one who sold a carriage, a slave, two pairs of horses, a piano, a lot of cigars, and some harness, for which he had contracted debts, in the absence of a showing that they had been bought for the purpose of sale (In re Rogers, 3 N. B. R. 139, 1 Lowell 423, Fed. Cas. No. 12001); a debtor who conducted a business on a cash basis and a considerable time prior to filing his petition had given it up, leaving nothing outstanding either as assets or debts (In re Keach, 3 N. B. R. 3, 1 Lowell 335, Fed. Cas. No. 7629); a stock and gold broker who was not a member of the stock exchange, but conducted his business through other brokers who were and who kept no books (In re Moss, 19 N. B. R. 132, Fed. Cas. No. 9877); or a common carrier (In re Union R. R. Co., 10 N. B. R. 178, Fed. Cas. No. 14376).

71—Webst. Dict., Toxaway Hotel Co. v. Smathers & Co., 216 U. S. 439, 54 L. ed. 558, 23 A. B. R. 626.

72—Bouv. Law Dict.

73—In re Morton Boarding Stables, 108 Fed. 791, 5 A. B. R. 736; In re Odell, 9 Ben. 209, Fed. Cas. No. 10426. Contra: Gallagher v. DeLancey Stables Co., 158 Fed. 381, 19 A. B. R. 801; In re Willis Cab & Automobile Co., 178 Fed. 113, 23 A. B. R. 593.

74—In re Sherwood, 17 N. B. R. 112; 9 Ben. 66, Fed. Cas. No. 12773. In re Barton Hotel Co., 12 A. B. R. 335.

75—In re Mutual Mercantile Agency, 111 Fed. 152, 6 A. B. R. 607.

Contra: Zugalla v. International Mercantile Agency, 142 Fed. 927, 16 A. B. R. 67, rev'g 13 A. B. R. 725.

76—In re Oriental Society, 104 Fed. 975, 5 A. B. R. 219; In re Reisler Amusement Co., 171 Fed. 283, 22 A. B. R. 501.

77—In re Fulton Club, 113 Fed. 997, 7 A. B. R. 670.

78—In re Altonwood Park Co., 160 Fed. 448, 20 A. B. R. 31; In re Kingston

loan corporation;<sup>79</sup> a corporation engaged in general stock, bond, grain and brokerage business;<sup>80</sup> a fire insurance company;<sup>81</sup> a laundry;<sup>82</sup> a saloon or restaurant;<sup>83</sup> a hotel;<sup>84</sup> a cold storage company;<sup>85</sup> a corporation authorized to buy, own and deliver merchandise, but which it never did own in fact;<sup>86</sup> or one engaged in the carriage by water of passengers.<sup>87</sup> It was held, however, that an incorporated sanatorium company conducting its business for profit, and not on charitable lines, was a corporation engaged principally in trading or mercantile pursuits and could be proceeded against in involuntary bankruptcy.<sup>88</sup>

### § 75. — Manufacturing corporations.

“Manufacturing” has no technical meaning and is not limited by the means used in making nor by the kind of product produced.<sup>89</sup>

To come within the provisions of the act as to manufacturers, it was not necessary that the corporation itself performed every operation with or upon the so-called raw material necessary to

Realty Co., 160 Fed. 445, 19 A. B. R. 845, rev'g 157 Fed. 299, 19 A. B. R. 465. Contra: In re Oregon Trust & Savings Bank, 156 Fed. 319, 19 A. B. R. 484.

79—In re The New York Building-Loan Banking Co., 127 Fed. 471, 11 A. B. R. 51.

80—See In re Moss, 19 N. B. R. 132, Fed. Cas. No. 9877; In re Surety & Guarantee Trust Co., 121 Fed. 73, 9 A. B. R. 129; Laker v. Stapely Co., 21 A. B. R. 303. Contra: In re Leighton & Co., 147 Fed. 311, 17 A. B. R. 275.

81—In re Moore & Muir Co., 173 Fed. 732, 23 A. B. R. 122; In re Cameron Town Mut. F., L. & N. Ins. Co., 96 Fed. 756, 2 A. B. R. 372. But see, In re Merchants' Ins. Co., 6 N. B. R. 43, 3 Biss. 162, Fed. Cas. No. 9441.

82—In re Steam Laundry Co. of Queens County, 24 A. B. R. 457; In re Eagle Steam Laundry Co., 184 Fed. 949, 25 A. B. R. 868; In re White Star Laundry Co., 117 Fed. 570, 9 A. B. R. 30.

83—In re U., S. Restaurant & Realty Co., 187 Fed. 118, 25 A. B. R. 915; In re

Excelsior Cafe Co., 175 Fed. 294, 23 A. B. R. 701; In re Wentworth Lunch Co., 159 Fed. 413, 20 A. B. R. 29. In re Chesapeake Oyster & Fish Co., 112 Fed. 960, 7 A. B. R. 173.

Contra: In re Barton Hotel Co., 12 A. B. R. 335.

84—Toxaway Hotel Co. v. Smathers & Co., 216 U. S. 439, 54 L. ed. 558, 23 A. B. R. 626; In re Barton Hotel Co., 12 A. B. R. 335.

Contra: Campbell v. Finck, 2 Duv. 107.

85—In re Philadelphia Freezing Co., 174 Fed. 702, 23 A. B. R. 508.

86—In re Tontine Surety Co., 116 Fed. 401, 8 A. B. R. 421.

87—In re Phila. & Lewes. Transp. Co., 114 Fed. 403.

88—In re San Gabriel Sanatorium Co., 1 N. B. N. 390, 2 A. B. R. 408, 95 Fed. 271.

89—Friday v. Hall & Kaul Co., 216 U. S. 449, 54 L. ed. 562, 26 L. R. A. (N. S.) 475, 23 A. B. R. 610, rev'g 158 Fed. 593, 19 A. B. R. 841.

produce the finished article, it being sufficient that it did any of the several acts necessary to produce the manufactured article in its completed form.<sup>90</sup> A corporation was held to be engaged in manufacturing though the bankruptcy proceedings were commenced before any manufactured articles were turned out in their final form.<sup>91</sup>

Thus it was held that a corporation which had purchased woodland was engaged in the manufacture of paper though no paper had actually been produced,<sup>92</sup> and that a corporation chartered to manufacture malt liquors, having built a brewery, was engaged in manufacturing, though it never began to brew.<sup>93</sup> A temporary suspension of business due to a lack of demand for the article manufactured did not prevent manufacturing from being the principal business of a corporation also engaged in other pursuits.<sup>94</sup>

The term manufacturer was held to include building and construction companies;<sup>95</sup> a corporation engaged in building ships;<sup>96</sup> a corporation engaged in installing heat and power plants, constructing conduits, waterworks and sewers;<sup>97</sup> a laundry;<sup>98</sup> and a fish packing company.<sup>99</sup> On the other hand, a cold storage corporation,<sup>1</sup> a corporation generating electricity,<sup>2</sup>

90—In re Troy Steam Laundering Co., 132 Fed. 266, 13 A. B. R. 97.

91—White Mountain Paper Co. v. Morse, 127 Fed. 643, 11 A. B. R. 633, aff'g 127 Fed. 180, 11 A. B. R. 491.

92—White Mountain Paper Co. v. Morse, 127 Fed. 643, 11 A. B. R. 633, aff'g 127 Fed. 180, 11 A. B. R. 491.

93—In re Duquesne Brew. Co., 177 Fed. 609, 24 A. B. R. 44; In re Bloomberg Brewing Co., 172 Fed. 174, 22 A. B. R. 625.

94—In re Georgia Manufacturing & Public Service Co., 166 Fed. 964, 21 A. B. R. 878.

95—Friday v. Hall & Kaul Co., 216 U. S. 449, 54 L. ed. 562, 26 L. R. A. (N. S.) 475, 23 A. B. R. 610, rev'g 158 Fed. 593, 19 A. B. R. 841; In re First Nat. Bank of Belle Fourche, 152 Fed. 64, 18 A. B. R. 265; In re Rutland Realty Co., 157 Fed. 296, 19 A. B. R. 546; In re Church Const. Co., 157 Fed. 298, 19 A. B. R. 549.

Contra: Walker Roofing, etc., Co. v.

Merchant & Evans Co., 173 Fed. 771, 23 A. B. R. 185; In re Kingston Realty Co., 160 Fed. 445, 19 A. B. R. 845, rev'g 157 Fed. 299, 19 A. B. R. 465; In re MacNichol Construction Co., 134 Fed. 979, 14 A. B. R. 188; Butt v. MacNichol Const. Co., 140 Fed. 840, 15 A. B. R. 515, aff'g 134 Fed. 979, 14 A. B. R. 188; In re Hill Co., 148 Fed. 832, 17 A. B. R. 517.

96—Columbia Irons Works v. National Lead Co., 127 Fed. 99, 64 L. R. A. 645, 11 A. B. R. 340.

97—United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 24 A. B. R. 726.

98—In re Troy Steam Laundering Co., 132 Fed. 266, 13 A. B. R. 97.

99—In re Alaska American Fish Co., 162 Fed. 498, 20 A. B. R. 712.

1—In re Philadelphia Freezing Co., 174 Fed. 702, 23 A. B. R. 508.

2—In re Hudson River Electric Power Co., 173 Fed. 934, 23 A. B. R. 191, aff'd 183 Fed. 701, 33 L. R. A. (N. S.) 454, 25 A. B. R. 504. Contra: In re Charles

a corporation engaged chiefly in repairing automobiles,<sup>3</sup> or in renting moving picture films,<sup>4</sup> or in soliciting and placing advertisements,<sup>5</sup> and a restaurant company,<sup>6</sup> were held not to be manufacturing companies.

### § 76. — Mining corporations.

Mining corporations were included, by the amendatory act of 1903, in the class of those who could be adjudged involuntary bankrupts. Prior to that date it was generally held that since they were not engaged in manufacturing, trading or mercantile pursuits they were excepted from the provisions of the law.<sup>7</sup> The term "mining" was held to include quarrying.<sup>8</sup>

### § 77. — Printers and publishers.

The decisions that the publishers of a daily paper and the proprietors of a book and job printing office were not manufacturers within the meaning of the act of 1867<sup>9</sup> were not controlling under the original act of 1898, since such corporations were specifically included within the later law and could now be proceeded against in involuntary bankruptcy.<sup>10</sup> A mercantile agency was held not to be engaged in publishing.<sup>11</sup>

### § 78. — Railroads.

Railroads and transportation companies did not come within any of the classes specified in original act of 1898 and accordingly could not be adjudicated involuntary bankrupts.<sup>12</sup>

Town Light & Power Co., 183 Fed. 160, 25 A. B. R. 68.

3—In re Concord Motor Car Co., 173 Fed. 445, 23 A. B. R. 73.

4—In re Imperial Film Exchange, 198 Fed. 80, 28 A. B. R. 815.

5—In re Humphery Advertising Co., 177 Fed. 187, 24 A. B. R. 41; In re Snyder & Johnson Co., 133 Fed. 806, 13 A. B. R. 325.

6—In re Wentworth Lunch Co., 159 Fed. 413, 20 A. B. R. 29.

7—In re Keystone Coal Co., 109 Fed. 872, 6 A. B. R. 377, reversing 3 N. B. N. R. 349; In re Woodside Coal Co., 105 Fed. 56, 5 A. B. R. 186; In re Elk Park Mining and Milling Co., 101 Fed. 422, 4 A. B. R. 131; In re Rollins Gold & Silver Mining Co., 102 Fed. 982, 4 A. B. R. 327; In re Chicago Joplin Lead & Zinc

Co., 104 Fed. 67; McNamara v. Helena Coal Co., 5 A. B. R. 48; In re Tecopa Mining & Smelting Co., 110 Fed. 120, 6 A. B. R. 250; Herron Co. v. Superior Court, 8 A. B. R. 492.

8—In re Matthews Consol. State Co., 144 Fed. 737, 16 A. B. R. 407, aff'g 144 Fed. 724, 16 A. B. R. 350; In re Quincey Granite Quarries Co., 147 Fed. 279, 16 A. B. R. 823.

9—In re Kenyon et al., 6 N. B. R. 238; In re The Capital Pub. Co., 18 N. B. R. 319.

10—See In re Mutual Mercantile Agency, 111 Fed. 152, 6 A. B. R. 607.

11—Zugalla v. International Mercantile Agency, 142 Fed. 927, 16 A. B. R. 67, rev'g 13 A. B. R. 725.

12—In re Philadelphia & Lewes Transp. Co., 114 Fed. 403; N. Y. & West-

## § 79. Corporations subsequent to amendment of 1910.

### § 80. — In general.

The amendatory act of 1910 renders "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over" subject to the provisions of the act. The language is similar to that employed in the act of 1867 and decisions under that act now become authoritative, though it should be observed that the act of 1867 did not except "municipal, railroad, insurance, or banking" corporations. The amendment of 1910 is not retroactive.<sup>13</sup>

The word "business" is more extensive than the word "trading,"<sup>14</sup> and a corporation carrying on and pursuing any lawful business defined by its charter, and clothed with the power to do so, for the sake of gain, may be termed a "business" corporation.<sup>15</sup> The words "money, business, or commercial corporations" may be said to embrace all those classes of corporations that deal in or with money or property in the transactions of money, business, or commerce, for pecuniary gain, and not for religious, charitable or educational purposes.<sup>16</sup> A corporation engaged in leasing its own property and collecting rents therefor is a business corporation,<sup>17</sup> as is a corporation engaged in farming.<sup>18</sup>

### § 81. — Quasi public corporations.

While it has been held that a public service corporation is not amenable to this act on the ground of public policy,<sup>19</sup> this seems doubtful in view of the express terms of the act which excludes

chester Water Co., 2 N. B. N. R. 414, 98 Fed. 711, 3 A. B. R. 508; Cong. Rec., Vol. 31, p. 6247.

13—In re United States Restaurant & Realty Co., 187 Fed. 118, 25 A. B. R. 915.

14—Adams v. B. H. & E. R. Co., Fed. Cas. No. 47, Holmes, 30; Harris v. Amery, L. R. 1 C. P. 148, 154.

15—Rankin v. Florida A. & G. C. R. Co., Fed. Cas. No. 11, 567, 1 N. B. R. 647; Alabama & C. R. Co. v. Jones, Fed. Cas. No. 126, 5 N. B. R. 97.

16—Adams v. Boston, H. & E. R. Co., Fed. Cas. No. 47, Holmes, 30. And see,

In re Radke Co., 193 Fed. 735, 27 A. B. R. 950; Sweatt v. Boston, H. & E. R. Co., 23 Fed. Cas. No. 13,684; Winter v. No. Pac. Ry. Co., 2 Dill 487, Fed. Cas. No. 17,890; Bump on Bankruptcy (9th Ed.) 778.

17—In re Radke Co., 193 Fed. 735, 27 A. B. R. 950.

18—Harris v. Amery, L. R. 1 C. P. 148, 154.

19—See In re Hudson River Electric Power Co., 173 Fed. 934, 23 A. B. R. 191, aff'd, 183 Fed. 701, 33 L. R. A. (N. S.) 454, 25 A. B. R. 504.



such corporations only if they are "municipal" or "railroad" corporations.<sup>20</sup> However, under the act of 1867, incorporated steamship companies and canal corporations, as well as railroad<sup>21</sup> and insurance<sup>22</sup> companies were held not amenable, and the same reason would perhaps now apply to public service corporations not within the technical definition of a municipal or railroad company.

A municipal corporation, strictly speaking, is one whose whole interest belongs to the government; or which is created for the administration of political or municipal power.<sup>23</sup>

### § 82. — Business conducted through agent.

Where a business is transacted, either purposely or by acquiescence, in the name of a corporation, the rule that one who credits an agent, who, by consent or with the knowledge of the principal, is transacting the principal's business in his own name, that is, the name of the agent, may ordinarily pursue for payment the agent, or the equitable owner, applies and the creditors have the option to proceed against the corporation.<sup>24</sup>

### § 83. — Pendency of proceedings to dissolve.

A corporation which has committed an act of bankruptcy cannot escape and avoid the jurisdiction of the bankruptcy court by instituting a proceeding in a state court for its dissolution.<sup>25</sup> A proclamation by the governor of a state repealing the charter of a corporation for nonpayment of taxes does not work a dis-

20—See *Adams v. Boston, H. & E. R. Co.*, Fed. Cas. No. 47, Holmes, 30.

21—*New Orleans S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244; *Adams v. B. H. & E. R. Co.*, Fed. Cas. No. 47, Holmes, 30; *Sweatt v. Boston, etc., Co.*, 5 N. B. R. 234, 3 Cliff. 339, Fed. Cas. No. 13684; *In re Cal. Pac. R. R. Co.*, 11 N. B. R. 193, 3 Sawy. 240, Fed. Cas. No. 2315; *Winter v. I. M. & N. Ry. Co.*, 7 N. B. R. 289, 2 Dill. 487, Fed. Cas. No. 17890; *In re Southern Minn. Ry. Co.*, 10 N. B. R. 86, Fed. Cas. No. 13138; *In re Opelousas & Great West R. R. Co.*, 3 N. B. R. 31, Fed. Cas. No. 10547; *In re Ala. & Chatt. R. R. Co.*, 6 N. B. R. 107, 5 Blatch. 390, Fed. Cas. No. 124; *Rankin v.*

*Florida, etc., R. R. Co.*, 1 N. B. R. 196, Fed. Cas. No. 11567; *Ala. & Chatt. R. R. Co. v. Jones*, 5 N. B. R. 97, Fed. Cas. No. 126.

22—*In re Independent Ins. Co.*, Fed. Cas. No. 7017, 1 Holmes, 103; *In re Hercules Ins. Co.*, Fed. Cas. No. 6402, 6 Ben. 35; *In re Merchants Ins. Co.*, Fed. Cas. No. 9441, 3 Bess. 162.

23—*Adams & Boston, H. & E. R. Co.*, Fed. Cas. No. 47, Holmes, 30. See also *Sweatt v. Boston, H. & E. R. Co.*, Fed. Cas. No. 13,684, 3 Cliff. 339.

24—*J. W. Calnan Co. v. Doherty*, 174 Fed. 222, 23 A. B. R. 297.

25—*In re Adams & Hoyt Co.*, 164 Fed. 489, 21 A. B. R. 161.

solution thereof so as to prevent an administration of its estate in bankruptcy proceedings.<sup>26</sup>

#### § 84. — Admission of insolvency.

Like an individual, a corporation may admit its insolvency and a willingness to be adjudged bankrupt, but such act will not make the proceedings in effect voluntary.<sup>27</sup> However, under the act as it stood prior to 1910 it was doubtful whether an adjudication should be made on an involuntary petition alleging such facts on the admission of the directors where the petition, for instance, was filed by three creditors, one being the president of the corporation and the others acting under his direction, since it would in effect be the voluntary act of the corporation and appear to be an attempt to evade the law.<sup>28</sup>

An admission of insolvency and willingness to be adjudged bankrupt, as stated in letters to creditors signed by the president and authorized by a meeting of the majority of directors, will support a petition although some of the directors may not have had notice of the meeting.<sup>29</sup>

#### § 85. — Consent adjudication.

On a petition in involuntary bankruptcy against a corporation, there can be no adjudication or reference of the case by the clerk to the referee, on a written admission by the respondent of the acts of bankruptcy charged and a waiver of service and of the time for appearance, because creditors as well as the alleged bankrupt have the right to appear and plead to the petition within five days after the return day, and hence that day must be fixed by the issuance of a subpoena and the case must remain in the clerk's office until the five days have passed;<sup>30</sup> nor in any involuntary proceeding is a consent order sufficient to warrant adjudication of the debtor, nor will other parties than the one against whom the petition is filed be adjudicated unless included

26—In re Munger Vehicle Tire Co., 159 Fed. 901, 19 A. B. R. 785.

27—In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528. But see, In re New Amsterdam Motor Co., 180 Fed. 943, 24 A. B. R. 757.

28—In re Bates Mach. Co., 1 N. B. N. 135, 91 Fed. 625, 1 A. B. R. 129.

29—In re Marine Mach. & Conveyor Co., 91 Fed. 630, 1 N. B. N. 135, 1 A. B. R. 421. See, also, *ante*, §§ 52, 53. And see, In re Kenwood Ice Co., 189 Fed. 525, 26 A. B. R. 499.

30—In re L. Humbert Co., 100 Fed. 439.

in the petition, though they are connected with him as partners, parties in interest or otherwise.<sup>31</sup>

### § 86. Executors and administrators.

Except in pending cases<sup>32</sup> the act of 1898 does not appear to have contemplated the administration of decedents' estates in bankruptcy, but seems to have left their administration to the proper state tribunals. No provision appears to have been made for proceedings in bankruptcy, in the case of an executor, or like officer, authorized by the court appointing him to carry on decedent's business temporarily, becoming, as to such business, bankrupt. If the debtor died after committing the act of bankruptcy, proceedings cannot be instituted against the executor, or administrator, and his estate cannot be administered in bankruptcy,<sup>33</sup> but in a pending case, they may appear or be made parties to represent a deceased bankrupt. Executors appointed by will for the limited purpose of adjusting the testator's banking business would not come within the class of executorships designed to be administered under the bankrupt act.<sup>34</sup>

### § 87. Indians.

See Indians, ante, § 62.

### § 88. Infants.

An infant cannot be adjudged bankrupt in an involuntary proceeding.<sup>35</sup> And where one member of a partnership in such proceedings is an infant, an adjudication should be made against the partner, or partners, who are of age, and against the firm, and the petition dismissed without costs to the infant, with a specific statement that it is dismissed because of his infancy. Nor can an infant member of a partnership join in a voluntary petition by the firm or be included in an adjudication thereon.<sup>36</sup>

31—*Mahoney v. Ward*, 2 N. B. N. R. 538, 100 Fed. 278, 3 A. B. R. 770.

32—Act of 1898, § 8.

33—*In re Pierce*, 2 N. B. N. R. 979, 102 Fed. 977.

34—*Graves v. Winter*, 9 N. B. R. 357, Fed. Cas. No. 5710.

35—*In re Eidemiller*, 105 Fed. 595, 53

L. R. A. 118, 5 A. B. R. 570; *In re Ellenbecker*, 205 Fed. 396, 30 A. B. R. 537.

36—*In re Dunnigan*, 1 N. B. N. 528, 2 A. B. R. 628, 95 Fed. 428; *In re Duguid*, 100 Fed. 274, 2 N. B. N. R. 607, 3 A. B. R. 794; *Consult In re Derby*, 8 N. B. R. 106, 6 Ben. 232, Fed. Cas. No. 3815; *Farris v. Richardson*, 6 Allen, 118;

In the case of a debt incurred by an infant which could not be repudiated upon reaching his majority, it would be such a debt as would support an involuntary petition after he becomes of age, but it is doubtful whether it would before that period.

### § 89. Indorsers.

An indorser's liability on a note constitutes a debt which may be made the foundation of either voluntary or involuntary proceedings in bankruptcy;<sup>37</sup> but it has been held that a mere accommodation indorser cannot be adjudged bankrupt for failure to pay such paper,<sup>38</sup> though this seems questionable.

### § 90. Insane persons.

A court of bankruptcy will not take jurisdiction of a petition in involuntary bankruptcy against a person who is insane, or who prior to the filing of the petition has been formally so adjudged by a competent court and for whose person and estate a guardian has been appointed. A transfer of property by such person, if at the time wholly incapable of managing his business affairs, cannot be held an act of bankruptcy on which a petition in involuntary bankruptcy may be maintained by his creditors against such guardian's objections.<sup>39</sup> If, however, the bankrupt does not become insane until after the filing of the petition, it will have no effect upon the proceeding.<sup>40</sup>

### § 91. Married women.

A married woman cannot be adjudged a bankrupt where by the law of her domicile she is incapable of making a contract,<sup>41</sup> though in those states where she is authorized to contract, she may be, and there appears to be no reason why a partnership between a man and his wife may not be so adjudged.<sup>42</sup> The test

In re Smedley, 10 L. T. N. S. 432; In re Cotton, 2 N. Y. Leg. Obs. 370; In re Book, 3 McLean, 317.

37—In re Nicodemus, 3 N. B. R. 55, Fed. Cas. No. 10254.

38—In re Clemens, 9 N. B. R. 57, 2 Dill, 533, Fed. Cas. No. 2877.

39—In re Ward, 194 Fed. 174, 28 A. B. R. 29; In re Solomon & Carvel, 163 Fed. 140, 20 A. B. R. 488; In re Funk, 101 Fed. 244, 4 A. B. R. 96; comp. In

re Weitzel, 14 N. B. R. 466, 7 Biss. 289, Fed. Cas. No. 17365; In re Pratt, 6 N. B. R. 276, 2 Lowell, 96, Fed. Cas. No. 11371; In re Murphy, 10 N. B. R. 48, Fed. Cas. No. 9946; In re Eisenberg, 117 Fed. 786, 8 A. B. R. 551.

40—Act of 1898, § 8.

41—In re Goodman, 8 N. B. R. 380, 5 Biss. 401, Fed. Cas. No. 5540.

42—In re Kinkad, 7 N. B. R. 439, 3 Biss. 405, Fed. Cas. No. 7824.

is whether her contracts constitute an existing indebtedness under the state law, and it is immaterial that they cannot be enforced by a judgment in personam.<sup>43</sup> She may avail herself of her coverture to defeat debts in bankruptcy,<sup>44</sup> and a petition founded upon a debt evidenced by notes which do not show on their face an intention to bind her separate estate must allege that the notes were given for the benefit of her separate estate or else were given by her in the course of business if she be a trader.<sup>45</sup>

### § 92. Unincorporated companies.

The restriction of liability to involuntary proceedings to corporations of certain classes does not apply to unincorporated companies, and accordingly an unincorporated company may be adjudged bankrupt regardless of the nature of its business.<sup>46</sup>

### § 93. Exempt occupations.

#### § 94. — In general.

The act expressly provides that wage-earners and persons engaged chiefly in farming and tillage of the soil cannot be adjudged involuntary bankrupts.<sup>47</sup> The fact that the act of bankruptcy complained of is a general assignment for creditors does not render such person subject to adjudication.<sup>48</sup>

The exceptions in the act apply to partnerships,<sup>49</sup> but not to corporations.<sup>50</sup> The clause "engaged principally in manufacturing, etc.," in the original act of 1898, qualified "any corpora-

43—A married woman in Florida, having separate statutory property, and engaging in trade, buying and selling on her own account, but not a free dealer, can be adjudged a bankrupt. *MacDonald v. Tefft-Weller Co.*, 128 Fed. 381, 65 L. R. A. 106, 11 A. B. R. 800.

44—In re Slichter, 2 N. B. R. 107, Fed. Cas. No. 12943.

45—In re Howland, 2 N. B. R. 114, Fed. Cas. No. 6791; In re Collins, 10 N. B. R. 325, 3 Biss. 415.

46—Unincorporated fire insurance association may be adjudged bankrupt. In re Seaboard Fire Underwriters, 137 Fed. 987, 13 A. B. R. 722.

Unincorporated company doing a general banking business under a name not disclosing the identity of the members thereof is in effect a partnership and may be adjudged. *Burkhart v. German-American Bank*, 137 Fed. 958, 14 A. B. R. 222.

47—Act of 1898, § 4b.

48—*Olive v. Armour & Co.*, 167 Fed. 517, 21 L. R. A. (N. S.) 109, 21 A. B. R. 901.

49—*H. D. Still's Sons v. American Nat. Bank*, 209 Fed. 749, 31 A. B. R. 320.

50—In re The Lake Jackson Sugar Co., 11 A. B. R. 458, referee's report confirmed 129 Fed. 640.

tion" only, and did not prevent the adjudication of an individual because not engaged in one of the occupations specified.<sup>51</sup>

All of the debtor's activities and pursuits must be considered as a whole. No part of them may be ignored merely because they concern themselves with the affairs of a partnership of which the debtor is a member.<sup>52</sup> The fact that one engaged chiefly in farming is incidentally engaged in the business of a private banker does not make him subject to the act.<sup>53</sup>

The business in which the person was engaged at the time of the commission of the act of bankruptcy ordinarily determines his status, and not that in which he was engaged when the petition was filed,<sup>54</sup> or when his debts were incurred. It does not follow that the time when the debts accrued and the nature of the debts are wholly immaterial. If they accrued, largely or wholly, while the debtor was not in a business rendering him exempt from adjudication, that fact might be quite persuasive in determining his status.<sup>55</sup>

Some courts have gone even further and held that the status of the bankrupt is to be determined as of the period during which he was engaged in the business in which he contracted the debts of the petitioners, and acquired and owned the assets sought to be subjected to administration, where such period precedes the

51—*Cleage v. Laidley*, 149 Fed. 346, 17 A. B. R. 598.

52—*American Agricultural Chemical Co. v. Brinkley*, 194 Fed. 411, 27 A. B. R. 438.

53—*Couts v. Townsend*, 126 Fed. 249, 11 A. B. R. 126.

54—*Counts v. Columbus Buggy Co.*, 210 Fed. 748, 31 A. B. R. 312; *In re Leland*, 185 Fed. 830, 25 A. B. R. 209; *Flickinger v. First Nat. Bank of Vandalia*, 145 Fed. 162, 16 A. B. R. 678; *In re Hoy*, 137 Fed. 175, 14 A. B. R. 648; *In re Lockhardt*, 101 Fed. 807, 4 A. B. R. 307; See *In re Taylor*, 2 N. B. N. R. 929, 102 Fed. 728, 4 A. B. R. 515.

*Contra*, *In re United States Hotel Co.*, 134 Fed. 225, 68 L. R. A. 588, 13 A. B. R. 403.

A merchant, who commits an act of bankruptcy, may be adjudged a bankrupt on a petition duly filed by his

creditors within the statutory period thereafter, notwithstanding the fact that, after the act of bankruptcy, he abandons the business in which he had been engaged, and becomes chiefly occupied in farming and so continues to the filing of the petition. *In re Lockhardt*, 101 Fed. 807, 4 A. B. R. 307; *In re Mackey*, 110 Fed. 355, 6 A. B. R. 577.

One who incurs debts in non-exempt occupation, changes to an exempt occupation, and thereafter commits an act that in a non-exempt occupation would constitute an act of bankruptcy, is not subject to adjudication in involuntary proceedings by reason thereof, and of such debts still existing, or at all. *In re Folkstad*, 199 Fed. 363, 29 A. B. R. 77.

And see, *In re Leland*, 185 Fed. 830, 25 A. B. R. 209.

55—*In re Leland*, 185 Fed. 830, 25 A. B. R. 209.

time of the commission of the act of bankruptcy; this on the theory that such construction will prevent the bankrupt from incurring debts and acquiring assets in a non-exempt occupation, and then by ceasing to do business in such occupation and engaging in an exempt occupation, and thereafter committing an act of bankruptcy, defeat the operation of the law.<sup>56</sup>

That a person or corporation comes within an excepted class under the statute is not a personal privilege which can be waived or only be set up by the bankrupt in person, but the question is jurisdictional and may be raised by any creditor.<sup>57</sup>

What constitutes one a wage-earner or person engaged chiefly in farming or tillage of the soil is a question of fact,<sup>58</sup> and the finding of the referee concurred in by the district will not be disturbed upon appeal in the absence of clear mistake.<sup>59</sup> While the issue of whether the alleged bankrupt is a farmer or wage-earner may be submitted to a jury, neither party is entitled to a jury as of right, and its finding thereon is purely advisory.<sup>60</sup>

While the burden is ordinarily upon the petitioners to show that the bankrupt did not belong to an exempted class,<sup>61</sup> yet, when it clearly appears that the debtor several years prior to the act of bankruptcy lost his status as a farmer or wage-earner, the burden rests upon the contestants to show that he has regained the exempt status.<sup>62</sup>

### § 95. — Farmers and tillers of the soil.

A person engaged chiefly in farming is one whose chief occupation or business is farming, and one's chief occupation or business, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature and which he deems of paramount importance to his welfare and

56—*In re Burgin*, 173 Fed. 726, 22 A. B. R. 574; *In re Naroma Chocolate Co.*, 178 Fed. 383, 24 A. B. R. 154. And, see, *In re Wakefield*, 182 Fed. 247, 25 A. B. R. 118.

57—*In re Taylor*, 102 Fed. 728, 2 N. B. N. R. 929, 4 A. B. R. 515.

58—*American Agricultural Chemical Co. v. Brinkley*, 194 Fed. 411, 27 A. B. R. 438.

59—*Stephens v. Merchants' Nat. Bank*, 154 Fed. 341, 18 A. B. R. 560.

60—*In re Wakefield*, 182 Fed. 247, 25 A. B. R. 118; *Carpenter v. Cudd*, 174 Fed. 603, 23 A. B. R. 463.

61—*In re Leland*, 185 Fed. 830, 25 A. B. R. 209; *In re Duke & Son*, 28 A. B. R. 195.

62—*In re Leland*, 185 Fed. 830, 25 A. B. R. 209.

on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small.<sup>63</sup>

In the expression "persons engaged chiefly in farming or the tillage of the soil," the latter phrase does not limit the former. The term farming is not synonymous with tillage of the soil, and to constitute one a farmer within the meaning of the act it is not essential that he in person till the soil, or that his operations should be limited to agricultural planting, sowing and cultivation of the soil.<sup>64</sup> Accordingly it is held that one chiefly engaged in stock farming is included within the exception though he cannot be said to be a tiller of the soil.<sup>65</sup> One who keeps a dairy as an incident to his farming operations may not on that account be adjudicated, if his principal business is that of farming.<sup>66</sup> A truck farmer who sells his products by cart the same from door to door is a tiller of the soil.<sup>67</sup>

A retired farmer renting his farm on shares is not exempt,<sup>68</sup> and where the farm upon which the alleged bankrupt had been engaged in farming belonged to his wife and was leased to a third party shortly before the commission of the act of bankruptcy, an adjudication was held proper.<sup>69</sup>

The wife of a farmer, who assists him in the usual and customary way by keeping the house and doing the dairy work, is not by reason of that fact a farmer, and the added facts that the title to the farm is in her, and that she rents adjacent land in her own name to be worked as part of the farm, does not operate to make her a farmer where it appears that the arrange-

63—In re Mackey, 110 Fed. 355, 6 A. B. R. 577; In re Drake, 114 Fed. 229, 8 A. B. R. 137.

64—Bank of Dearborn v. Matney, 132 Fed. 75, 12 A. B. R. 482; In re Rugsdale, 16 N. B. R. 215, Fed. Cas. No. 12123.

65—One whose principal occupation is raising live stock and producing fodder for feeding them by cultivation of the soil, is chiefly engaged in farming. In re Dwyer, 184 Fed. 880, 25 A. B. R. 913; Hoffschlaeger Company, Ltd., v. Young Nap, *alias* Young Lap, 12 A. B. R. 510; In re Rugsdale, 16 N. B. R. 215, Fed. Cas. No. 12123.

One whose chief occupation is trading cattle, using his lands as a mere feed-

ing station, relying upon purchased feed for preparing the cattle for market much more than on the products of his farm, held not chiefly engaged in farming or tillage of the soil. Bank of Dearborn v. Matney, 132 Fed. 75, 12 A. B. R. 482; In re Brown, 132 Fed. 706, 13 A. B. R. 140.

66—Gregg v. Mitchell, 166 Fed. 725, 20 L. R. A. (N. S.) 148, 21 A. B. R. 659.

67—In re Terry, 208 Fed. 162, 30 A. B. R. 631.

68—In re Leland, 185 Fed. 830, 25 A. B. R. 209.

69—Hoffschlaeger Company, Ltd., v. Young Nap, *alias* Young Lap, 12 A. B. R. 521.



ment was made as a cover and to keep the property from the creditors of her husband, who was the actual owner.<sup>70</sup>

### § 96. — Wage earners.

This term comprehends any one who works for wages, salary, or hire, at a rate not to exceed \$1,500 per annum;<sup>71</sup> and while such a person may become a voluntary bankrupt, he cannot be adjudicated an involuntary bankrupt.<sup>72</sup> Where a salesman obtains an expense allowance above his salary, such allowance, in so far as it defrays living expenses which would otherwise necessarily be paid by the salesman, must be counted in determining whether the total compensation exceeds \$1,500.<sup>73</sup> While the act does not expressly provide that a person's chief occupation must be that of a wage-earner to come within its exceptions, it is held that a manufacturer or trader does not come within the definition of a wage-earner because incidentally earning wages in another occupation.<sup>74</sup> So, the president and owner of the majority of stock of a corporation who receives in dividends an amount much in excess of his salary and who has other means of obtaining a livelihood cannot be said to be a wage-earner because his salary as president of the corporation is less than \$1,500 per year.<sup>75</sup>

The work done must be such as is compensated by wages, salary or hire, other earnings not being put in the same category.<sup>76</sup> A teamster who uses his horses and wagons in performing services for which he is paid by the day is a wage-earner,<sup>77</sup> but a person giving music lessons at a stated price per hour is not.<sup>78</sup>

A married woman doing ordinary house work does not become a wage-earner by reason of the fact that at times she performs services for third persons.<sup>79</sup>

70—In re Johnson, 149 Fed. 864, 18 A. B. R. 74.

71—Act of 1898, § 1 (27).

72—In re Pilger, 118 Fed. 206.

73—In re Hurley, 204 Fed. 126, 29 A. B. R. 567.

74—In re Naroma Chocolate Co., 178 Fed. 383, 24 A. B. R. 154.

75—Carpenter v. Cudd, 174 Fed. 603, 23 A. B. R. 463.

76—First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245, 20 A. B. R. 439.

77—In re Yoder, 127 Fed. 894, 11 A. B. R. 445.

78—First Nat. Bank of Wilkes-Barre v. Barnum, 160 Fed. 245, 20 A. B. R. 439.

79—In re Remaley, 23 A. B. R. 29.

## C. BANKRUPTCY OF PARTNERSHIP AND MEMBERS THEREOF

## § 97. Jurisdiction in general.

A partnership is regarded in the bankruptcy law as a legal entity capable of being adjudicated a bankrupt. That its members reside in different districts is no objection to the adjudication of a firm.<sup>80</sup> The court, having jurisdiction over one partner, has jurisdiction to adjudge his firm bankrupt though it has not been in existence three months.<sup>81</sup>

## § 98. What is a partnership.

A partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. But partnership and community of interest, independently considered, are not always the same thing; for the first as between the partners themselves, is founded upon the copartnership agreement which prescribes the relation they bear to each other, and of itself creates the community of interest; but the last may exist, notwithstanding there has been no agreement between the parties. Part owners of a ship, for example, are uniformly treated as tenants in common, and not as partners, although it cannot be denied that there is a community of interest between them in every part of the vessel, and each is entitled to a share of her earnings in proportion to his individual interest, and must also share the loss. Joint owners of merchandise may consign it for sale abroad to the same consignee; and if each gives separate instructions for his own share, it is well settled law that these interests are several, and that they are not to be treated as partners in the adventure.<sup>82</sup>

While every partnership is founded on a community of interest, it is, nevertheless, incorrect to suppose that every community of interest necessarily constitutes the relation of partnership within the meaning of the commercial law. Whenever it appears that there is a community of interest in the capital

80—In re Schwartz, 204 Fed. 326, 30 A. B. R. 344.

82—Berthold v. Goldsmith, 24 How. 536, 16 L. ed. 762.

81—In re Mitchell & Co., 211 Fed. 778, 31 A. B. R. 814.

stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is so as to third parties. The authorities are uniform, however, that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties. Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention.<sup>83</sup> It has also been held that where it is known that a person augments the capital of a partnership and enhances its credit he cannot be exempted from liability for its debts.<sup>84</sup>

Actual participation in the profits as principal creates a partnership as between the parties and third persons,<sup>85</sup> whatever may be the intention in that behalf, and that is so although the dormant partner is not liable for the loss beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment.<sup>86</sup> Actual partnership, as between a creditor and the dormant partner, is considered by the law to exist where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to the partnership relation.<sup>87</sup>

The mere possession by a person, without consideration, of goods sold a firm, does not prove him a partner.<sup>88</sup>

83—*Berthold v. Goldsmith*, 24 How. 536, 16 L. ed. 762.

84—*Wallerstein v. Ervin*, 112 Fed. 124, 7 A. B. R. 256, citing *Ex parte Sillitoe*, 1 Glyn & J. 374, *Ex parte Hargreaves*, 1 Cox, Ch. 440, *In re Mason* (1899), 1 Q. B. 810, *Stratton v. Tabb*, 8 Ill. App. 225, and others.

85—*In re Francis*, 7 N. B. R. 359, 2 Sawy. 286; *In re Blumenthal*, 18 N. B.

R. 555; see *Moore v. Walton*, 9 N. B. R. 402, Fed. Cas. No. 9779.

86—*Grace v. Smith*, 2 W. Black, 998; *Waugh v. Carver*, H. Black. 235.

87—*Pond v. Pittard*, 3 Mees. and Wels. 357; *Berthold v. Goldsmith*, 24 How. 536, 16 L. ed. 762.

88—*Lott v. Young*, 109 Fed. 798, 6 A. B. R. 436.

**§ 99. Creditor cannot compel institution of proceedings.**

A creditor cannot compel partners to petition for the adjudication of co-partners, or the firm.<sup>89</sup>

**§ 100. Good faith of petitioner.**

A proceeding instituted by one partner for the purpose of vexing and harassing his co-partner,<sup>90</sup> or merely to dissolve the partnership,<sup>91</sup> will be dismissed.

**§ 101. Adjudication by consent.**

An order by consent will not authorize the adjudication of other parties than those against whom the petition is filed, though they be connected with the latter as partners,<sup>92</sup> and an adjudication of a partnership on a voluntary petition of one member will be vacated where the other member did not authorize or consent and was not given notice.<sup>93</sup>

The fact that two alleged partners admit the existence of a partnership alleged to be composed of more than two members is not sufficient proof thereof to admit an adjudication without the consent of the other alleged partners.<sup>94</sup>

**§ 102. Period during which partnership may be adjudicated.**

To render a partnership subject to adjudication in involuntary proceedings, it is essential that the partnership actually be in existence or its affairs must still be unsettled at the time of the filing of the petition.<sup>95</sup>

Bankruptcy proceedings may be instituted by and against a partnership so long as any party has the right to sue for a settlement or to enforce an executory agreement or to recover reimbursement for moneys paid on a partnership debt, or unad-

89—In re Harbaugh, 15 N. B. R. 246, Fed. Cas. No. 6045.

90—In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, Fed. Cas. No. 5994.

91—Amsinck v. Bean, 11 N. B. R. 496, 22 Wall 395, 22 L. ed. 801.

92—In re Elliot, 2 N. B. N. R. 350; Mahoney v. Ward, 100 Fed. 278, 2 N. B. N. R. 538, 3 A. B. R. 770; In re Kruegar, 5 N. B. R. 539, Fed. Cas. No. 7941; In re Prankard, 1 N. B. R. 51, Fed. Cas. No. 11366; In re Freund, 1 N. B. N. 165, 1 A. B. R. 25; In re O'Brian, 2 N. B. N. R.

312; but see as to secret partners, In re Mandenhall, 9 N. B. R. 497, Fed. Cas. No. 9425; In re Harris, 2 N. B. N. R. 868, 4 A. B. R. 132.

93—In re City Con. & B. Co., 29 A. B. R. 171.

94—In re McLaren, 125 Fed. 835, 11 A. B. R. 141.

95—Act of 1898, § 5, provides that "a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

ministered partnership assets remain, or partnership debts enforceable against any partner anywhere within the territorial jurisdiction of the United States exist,<sup>96</sup> notwithstanding the fact that the partnership may have been dissolved. The partners cannot put an end to the power of the bankruptcy court to administer the partnership estate by a mere dissolution of the firm,<sup>97</sup> and although one of the members has already been adjudicated, the firm may still be declared bankrupt.<sup>98</sup>

Under the act of 1867, it was held that a partnership, though dissolved, might be adjudged a bankrupt, if it had assets,<sup>99</sup> but not if the contrary was shown,<sup>1</sup> though there were certain cases which held that while there might be no assets, but there were debts, it could be,<sup>2</sup> which last ruling seems to have proceeded on the theory that since there were possible assets, a partnership bankruptcy might be necessary after all and it might as well be granted at once. The insertion of the words "before final settlement" in the present act was probably done to remove the doubt which existed under the former act.

If the partnership has been dissolved by the partners *inter sese* prior to the filing of the petition, the bankruptcy proceedings cannot be said to have been instituted "during the continuation of the partnership business" though creditors, without

96—In re Webster, 2 N. B. N. R. 54; In re Levy, 95 Fed. 812, 2 A. B. R. 21; *ref. dec.* 1 N. B. N. 287; In re Meyers, 96 Fed. 408, 1 N. B. N. 515; In re Hersch, 97 Fed. 571, 2 N. B. N. R. 137, 3 A. B. R. 344; In re Elliot, 2 N. B. N. R. 350; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25. *Contra*, when only debts exist; In re Altman, 1 N. B. N. 358, 1 A. B. R. 689.

97—In re Noonan, 10 N. B. R. 330, Fed. Cas. No. 10292.

98—Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6896.

99—In re Greenfield, 5 Ben. 552, Fed. Cas. No. 5772; In re Marko, Fed. Cas. No. 9094; In re Gorham, 18 N. B. R. 419, 9 Biss. 23, Fed. Cas. No. 5264; In re Crockett, 2 N. B. R. 75, 2 Ben. 514, Fed. Cas. No. 3402; In re Bidwell, 2 N. B. R. 78, Fed. Cas. No. 3402; In re Mitchell, 3 N. B. R. 111, Fed. Cas. No.

9650; *Ex parte* Hall, Fed. Cas. No. 5919; In re Harbaugh, 3 N. B. R. 107, Fed. Cas. No. 6164; See also, In re Hathorn, 2 Woods 73, Fed. Cas. No. 6214; In re McFarland, 10 N. B. R. 381, Fed. Cas. No. 8788.

1—In re Winkins, 2 N. B. R. 113, Fed. Cas. No. 17875; In re Abbe, 2 N. B. R. 26, Fed. Cas. No. 4; Hopkins v. Carpenter, 18 N. B. R. 339, Fed. Cas. No. 6686; In re Work, Fed. Cas. No. 18044; In re Daggett, 8 N. B. R. 433, Fed. Cas. No. 3536; In re Temple, 17 N. B. R. 345, 4 Sawy. 92, Fed. Cas. No. 13825.

2—In re Noonan, 10 N. B. R. 330, 3 Biss 491, Fed. Cas. No. 10292; In re Williams, 3 N. B. R. 74, 1 Lowell 406, Fed. Cas. No. 17703; Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6896; Hudgins v. Lane, 11 N. B. R. 463, 2 Hughes, 361, Fed. Cas. No. 6827.

knowledge of the dissolution of the partnership, have extended credit to the continuing partner upon reliance of the existence of the partnership. The partnership affairs are unsettled within the meaning of the act so long as partnership debts are left unpaid; but debts which are binding on the partners only by estoppel as to creditors without notice of dissolution are not firm debts, within the meaning of the rule.<sup>3</sup>

### § 103. Death or insanity of a partner.

After the filing of a petition, the death or insanity of a partner will not abate the proceedings, but they are continued in the same manner so far as possible, as though he had not died or become insane.<sup>4</sup> A surviving partner who commits an act of bankruptcy with respect to the joint property can be adjudged bankrupt individually<sup>5</sup> and it has been held that where the firm is dissolved by the death of one partner, the firm cannot be adjudicated,<sup>6</sup> though the survivor may be individually and as surviving member of the firm,<sup>7</sup> and the individual estate of the deceased would still be liable for the partnership debts.<sup>8</sup> On the other hand, it is held that where the partnership articles provide that upon the death of a member thereof the surviving partners shall continue the business through the year, as surviving partners, the latter, upon death of partner member, constitute the firm entity, and may petition or be petitioned against to put the firm in bankruptcy, an act of bankruptcy having been committed by them.<sup>9</sup>

A partnership, one of whose members is insane, may be adjudicated,<sup>10</sup> and it has been held that the guardian of a partner, who becomes insane before adjudication, may consent to the administration of the estate in bankruptcy,<sup>11</sup> though this position does not seem tenable, if the party became insane before the petition was filed.<sup>12</sup>

3—In re Pinson & Co., 180 Fed. 787, 24 A. B. R. 804.

4—Act of 1898, § 8. Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6896.

5—In re Meyer, 98 Fed. 976; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 Fed. 896; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393.

6—In re Evans, 161 Fed. 590, 20 A. B. R. 406; In re Temple, 17 N. B. R. 345, 4 Sawy. 92, Fed. Cas. No. 13825.

7—In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393.

8—Vaccaro v. Bank, 2 N. B. N. R. 1037, 103 Fed. 436.

9—In re Coe, 157 Fed. 308, 19 A. B. R. 618.

10—In re L. Stein & Co., 127 Fed. 547, 11 A. B. R. 536.

11—In re O'Brien, 2 N. B. N. R. 312.

12—See, also, *post*, § 391.

## § 104. What partners may be adjudged involuntary bankrupts.

## § 105. — In general.

All the members of a firm may be adjudged bankrupts, though one has assumed the firm debts and purchased the assets;<sup>13</sup> or where a special partner contributes a certain sum in cash and a certain amount in goods;<sup>14</sup> and the firm creditors may prove against the assuming member as if they were his individual creditors.<sup>15</sup>

If a liquidating partner makes a general assignment of the firm's property, he, together with the partnership, should be adjudged bankrupt.<sup>16</sup>

Persons doing business without authority under a corporate name may be proceeded against as a partnership, or individually.<sup>17</sup>

## § 106. — Nominal and dormant partners.

A secret partner whose firm commits an act of bankruptcy may be adjudged a bankrupt although individually entirely solvent, and it has been held that the law is restricted to the case of an actual partnership between the parties, and not to a partnership as to creditors only where there is no joint estate.<sup>18</sup> There is no reason why a dormant partner may not be either included in an adjudication against the firm, or be adjudged bankrupt on a petition against him separately<sup>19</sup> which rule would doubtlessly be true of nominal partners,<sup>20</sup> since one who permits himself to be held out as a partner may be adjudged bankrupt as a member of the firm, at the suit of the creditors.<sup>21</sup>

13—In re Shepard, 3 B. R. 42, 3 Ben. 347, Fed. Cas. No. 12754; In re Stowers, 1 Lowell, 528, Fed. Cas. No. 13516.

14—In re Merrill, 13 N. B. R. 91, 12 Blatchf. 221, Fed. Cas. No. 9467.

15—In re Long, 9 N. B. R. 227, 7 Ben. 141, Fed. Cas. No. 8476; In re Downing, 3 B. R. 182; 1 Dill. 33, Fed. Cas. No. 4044; In re Collier, 12 B. R. 266, Fed. Cas. No. 3002; In re Rice, 9 B. R. 373, Fed. Cas. No. 11750.

16—In re Meyer, 98 Fed. 976, 3 A.

B. R. 559, aff'g 92 Fed. 896, 1 N. B. N. 1304, 1 A. B. R. 565.

17—Davis v. Stevens, 104 Fed. 235; In re Mandenhall, 9 N. B. R. 497, Fed. Cas. No. 9425.

18—In re Kenney, 97 Fed. 554, 3 A. B. R. 353; see also, In re Downing, 3 N. B. R. 748; Lott v. Young, 109 Fed. 798, 6 A. B. R. 436.

19—Ex parte Hamper, 17 Ves. 403.

20—Lindley on Part. p. 650.

21—In re Krueger, 5 N. B. R. 439, 2 Low. 66, Fed. Cas. No. 7941.

### § 107. What partners may not be adjudged.

On a petition filed against a partnership and its members, a partner who has not committed or participated in committing the act of bankruptcy cannot be adjudged bankrupt;<sup>22</sup> and where there has been no settlement, after dissolution of a firm, one partner is not entitled to an adjudication against his former partner on account of money or assets that have come into his hands over and above his share, or on account of obligations entered into during the continuation of the partnership, for which both are jointly liable.<sup>23</sup>

A minor cannot generally be adjudged an involuntary bankrupt,<sup>24</sup> hence, if one member of a firm is a minor, the petition should be dismissed as to him without costs, but with a specific statement that the dismissal is on account of his minority, and continued against the adult partners and against the firm. Clause "h" of section 5 not applying in this instance.<sup>25</sup>

### § 108. Proceedings against solvent partner.

If a firm be insolvent, but one partner thereof solvent, the creditors may proceed against both the firm and the solvent partner, but the latter may clear himself by paying all the debts.<sup>26</sup>

An objecting partner cannot be adjudicated against his will and may prevent his own adjudication, but he cannot escape an accounting which is necessary to facilitate the jurisdiction of the court over the partnership case.<sup>27</sup>

### § 109. Exempted occupations.

The fact that a member of a partnership is chiefly engaged in farming or is a wage-earner does not prevent the adjudication of

22—*In re Meyers*, 98 Fed. 976, 3 A. B. R. 559, aff'g 92 Fed. 896, 1 N. B. N. 304, 1 A. B. R. 565.

23—*Sigsby v. Willis*, 3 N. B. R. 51, 3 Ben. 371, Fed. Cas. No. 12849.

24—See *ante*, § 88.

25—*In re Duguid*, 100 Fed. 274, 2 N. B. N. R. 607, 3 A. B. R. 794; *In re Dunnigan*, 95 Fed. 428, 1 N. B. N. 528, 2 A. B. R. 628; *In re Derby*, 8 N. B. R. 106, 6 Ben. 232, Fed. Cas. No. 3815; *Farris v. Richardson*, 6 Allen (Mass.)

118; *Lovell v. Beauchamp* (1894), App. Cas. 607; but see *In re Brice*, 93 Fed. 942, 1 N. B. N. 310, 2 A. B. R. 197.

26—*In re Bennett*, 12 N. B. R. 181, 2 Lowell, 400, Fed. Cas. No. 1314.

27—*In re Junck & Balthazard*, 169 Fed. 481, 22 A. B. R. 298.

And see, *Francis v. McNeal*, 228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244, aff'g 186 Fed. 481, 26 A. B. R. 555.



the partnership of which he is a member, nor prevent the administration of the assets of the non-adjudicated partner.<sup>28</sup>

It has been held that a partnership engaged chiefly in farming or tillage of the soil cannot be adjudicated.<sup>29</sup>

28—In re Duke & Son, 28 A. B. R. Fed. 749, 31 A. B. R. 320; E. E. Sutherland Medicine Co. et al. v. Rich & Bailey, 195; Id., 199 Fed. 199, 29 A. B. R. 93.  
29—Stills' Sons v. Am. Nat. Bank, 209 22 A. B. R. 85.

## CHAPTER VI

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## A. VOLUNTARY PROCEEDINGS

**§ 110. Who may file a voluntary petition.<sup>1</sup>**

Any qualified person may file a petition to be adjudged a voluntary bankrupt.<sup>2</sup>

The president of a corporation cannot execute and file a petition in voluntary bankruptcy in the name of the corporation without special authority.<sup>3</sup>

**§ 111. Petition to be based on provable debt.**

Where the petition schedules no debts or only such as are excepted from a discharge, the adjudication should not be made, or, if made, be set aside upon motion and the proceedings dismissed for want of jurisdiction, since a debt not affected by a discharge will not give jurisdiction.<sup>4</sup>

**§ 112. Filing must be voluntary.**

No one can be called on to show cause why he himself shall not go or put any one else into voluntary bankruptcy,<sup>5</sup> although, if a debtor has committed no act of bankruptcy, and will not voluntarily petition, a creditor may sue him, so as to force him to commit an act of bankruptcy, and may then institute involuntary

1—See Chap. 5 for persons qualified to become bankrupt.

2—Act of 1898, § 59a.

Analogous provision in act of 1867. "Sec. 11. . . . That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition. . . . the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt. . . ."

3—In re Jefferson Casket Co., 182 Fed. 689, 25 A. B. R. 663.

4—Act of 1898, § 4a; In re Maples 105 Fed. 919, 5 A. B. R. 426; In re Yates, 114 Fed. 365, 8 A. B. R. 69; In re Morales, 105 Fed. 761; In re Bellah, 116 Fed. 69, 8 A. B. R. 310; Elmira Steel Co., 109 Fed. 456, 5 A. B. R. 484; Contra, In re Tinker, 99 Fed. 79, 2 N.

B. N. R. 39, 3 A. B. R. 580. But see Columbia Real Estate Co., 4 A. B. R. 411.

5—In re Harbaugh, 15 N. B. R. 246, Fed. Cas. No. 6045; "There is nothing in the law requiring an insolvent person to file a petition under any circumstances. He has the right to do so when he finds that he is unable to pay his debts and desires to make a surrender of his property, under the provisions of the bankruptcy act, distribute it equally among his creditors, and be relieved from further liability. The right of voluntary petition is a privilege extended by the law to be exercised by the debtor, as he may see proper. It is the right of a creditor to institute and prosecute involuntary proceedings, but he cannot, under any conditions, compel the debtor to take the initiative." Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 17 A. B. R. 583.

proceedings against him.<sup>6</sup> The default of a defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceedings into one of voluntary bankruptcy.<sup>7</sup>

### § 113. Pendency of previous voluntary or involuntary petition.

General Order VII, providing for priority of the petition alleging the earliest act of bankruptcy, only applies where the debtor has appeared and shown cause against an adjudication on two or more involuntary petitions, and cannot be relied upon to determine the priority between an involuntary and a voluntary petition.<sup>8</sup> The pendency of an involuntary petition before adjudication does not necessarily invalidate a subsequent voluntary petition, or vice versa, filed in the same or another district, as the former may be invalid for want of jurisdiction, or other creditors may justify, or even make desirable a subsequent petition, and the question of jurisdiction will arise on each petition and be determined according to the circumstances, and this is true both as to individual bankruptcy and as to partnership cases.<sup>9</sup> In such case it would seem advisable to give creditors, filing the involuntary petition, notice, before any adjudication is made on the voluntary petition, and then such action should be taken as appears for the best interests of the estate;<sup>10</sup> but want of formal notice of the filing of a voluntary petition to creditors who had previously filed an involuntary petition is no objection to an adjudication upon the voluntary petition where such creditors had actual notice.<sup>11</sup> Nor is it any objection to an adjudication upon such voluntary petition that the motive of the debtor in seeking a speedy adjudication in the voluntary case is that he may be enabled to effect a composition with his

6—*Warren v. Bank*, 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. No. 17202; *Coxe v. Hale*, 8 N. B. R. 562, Fed. Cas. No. 3310.

7—*In re Taylor*, 2 N. B. N. R. 926, 102 Fed. 728, 4 A. B. R. 515.

8—*In re New Chattanooga Hardware Co.*, 190 Fed. 241, 27 A. B. R. 77.

9—*In re Lachenmaier*, 203 Fed. 32, 29 A. B. R. 325; *In re New Chattanooga Hardware Co.*, 190 Fed. 241, 27 A. B. R. 77; *In re Carpenter*, 25 A. B. R. 161; *In re Billing*, 145 Fed. 395, 17 A. B. R.

80; *In re Waxelbaum*, 2 N. B. N. R. 228, 98 Fed. 589, 3 A. B. R. 392; *In re Steger*, 113 Fed. 978, 7 A. B. R. 665; *In re Dwyer*, 112 Fed. 777, 7 A. B. R. 532; *In re Canfield*, Fed. Cas. No. 2380; *In re Willarski*, 4 N. B. R. 390, Fed. Cas. No. 17619; *In re Stewart*, 3 N. B. R. 28, Fed. Cas. No. 13419; *In re Flanagan*, 18 N. B. R. 439, Fed. Cas. No. 4850, 5 Sawy. 312.

10—*In re Dwyer*, 112 Fed. 777, 7 A. B. R. 532.

11—*In re New Chattanooga Hardware Co.*, 190 Fed. 241, 27 A. B. R. 77.

creditors,<sup>12</sup> or that the petitioning creditors have incurred expense in connection with the involuntary petition, or that a receiver has been appointed in the involuntary proceedings.<sup>13</sup>

A voluntary bankrupt, who has contracted new debts since filing a petition on which a discharge was refused, may file a new petition;<sup>14</sup> and, where two creditors each file a petition against their debtor, who, pending such proceedings, files a petition and is adjudged bankrupt, and the petitioning creditors prove their claims under the voluntary petition, they waive their right to continue the involuntary proceedings.<sup>15</sup>

The provision in section 14b of the act denying the right to a discharge to one who has in voluntary proceedings been granted a discharge within six years does not prevent the filing of a second voluntary petition within six years after a previous discharge, though in the second proceeding no discharge can be had.<sup>15a</sup>

#### § 114. Joint petitions.

Two or more persons cannot apply for bankruptcy in the same petition, except as incidental to a partnership, so that joint contractors, not partners, must file separate petitions and the creditors can prove against each estate separately;<sup>16</sup> but, where community rights exist, it has been held that husband and wife may unite in a joint petition.<sup>17</sup>

#### § 115. Allegations of the petition.

A voluntary petition need not in every case set up a technical act of bankruptcy.<sup>18</sup>

In order to justify an adjudication in voluntary bankruptcy, a petition filed in the name of a corporation must allege corporate

12—In re New Chattanooga Hardware Co., 190 Fed. 241, 27 A. B. R. 77.

13—In re New Chattanooga Hardware Co., 190 Fed. 241, 27 A. B. R. 77; In re Stegar, 113 Fed. 978, 7 A. B. R. 665.

14—In re Driske, 13 N. B. R. 112, 2 Lowell, 430, Fed. Cas. No. 4090; In re Drisco, 14 N. B. R. 551, Fed. Cas. No. 4086.

15—In re Noonan, 6 N. B. R. 579.

15a—In re Little, 137 Fed. 521, 13 A. B. R. 640.

16—In re Altman, 1 N. B. N. 358, 1

A. B. R. 689; In re Moore, 5 Biss. 79, Fed. Cas. No. 9750; Ex parte Weston, 12 Met. 1; Harmon v. Clark, 13 Gray, 114, 122; Forsyth v. Woods, Fed. Cas. No. 17992, 11 Wall. 484, 486, 20 L. ed. 207, 209; In re Nuns, 16 Blatch. 439, Fed. Cas. No. 10269; In re Roddin, 6 Biss. 377, Fed. Cas. No. 11989; Buffum v. Seaver, 16 N. H. 160; Mack v. Woodruff, 87 Ill. 570.

17—In re Ray, 1 N. B. N. 276.

18—In re Junck & Balthazard, 169 Fed. 481; 22 A. B. R. 298.

action by the board of directors authorizing the petition and its execution by the officer signing the name of the corporation thereto.<sup>19</sup>

Objections to a petition on the ground that it fails to show that the bankrupt was not within the exceptions of section 4a, and that it does not have the seal of the corporation attached and fails to show that it was authorized by the corporation must be made before the adjudication.<sup>19a</sup>

### § 116. Withdrawal of the petition.

When there are no creditors who have proved their claims or who object, a voluntary bankrupt may withdraw his petition, and cannot be prevented by subsequent creditors who wish to prevent new proceedings.<sup>20</sup>

## B. INVOLUNTARY PROCEEDINGS

### § 117. Nature of proceedings.

A proceeding in involuntary bankruptcy is not a mere suit inter parties, but partakes of the nature of a proceeding in rem, in which every creditor has a direct interest,<sup>21</sup> and cannot be converted into voluntary bankruptcy by the default of defendant to appear.<sup>22</sup>

### § 118. Against whom commenced.

Section 4b of the law makes provision for the persons who may become involuntary bankrupts. A petition may be filed against a person who is insolvent; and who has committed an act of bankruptcy within four months after the commission of such act.<sup>23</sup>

### § 119. Who may file petition.

### § 120. — Good faith of petitioner.

The utmost good faith is required on the part of creditors filing a petition in involuntary bankruptcy and they should not

19—In re Jefferson Casket Co., 182 Fed. 689, 25 A. B. R. 663.

19a—Dodge v. Kenwood Ice Co., 204 Fed. 577, 29 A. B. R. 586.

20—In re Hebbert, 104 Fed. 322.

21—In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Boston, etc., R. R. Co., 6 N. B. R. 209, 9 Blatch, 101, Fed. Cas. No. 1678; In re Platt, 6 N. B. R.

465, Fed. Cas. No. 11213; In Hanover Nat. Bank v. Moyes, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

22—In re Taylor, 2 N. B. N. R. 926, 102 Fed. 728, 4 A. B. R. 515; see also *ante*, § 112.

23—Act of 1898, § 3b. See *ante*, Chap. IV.

be permitted to recklessly institute proceedings for the purpose of making the alleged bankrupt disclose a list of his creditors, his assets or liabilities.<sup>24</sup> An agreement by an attorney to pay the creditor's claim, in order to induce him to sign the petition, is not invalid and does not disqualify the creditor.<sup>25</sup>

### § 121. — Compelling creditors to become petitioners.

The court of bankruptcy is not vested with power to compel a creditor to become a petitioner in involuntary bankruptcy.<sup>26</sup>

### § 122. — Number of creditors and amount of claims.

Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.<sup>27</sup> The same number of creditors are required for proceedings against a corporation as in the case of an individual.<sup>28</sup> If a merchant fails to exhibit a statement of his accounts when demanded, he cannot complain of proceedings in bankruptcy commenced against him without the requisite number of creditors joining in the petition, provided a sufficient number join before the trial.<sup>29</sup>

A claim cannot be split up and part thereof assigned for the purpose of obtaining additional creditors,<sup>30</sup> nor can a general

24—In re Scammon, 11 N. B. R. 280, 6 Biss. 195, Fed. Cas. No. 12429.

25—Bernard v. Fromm, 132 App. Div. (N. Y.) 922, 22 A. B. R. 585.

26—In re Gillette, 104 Fed. 769.

27—Act of 1898, § 59b; Analogous provision in act of 1867. "Sec. 39. . . . Any person . . . shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under the act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed."

28—In re Leavenworth Savings Bank, 14 N. B. R. 92, 4 Dill. 363, Fed. Cas. No. 8165.

29—Paren & Gaff Mfg. Co. v. Peale, 17 N. B. R. 377, Fed. Cas. No. 10981.

30—In re Independent Thread Co., 113 Fed. 998, 7 A. B. R. 704; In re Halsey Electric Generator Co., 163 Fed. 118, 20 A. B. R. 738; In re Tribelhorn, 137 Fed. 3, 14 A. B. R. 491.

"Splitting of claim" held to disqualify both assignees thereof as petitioners. In re Perry & Whitney Co., 172 Fed. 744, 22 A. B. R. 772, aff'd 175 Fed. 52, 23 A. B. R. 695.

The fact that the one of the petitioners derived his claim by assignment from another is immaterial in the absence of



assignee, to whom the claims of a majority of creditors have been assigned, reassign such claims to third persons for the sole purpose of increasing the number of creditors and thereby prevent the filing of a petition by a single creditor.<sup>31</sup> Creditors may, however, purchase claims against the debtor, in good faith, in order to join in the petition to make the necessary amount.<sup>32</sup> That one not joining in the petition owns a claim, such as would have made her a competent petitioner, is immaterial on question whether there is a sufficient number of petitioning creditors.<sup>33</sup>

Where two of the original petitioning creditors collude to compel the debtor to pay the claim of a third, they are estopped from proceeding further as petitioning creditors, where as a result of their collusion the number of petitioning creditors is reduced below the statutory number.<sup>34</sup>

Where in pursuance of a fraudulent scheme to prevent the filing of a petition against him, the insolvent transfers all his property to a third person who assumes the payment of all his debts, except one, and, by the state law, such transferee becomes absolutely liable to the creditors whose debts are assumed, the creditors so preferred will not be counted so as to bring the number of creditors over twelve and prevent the filing of the petition by the unpaid creditor.<sup>35</sup> Nor will the holders of small claims against the insolvent based on purchases of household necessities after the making of such transfer be counted, where it is apparent that they were left unpaid for the express purpose of preventing the filing of a petition in bankruptcy.<sup>36</sup>

A judgment on an involuntary petition is final and conclusive, unless reversed for error or fraud, as against all persons who were before the court at the time,<sup>37</sup> and an application to hold

a showing that the claim of the latter was split up for the purpose of creating a petitioning creditor. *In re Stone*, 206 Fed. 356, 30 A. B. R. 392.

31—*Leighton v. Kennedy*, 129 Fed. 737, 12 A. B. R. 229.

Where a number of claims have been assigned to a common assignor, they will be considered as claims filed by one creditor. *Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007, 12 A. B. R. 601.

32—*In re Bevins*, 165 Fed. 434, 21

A. B. R. 344; *In re Woodford*, 13 N. B. R. 575, Fed. Cas. No. 17972.

33—*In re Perry & Whitney Co.*, 172 Fed. 745, 22 A. B. R. 772.

34—*Cummins Grocery Co. v. Talley*, 187 Fed. 507, 26 A. B. R. 484.

35—*In re Blount*, 142 Fed. 263, 16 A. B. R. 97.

36—*In re Blount*, 142 Fed. 263, 16 A. B. R. 97.

37—*Neustadter v. Dry Goods Co.*, 1 N. B. N. 552, 96 Fed. 830, 3 A. B. R. 96.

such adjudication void on the ground that the requisite number and amount had not joined<sup>38</sup> should not be entertained.

Although the bankrupt has signed a written admission that the requisite quorum has united in the petition it has been held that the court must still "be satisfied that the admission is made in good faith,"<sup>39</sup> which probably means that the court is to ascertain that the admission is true, since there are others than the bankrupt interested and entitled to be heard. The adjudication being conclusive on the question of whether the requisite number join in the petition, the fact that less than the requisite number and value join is an irregularity which in one case has been held will be cured by a decree rendered with respondent's consent,<sup>40</sup> though this position seems hardly tenable since all creditors are entitled to an opportunity to contest the adjudication.

### § 123. — Creditors of what date included.

The right to file an involuntary petition is limited to such creditors as hold debts at the date of the alleged act of bankruptcy;<sup>41</sup> but a creditor is not disqualified as a petitioner because a claim owned by him was not transferred to him until after the act of bankruptcy.<sup>42</sup>

The number of petitioning creditors and amount of their claims is to be determined as of the date of the filing of the petition.<sup>43</sup>

### § 124. — Relatives and employees.

The bankruptcy act expressly provides that in computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors

38—In re Duncan, 14 N. B. R. 18, 8 Ben. 365, Fed. Cas. No. 4131.

39—In re Flanagan, 18 N. B. R. 439, Fed. Cas. No. 4850.

40—In re Williams, 11 N. B. R. 146, 6 Biss. 233, Fed. Cas. No. 17700.

41—In re Stone, 206 Fed. 356, 30 A. B. R. 392; In re Callison, 130 Fed. 987, 12 A. B. R. 344.

42—In re Hanyan, 180 Fed. 498, 24 A. B. R. 72; In re Perry & Whitney Co., 172 Fed. 745, 22 A. B. R. 772.

43—In re Western Sav. & Tr. Co., 17 N. B. R. 413; Moulton v. Coburn, 131 Fed. 201, 12 A. B. R. 553, aff'g 126 Fed. 218, 11 A. B. R. 212; Contra. In re Plymouth Cordage Co., 135 Fed. 1000, 13 A. B. R. 665 (holding date of adjudication as proper time); In re Jacobson, 21 A. B. R. 921 (holding that where the act of bankruptcy consists of an assignment for creditors, the amount of creditors is to be computed as of the date of assignment).

as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.<sup>44</sup>

Consanguinity is the relation existing between persons descending from a common ancestor; affinity is the connection existing, in consequence of marriage, between the husband or wife and the kindred of the other. Creditors of a bankrupt corporation who are its officers or directors should not be counted, because of their connection with respondent corporation, on the ground of its being in the case of a corporation the same as consanguinity and affinity in a natural person, or because they are employees.<sup>45</sup>

The provisions of the act excluding employees and relatives in counting the number of creditors applies only when such employees or relative refuse to join in the petition. Employees and near relatives are presumably in sympathy with the alleged bankrupt, and the purpose of this provision is clearly to prevent the fictitious use of their names to defeat a proceeding otherwise maintainable. Where the employee or relative appears, not in aid of a defense, or as a weapon to defeat, but as a petitioner, the reason for excluding him in counting the number of creditors fails, and with it the rule.<sup>46</sup>

### § 125. — Stockholders and directors as creditors.

There seems to be no reason why creditors of a corporation, who happen also to be stockholders, might not join in a petition, but this would not be so if such creditors are its directors or officers, in which case they should be excluded on the ground of being employees.<sup>47</sup>

<sup>44</sup>—Act of 1898, § 59e.

<sup>45</sup>—*In re Barrett Pub. Co.*, 2 N. B. N. R. 80; *Contra*, *In re Rollins Gold and Silver Min. Co.*, 2 N. B. N. R. 988, 102 Fed. 982, 4 A. B. R. 327.

<sup>46</sup>—*Perkins v. Dorman*, 206 Fed. 858, 30 A. B. R. 767. An employee or person related within the third degree to the bankrupt may be a petitioning creditor, and in case the number of creditors be less than twelve, and his

claim amounts to \$500 or more, he may be the sole petitioner. *Id.*

<sup>47</sup>—*Barrett Pub. Co.*, 2 N. B. N. R. 80; *Contra*, *In re Rollins Gold & Silver Min. Co.*, 2 N. B. N. R. 988, 102 Fed. 982, 4 A. B. R. 327.

Directors of a corporation who are also creditors may become petitioning creditors. *Home Powder Co. v. Geis*, 204 Fed. 568, 29 A. B. R. 580.

### § 126. — Corporation acting as purchasing agent.

A creditor of a corporation acting as purchasing agent for another is not a creditor of the latter, though its stock is owned and its business controlled by the latter.<sup>48</sup>

### § 127. — Stockholder's or director's liability.

A judgment founded on tort against an insolvent corporation is sufficient to constitute the basis of a creditor's suit to reach an unpaid subscription to the corporate stock, entitling the judgment creditor to join in a petition against the stockholder.<sup>49</sup>

Where, under the laws of a state, the liability of the director of a corporation whose funds have been embezzled is contractual, a creditor of the corporation has a provable claim and may petition for the adjudication of the director.<sup>50</sup>

### § 128. — Assignee or trustee.

The fact that an assignee of an entire claim has no financial interest in the claim but holds it solely for the benefit of his assignor does not disqualify him as petitioning creditor;<sup>51</sup> but the transfer of a partnership note, to the wife of a partner of the alleged bankrupt, to prevent the setting up of any set-off or counterclaim or defense which the latter might have against his partner, has been held to prevent the transferee from becoming a petitioning creditor.<sup>52</sup> The mere fact that the creditor is a trustee under a voluntary assignment does not exclude him from petitioning or being counted, unless there is some fraud connected with it.<sup>53</sup>

A trustee in bankruptcy may be a petitioning creditor.<sup>54</sup>

### § 129. — Married women.

A married woman may commence or join in proceedings against her husband where she is an actual creditor, and the law

48—In re Hudson River Electric Power Co., 173 Fed. 934, 23 A. B. R. 191, aff'd 183 Fed. 701, 33 L. R. A. (N. S.) 454, 25 A. B. R. 504.

49—In re Putman, 193 Fed. 464, 27 A. B. R. 923.

50—In re Brown, 164 Fed. 673, 21 A. B. R. 123.

51—In re Halsey Electric Generator Co., 163 Fed. 118, 20 A. B. R. 738.

52—In re Pangborn, 185 Fed. 673, 26 A. B. R. 40.

53—In re Lloyd, 15 N. B. R. 257, Fed. Cas. No. 8429.

54—Hays v. Wagner, 150 Fed. 533, 18 A. B. R. 163.

of the state permits the creation of enforceable debts as between husband and wife.<sup>55</sup>

### § 130. — Obligee in bond and surety.

In the case of a bond payable to the people of a state, the state is the creditor, although the money goes to the city treasurer,<sup>56</sup> and in the case of a surety on a defaulting contractor's bond the surety company becomes a creditor for the amount of the loss sustained and may file the petition.<sup>57</sup>

A surety upon a note who has not paid the note cannot file a petition against the maker, although the latter has committed an act of bankruptcy.<sup>58</sup>

A surety upon an "officer's receipt" given in attachment proceedings, who turned back the property attached to the attachment debtor, taking his mortgage note, cannot force the debtor into bankruptcy, because he takes no further action about the attachment, and by his inaction has permitted the four months to come within five days of expiring.<sup>59</sup>

### § 131. — Partner.

In involuntary proceedings, an objection that the petitioner and the alleged bankrupt are partners is not determinable on a preliminary objection to the jurisdiction, where the arrangements between the parties is not one going to the merits of the controversy.<sup>60</sup>

### § 132. — Claims counted.

All claims must be counted irrespective of amounts;<sup>61</sup> provided they are provable,<sup>62</sup> although they may not be due.<sup>63</sup>

55—In re Novak, 101 Fed. 800, 4 A. B. R. 311.

56—In re Chamberlin, 17 N. B. R. 50, 9 Ben. 149, Fed. Cas. No. 2580.

57—Boyce v. U. S. Fidelity & Guaranty Co., 111 Fed. 138, 7 A. B. R. 6.

58—Phillips v. Dreher Shoe Co., 112 Fed. 404, 7 A. B. R. 326; In re Kiker, 18 N. B. R. 383, Fed. Cas. No. 11833.

59—In re Windt, 177 Fed. 584, 24 A. B. R. 536.

60—In re Schenklin & Coney, 113 Fed. 421, 7 A. B. R. 162.

61—In re Brown, 111 Fed. 979, 7 A. B. R. 102; In re Woodford, 13 N. B. R. 575, Fed. Cas. No. 17972.

62—One cannot force another into bankruptcy by the use of alleged debts which by operation of law will be extinguished, and therefore not provable, the instant the adjudication exists. In re Windt, 177 Fed. 584, 24 A. B. R. 536.

Under the laws of Massachusetts tax-collector cannot maintain involuntary petition unless the taxes have remained unpaid for three months after having been committed to him, since until then he has no provable claim. In re Corwin Mfg. Co., 185 Fed. 976, 26 A. B. R. 269.

63—Linn v. Smith, 4 N. B. R. 12, Fed. Cas. No. 8375; In re Alexander, How. 470, Fed. Cas. No. 161.

A claim for accrued interest will be counted,<sup>64</sup> as will a claim based on an indorser's liability on a note, if fixed;<sup>65</sup> a claim for damages for a breach of contract;<sup>66</sup> a claim released without consideration upon the fraudulent representations of another creditor;<sup>67</sup> a claim based upon an alleged gaming contract where respondent's testimony is the only evidence against the express terms of the contract and rules of the exchange on which it was to be executed,<sup>68</sup> or the like.

A petition cannot be filed by one holding an unliquidated claim for damages for a tort;<sup>69</sup> or claims for rent to accrue under a lease for breach of warranty, until liquidated;<sup>70</sup> or claims against an infant which may be repudiated on reaching majority.<sup>71</sup> Nor can a petition be filed by a creditor who has disposed of his claim;<sup>72</sup> or one whose claim is barred by the statute of limitations of the state where the proceedings are pending;<sup>73</sup> or by an indorsee whose claim is paid by the indorser during the pendency of the proceeding.<sup>74</sup>

It is not necessary that the larger creditors should be requested to sign the petition for adjudication and refuse.<sup>75</sup>

Creditors who have assented to a general assignment made by their debtor and who therefore cannot join in a petition, are not to be counted;<sup>76</sup> or claims based on a note given in place of a lost note, if both are without consideration, though not neces-

64—*Sloan v. Lewis*, 12 N. B. R. 173, 22 Wall. 150, 22 L. ed. 832.

65—*In re Nickodemus*, 3 N. B. R. 55, Fed. Cas. No. 10254.

66—The owner of a note not yet due, indorsed by the bankrupt, has a provable claim and may join in the petition. *In re Rothenberg*, 140 Fed. 798, 15 A. B. R. 485.

67—*In re Stern*, 116 Fed. 604, 8 A. B. R. 569; but see *In re Big Meadow Gas Co.*, 113 Fed. 974, 7 A. B. R. 697; *In re Grant Shoe Co.*, 130 Fed. 881, 12 A. B. R. 349, aff'g 125 Fed. 576, 11 A. B. R. 48.

68—*Michaels v. Post*, 12 N. B. R. 152, 21 Wall. 398, 22 L. ed. 520.

69—*Hill v. Levy*, 2 N. B. R. 180, 98 Fed. 94, 3 A. B. R. 374.

70—*In re Brinckmann*, 103 Fed. 65,

4 A. B. R. 551; *Beers v. Hanlin*, 99 Fed. 695, 3 A. B. R. 745; *In re Heinsfurter*, 97 Fed. 198, 3 A. B. R. 113.

71—*In re Mahler*, 105 Fed. 428, 5 A. B. R. 453.

72—*In re Eidemiller*, 105 Fed. 595, 53 L. R. A. 118, 5 A. B. R. 570.

73—*In re Burlington Malting Co.*, 109 Fed. 777, 6 A. B. R. 369.

74—*In re Noesen*, 12 N. B. R. 422, 6 Biss. 443, Fed. Cas. No. 10238; *In re Cromwell*, 6 N. B. R. 305, Fed. Cas. No. 3250.

75—*In re Broich*, 15 N. B. R. 11, 7 Biss. 303, Fed. Cas. No. 1921.

76—*In re Currier*, 13 N. B. R. 68, 2 Lowell 436, Fed. Cas. No. 3492.

77—*In re Miner*, 2 N. B. R. 1073, 104 Fed. 520. See, also, *post*, § 136.

sarily a voluntary gift;<sup>77</sup> or where the respondent has a counterclaim provable in bankruptcy against the petitioning creditor which would reduce the claims below the requisite amount.<sup>78</sup>

A subcontractor who has furnished the alleged bankrupt, a contractor, materials and labor under a contract by the terms of which the contractor was not to become liable therefor until the material was in place and the owners had paid therefor cannot become a petitioning creditor until the contingencies provided for have occurred.<sup>79</sup> A creditor holding a claim based upon a contract in violation of statute is not proper petitioner.<sup>80</sup>

### § 133. — Unliquidated claims.

Where the claims of the petitioning creditors are unliquidated, the court, upon the motion of the alleged bankrupt, may direct the liquidation thereof before answer.<sup>81</sup>

### § 134. — Secured, priority and lien creditors.

Secured creditors may prove their claims;<sup>82</sup> but the court has authority to inquire into and determine the value of such securities, or priority claims, in order to ascertain whether the claims of the petitioning creditors are of the amount required by law;<sup>83</sup> and only the excess over such securities or priorities is counted.<sup>84</sup> Creditors having liens created within four months

77—In re Cornwall, 4 N. B. R. 134, Fed. Cas. No. 3251.

78—In re Osage Valley, etc., Co., 9 N. B. R. 281, Fed. Cas. No. 10592.

79—In re Ellis, 143 Fed. 103, 16 A. B. R. 221.

80—In re Wyoming Valley Co-operative Ass'n, 198 Fed. 436, 28 A. B. R. 462.

81—In re Smith, 209 Fed. 91, 31 A. B. R. 560.

82—Act of 1898, § 57a, §§ 562, 629.

83—In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, Fed. Cas. No. 2315.

84—Act of 1898, § 56b. In re Smith, 176 Fed. 426, 23 A. B. R. 864.

Under the act of 1867, it was held that secured or lien creditors could not be reckoned among creditors whose claims were unconditionally provable and hence

entitled to sign the petition (In re Frost, 11 N. B. R. 69, 6 Biss. 213, Fed. Cas. No. 5134), which was especially true if they obtained their security or lien in fraud of the act or if it would be avoided if bankruptcy followed (In re Scrafford, 15 N. B. R. 104, 4 Dill. 376, Fed. Cas. No. 12556). A fully secured creditor might file his petition without expressly waiving his preference though the better practice was to do so (In re Stansell, 6 N. B. R. 183, Fed. Cas. No. 13293; In re Bloss, 4 N. B. R. 37, Fed. Cas. No. 1562; see In re Crossette, 17 N. B. R. 208, Fed. Cas. No. 3455); and in such a case the petition had the same effect as a waiver (In re Bloss, 4 N. B. R. 37, Fed. Cas. No. 1562; In re Broich, 15 N. B. R. 11, 7 Biss. 303, Fed. Cas. No. 1921).

of the filing of the petition, on discovering the true condition of the bankrupt, may institute proceedings.<sup>85</sup>

### § 135. — Preferred creditors.

Creditors holding claims unconditionally provable without any release or other preliminary action,<sup>86</sup> will be counted. The object of the bankrupt law is the equal distribution of an insolvent's property among his creditors; and to this end intentional preferences are forbidden and made acts of bankruptcy. Hence a conveyance of property,<sup>87</sup> or a transfer constituting a preference, void under the bankrupt law for any reason,<sup>88</sup> or which it is charged is a fraudulent preference,<sup>89</sup> cannot be considered as paying or satisfying the debts for which they are given. Otherwise an insolvent debtor and his preferred creditors could violate the law and, upon their very violation, base their claim to protection against its enforcement, which could not be allowed, since no one can base a right on an unlawful act. Such transactions are unlawful; they are prohibited by law; and are acts of bankruptcy. The debts attempted to be satisfied are still the debts of the debtor within the meaning of the law. The same act cannot be at the same time an act of bankruptcy and a discharge therefrom. It cannot have the effect of making the debtor a bankrupt and protecting him from being adjudged a bankrupt.

The act of 1867 as amended by the act of June 22, 1874,<sup>90</sup> provided that fraudulently preferred debts should not be proved until the preferences were surrendered, and under that provision it was held that where a creditor had two disconnected claims and received a fraudulent preference on one, he could prove on the other;<sup>91</sup> but, if he had but one and had received a preference, having at the time reasonable cause to believe his debtor insolv-

85—In re Smith, 176 Fed. 426, 23 A. B. R. 864.

But see, In re Schenkein et al., 113 Fed. 421, reversing 7 A. B. R. 162; In re Burlington Malting Co., 109 Fed. 777, 6 A. B. R. 369.

86—In re Frost, 11 N. B. R. 69, 6 Biss. 213, Fed. Cas. No. 5134; In re Hunt, 5 N. B. R. 433, Fed. Cas. No. 6882.

87—In re Norcross, 1 N. B. N. 257, 1 A. B. R. 644.

88—In re Tirre, 1 N. B. N. 402, 95 Fed. 425, 2 A. B. R. 493.

89—In re Cain, 1 N. B. N. 389, 2 A. B. R. 378.

90—18 U. S. Stat. 178, § 12.

91—In re McVay, 13 Fed. 443; In re Holland, 8 N. B. R. 190, Fed. Cas. No. 6604; In re Aspinwall, 11 Fed. 146; In re Richter's Est, 4 N. B. R. 67, 1 Dill. 544, Fed. Cas. No. 11803.



ent, he could not prove it or be counted to make the requisite number.<sup>92</sup>

Under the present act the proof and allowance of claims are distinct<sup>93</sup> and there is no requirement that a preferred creditor shall surrender payments on account before proving his claim, or forbidding him to prove it,<sup>94</sup> but merely that it cannot be allowed unless the preference is surrendered.<sup>95</sup> There being no prohibition against his proving his claim and his claim not being satisfied by the preference, a preferred creditor has a provable claim<sup>96</sup> and should be counted to make the requisite number of creditors and may file a petition in involuntary bankruptcy.<sup>97</sup> This must be so since there is no provision of law enabling him to surrender his preference and fully qualify himself for an allowance until the trustee is appointed, since the referee cannot receive it and a receiver is not to be appointed for that purpose,<sup>98</sup> and furthermore it does not remain for the bankrupt to say that the creditor has been preferred.<sup>99</sup> This is contrary to several decisions,<sup>1</sup> though even in this line of decisions his right is recognized if his preference is innocent and he offers to surrender

92—In re Israel, 12 N. B. R. 204, 3 Dill. 511, Fed. Cas. No. 7111; Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2899; In re Currier, 13 N. B. R. 68, 2 Lowell 436, Fed. Cas. No. 3492; In re Rado, 6 Ben. 230, Fed. Cas. No. 11522; In re Hunt, 5 N. B. R. 433, Fed. Cas. No. 6882; In re Marcer, 6 N. B. R. 361, Fed. Cas. No. 9060; Ecker v. McAllister, 17 N. B. R. 42.

93—In re Wise, 2 N. B. N. R. 151.

94—Act of 1898, § 63a, § 619 *et seq.*; In re Folb, 1 N. B. N. 134, 91 Fed. 107, 1 A. B. R. 22.

95—In re Knost & Wilhelmy, 1 N. B. N. 403, 2 A. B. R. 471; *aff'd* 99 Fed. 409; In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 434, 99 Fed. 400, 3 A. B. R. 634; In re Conhaim, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249.

96—In re Norcross, 1 N. B. N. 257, 1 A. B. R. 644.

97—In re Smith, 176 Fed. 426, 23 A. B. R. 864; In re Cain, 1 N. B. N. 389, 2 A. B. R. 378; In re Hertzshkopf, 118 Fed. 101, 9 A. B. R. 90; In re Norcross,

1 N. B. N. 257, 1 A. B. R. 644; see In re Bloss, Fed. Cas. No. 1562; In re Calif. Pac. R. R. Co., Fed. Cas. No. 2315; In re Stansell, Fed. Cas. No. 13293; In re Miller, 5 A. B. R. 140.

A preferred creditor may not be counted against the petition, nor in computing the number of creditors that must join in the petition, unless he first surrenders his preference, but if he surrenders his preference before the adjudication, he may then be counted. In re Vastbinder, 126 Fed. 417, 11 A. B. R. 118; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 17 A. B. R. 609.

98—In re Thompson, 2 N. B. N. R. 1016.

99—In re Morton, 118 Fed. 908.

1—In re Wing Yick Co., 13 A. B. R. 757; In re Fishplate Clothing Co., 125 Fed. 986, 11 A. B. R. 204; In re Gillette, 104 Fed. 769, 5 A. B. R. 119; In re Miner, 2 N. B. N. R. 1073, 104 Fed. 520; In re Rogers Milling Co., 2 N. B. N. R. 973, 102 Fed. 687, 4 A. B. R. 540.

it,<sup>2</sup> but they appear to rest on a failure to distinguish between the proof and allowance of claims, which is drawn in the present act, and follow the cases under the former act, the difference in which has been pointed out. So a creditor is entitled to prove for the balance of a claim on which a payment was made long prior to the filing of the petition.<sup>3</sup>

### § 136. — Creditors participating in act of bankruptcy.

The general rule is that where a creditor connives in the alleged act of bankruptcy, whether it be either actually or constructively fraudulent, he is precluded from proceeding against such debtor in involuntary bankruptcy, and should not therefore be counted,<sup>4</sup> as where a creditor on being made a party to a general assignment files his claim and participates in the administration of the estate under the assignment,<sup>5</sup> though if the

2—In *re Miller*, 104 Fed. 764, 5 A. B. R. 140.

3—In *re Girard Glazed Kid Co.*, 129 Fed. 841, 12 A. B. R. 295; In *re Folb*, 1 N. B. N. 134, 91 Fed. 107, 1 A. B. R. 22; In *re Marcer*, 6 N. B. R. 351, Fed. Cas. No. 9060.

4—*Clark v. Henne & Meyer*, 127 Fed. 288, 11 A. B. R. 583; *Stroheim v. Perry & Whitney Co.*, 175 Fed. 52, 23 A. B. R. 695, aff'g 172 Fed. 745, 22 A. B. R. 772; In *re Crenshaw*, 156 Fed. 638, 19 A. B. R. 502; *Woolford v. Diamond State Steel Co.*, 138 Fed. 582, 15 A. B. R. 31; *Durham Paper Co. v. Seaboard Knitting Mills*, 121 Fed. 179, 10 A. B. R. 29; *Simonson v. Sinsheimer*, 95 Fed. 948; *Leidigh Carriage Co. v. Stengel*, 1 N. B. N. 387, 95 Fed. 637, 2 A. B. R. 383; In *re Romanow*, 1 N. B. N. 213, 1 A. B. R. 461, 92 Fed. 510; In *re Gillette*, 104 Fed. 769, 5 A. B. R. 119; In *re Mass. Brick Co.*, 5 N. B. R. 408, Fed. Cas. No. 9259; *Perry v. Langley*, 1 N. B. R. 559, Fed. Cas. No. 11006; contra, In *re Curtis*, 1 N. B. N. 357, 2 A. B. R. 226, 94 Fed. 630, aff'g 1 N. B. N. 163, 1 A. B. R. 440, 91 Fed. 737.

Creditor inducing, procuring or consenting to the act of bankruptcy complained of is estopped to become a petitioner. In

*re Taylor House Ass'n*, 209 Fed. 924, 31 A. B. R. 727.

In the absence of special circumstances a creditor assenting in writing to a common-law assignment for the benefit of creditors is estopped to petition for the bankruptcy of the assignor on the ground of such assignment. *Moulton v. Coburn*, 131 Fed. 201, 12 A. B. R. 553, aff'g 126 Fed. 218, 11 A. B. R. 212.

Creditors participating in receivership proceedings cannot petition. *Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007, 12 A. B. R. 601.

Creditor assenting to state court receivership estopped to become petitioning creditor. In *re Gold Run Mining & Tunnel Co.*, 200 Fed. 162, 29 A. B. R. 563.

An officer of alleged bankrupt corporation who has himself brought about the act of bankruptcy complained of is not a proper petitioner. In *re Taylor House Ass'n*, 209 Fed. 924, 31 A. B. R. 727.

5—*Lowenstein v. McShane Mfg. Co.*, 130 Fed. 1007, 12 A. B. R. 601; *Moulton v. Coburn*, 131 Fed. 201, 12 A. B. R. 553, aff'g 126 Fed. 218, 11 A. B. R. 212; In *re Hirose, Doing Business Under the Name of Hirose Shoten*, 12 A. B. R. 154; In *re Miner*, 2 N. B. N. R. 1073, 104 Fed.

creditor has done nothing more than file his claim with the assignee or receiver<sup>6</sup> or merely sells him small bills of goods to replace his stock,<sup>7</sup> he will not be estopped. Nor does the general rule apply if the creditor has only offered to assent to a general assignment for the benefit of creditors upon condition that the assignee be changed,<sup>8</sup> or if his consent has been procured by fraud<sup>9</sup> or false representations of his debtor<sup>10</sup> or he merely advises the sale of a debtor's property for a certain sum and the distribution of the proceeds among his creditors pro rata, when such transfer is the alleged act of bankruptcy, if, after such transfer, the proceeds were diverted by the debtor to other purposes.<sup>11</sup>

### § 137. Intervening petitioners.

### § 138. — Right to intervene.

A creditor other than the original petitioner, although holding a claim for a mere nominal sum,<sup>12</sup> or holding security for part of his claim,<sup>13</sup> may enter his appearance by petition alleging that he is a creditor, stating the purpose of his petition and nothing more, and thereby acquire all the rights of the original petitioner, even though it be proven that the latter has no claim.<sup>14</sup>

520; *In re Simonson v. Sinsheimer*, 95 Fed. 948; *Leidigh Carriage Co. v. Stengel*, 1 N. B. N. 387, 95 Fed. 637, 2 A. B. R. 383; *Massachusetts Brick Co.*, 5 N. B. R. 408, Fed. Cas. No. 9259; *Perry v. Langley*, 1 N. B. R. 559, Fed. Cas. No. 11006; *In re Romanow*, 92 Fed. 510, 1 N. B. N. 213, 1 A. B. R. 461; but see *Spicer v. Ward*, 3 N. B. R. 127, Fed. Cas. No. 13241.

In *In re Salmon & Salmon*, 143 Fed. 395, 16 A. B. R. 122, it was held that creditors participating in proceedings instituted by the Attorney General of the state for the appointment of a receiver for an insolvent private bank were not thereby estopped to demand an adjudication in bankruptcy, since the operation of the statute in so far as it applied to private banks was suspended by the passage of the bankruptcy act.

6—*In re Salmon & Salmon*, 143 Fed. 395, 16 A. B. R. 122; *Hays v. Wagner*, 150 Fed. 533, 18 A. B. R. 163; *In re*

*Weedman Stave Co.*, 199 Fed. 948, 29 A. B. R. 460; *In re Curtis*, 91 Fed. 737, 1 N. B. N. 163, 1 A. B. R. 440; *In re Romanow*, 1 N. B. N. 213, 1 A. B. R. 461, 92 Fed. 510; *Simonson v. Sinsheimer*, 95 Fed. 948.

7—*Simonson v. Sinsheimer*, 100 Fed. 426, 3 A. B. R. 824.

8—*Spicer v. Ward*, 3 N. B. R. 127, Fed. Cas. No. 13241.

9—*Canner v. Webster Tapper Co.*, 168 Fed. 519, 21 A. B. R. 872.

10—*In re Canner*, 21 A. B. R. 199; *Canner v. Webster Tapper Co.*, 168 Fed. 519, 21 A. B. R. 872.

11—*In re Gillette*, 104 Fed. 769, 5 A. B. R. 119.

12—*In re Brown*, 111 Fed. 979, 7 A. B. R. 102.

13—*Johansen Bros. Shoe Co. v. Alles*, 197 Fed. 274, 28 A. B. R. 299.

14—Act 1898, § 59f. *In re Vastbinder*, 126 Fed. 417, 11 A. B. R. 118; *In re Lacey*, 10 N. B. R. 477; *In re Taylor*,

The purpose of this provision of the act is to enable creditors, other than the original petitioners, who favor an adjudication, to acquire a standing such as will prevent a dismissal in case any of the original petitioners are disqualified, and to grant to creditors who are opposed to an adjudication, the right to join the alleged bankrupt, or assert his right in opposition in case of his failure to do so.<sup>15</sup>

A creditor who files a petition in bankruptcy has the right to request others to intervene when such intervention becomes necessary to preserve the proceeding,<sup>16</sup> and another creditor may intervene and be permitted to prosecute the original petition where the court is satisfied that the original petitioning creditor does not intend to prosecute further, and the pending application of the original creditor to discontinue the proceedings is sufficient evidence in that regard.<sup>17</sup> The pendency of a petition to discontinue the proceedings instead of depriving creditors of the right to intervene is notice to them that the original creditor does not intend to prosecute further and confers on them the very right to intervene.<sup>18</sup>

An assignee of a claim has same right to intervene as his assignor,<sup>19</sup> and where one who files a petition in bankruptcy against another is himself adjudged a bankrupt, his trustee is properly substituted as petitioner in his place.<sup>20</sup>

A receiver appointed by a state court may be permitted to intervene to oppose the adjudication, in the discretion of the court.<sup>21</sup>

A creditor assenting to a common-law assignment is estopped to intervene.<sup>22</sup>

1 N. B. N. 412; In re Austin, 16 N. B. R. 518, Fed. Cas. No. 662; In re Mendenhall, 9 N. B. R. 380, Fed. Cas. No. 9424; In re Mammoth Lumber Co., 109 Fed. 308, 6 A. B. R. 84.

15—In re Dandridge & Pugh, 209 Fed. 838, 31 A. B. R. 15.

16—In re Smith, 176 Fed. 426, 23 A. B. R. 864.

17—In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2073; In re Lacey, 10 N. B. R. 477, Fed. Cas. No. 7965; In re Shaffer, 17 N. B. R. 369, 4 Sawy. 363, Fed. Cas. No. 12742.

18—In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2073.

19—In re Fitzgerald, 191 Fed. 95, 26 A. B. R. 773.

20—In re Jones, 7 N. B. R. 506, Fed. Cas. No. 7450.

21—Blackstone v. Everybody's Store, 207 Fed. 752, 30 A. B. R. 497; Butler & Co. v. Palmenberg, 207 Fed. 705, 30 A. B. R. 502.

22—In re Lewis F. Perry & Whitney Co., 172 Fed. 745, 22 A. B. R. 772; *aff'd* Stroheim v. Perry & Whitney Co., 175 Fed. 52, 23 A. B. R. 695.

Where the act of bankruptcy charged in an involuntary petition against a partnership is the transfer of its property to an assignee for the benefit of creditors, such assignee is entitled to intervene and contest the petition, and, having been permitted to intervene and been heard, he has the right to appeal from a decree adjudging respondent bankrupt.<sup>23</sup> Where one member of a firm died and his administrators allowed the surviving partner (respondent) to continue the business without a new agreement, the administrators could only come in as any other creditors, in the absence of a new agreement, the surviving partner having converted his former partner's property to his own use with the knowledge and consent of the administrators.<sup>24</sup>

### § 139. — Time of intervention.

Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition,<sup>25</sup> even though the four months have expired since the commission of the act of bankruptcy.<sup>26</sup> Such intervention must be made during the pendency of the proceedings, and as a rule will not be made after adjudication or dismissal, since the successive retrial of decided issues will not be permitted,<sup>27</sup> though it is within the court's power to permit creditors other than original petitioners to intervene at any time.<sup>28</sup> Under the former act nearly two years after a firm filed a voluntary petition in bankruptcy on which it was adjudged bankrupt and its property conveyed to an assignee, a creditor filed a bill alleging that two persons not named in the petition were copartners in the firm and asked that they be joined in the bankruptcy proceedings, and it was held that the creditor could not supply the omission, but could have

23—*In re Meyer*, 98 Fed. 976, 3 A. B. R. 550.

24—*In re Mills*, 11 N. B. R. 74, Fed. Cas. No. 9611.

25—Act of 1898, § 59f. *In re Crenshaw*, 156 Fed. 638, 19 A. B. R. 502; *In re Lewis F. Perry & Whitney Co.*, 172 Fed. 744, 22 A. B. R. 770.

26—*In re Charles Town Light & Power Co.*, 183 Fed. 160, 25 A. B. R. 687; *In re Mackey*, 110 Fed. 355, 6 A. B. R. 577; *In re Stein*, 105 Fed. 749, 5 A. B. R. 288; *In re Romanow*, 1 N. B. N. 213, 1 A. B. R. 461, 92 Fed. 510.

27—*Neustadter v. Dry Goods Co.*, 1 N. B. N. 552, 3 A. B. R. 96, 96 Fed. 830; *In re Bush*, 6 N. B. R. 179, Fed. Cas. No. 222; *In re Mutual Mercantile Agency*, 111 Fed. 152, 6 A. B. R. 607; *In re Tribelhorn*, 137 Fed. 3, 14 A. B. R. 491; *In re Marion Contract and Construction Co.*, 166 Fed. 618, 22 A. B. R. 81.

28—*In re Stein*, 105 Fed. 749; *In re Houghton*, 10 N. B. R. 337, Fed. Cas. No. 6730; *In re Olmstead*, 4 N. B. R. 71, Fed. Cas. No. 10505.

the same remedies against such parties as before the petition was filed.<sup>29</sup>

### § 140. — Manner of intervention.

A creditor other than the original petitioner may intervene by petition, simply alleging that he is a creditor and desires to intervene and thereby becomes entitled to all the rights of such original petitioner.<sup>30</sup>

### § 141. — Status of intervenors.

Intervening creditors acquire a definite status as parties, and any order or decree of the bankrupt court affects them just as it affects original parties. The intervenors cannot be eliminated except upon such hearing as must be accorded to the original parties. So it is held that they are necessary parties to an appeal from an order denying an adjudication.<sup>31</sup>

### § 142. — Intervening creditors counted.

Creditors joining in the petition subsequent to the filing thereof may be counted in making up the number of creditors and amount of claims,<sup>32</sup> and where the requisite number does not join, and afterwards a supplemental petition is filed in which other creditors join, the total number being sufficient, the supplemental petition will not be dismissed because it did not alone contain the requisite number.<sup>33</sup>

### § 143. — Withdrawal of petitioners.

Permission to withdraw will be denied whenever necessary to further the purposes of the act.<sup>34</sup>

Where a creditor joins in a proceeding in involuntary bankruptcy and allows the petition to be filed, and afterwards assigns

29—*Citizens' Nat. Bank v. Cass*, 18 N. B. R. 279, Fed. Cas. No. 2732.

30—*In re Taylor*, 1 N. B. N. 412; *In re Austin*, 16 N. B. R. 518, Fed. Cas. No. 662; *In re Mendenhall*, 9 N. B. R. 380, Fed. Cas. No. 9424.

31—*In re Dandridge & Pugh*, 209 Fed. 838, 31 A. B. R. 15.

32—*In re Crenshaw*, 156 Fed. 638, 19 A. B. R. 502; *In re Plymouth Cordage Co.*, 135 Fed. 1000, 13 A. B. R. 665; *In re Charles Town Light & Power Co.*, 183 Fed. 160, 25 A. B. R. 687.

33—*In re Frisbie*, 15 N. B. R. 522, 14 Blatch. 185, Fed. Cas. No. 5129.

34—*In re Quincey Granite Quarries Co.*, 147 Fed. 279, 16 A. B. R. 823; *In re Sheffer*, 17 N. B. R. 369, 4 Sawy. 363, Fed. Cas. No. 12742; *In re Beddingfield*, 1 N. B. N. 385, 2 A. B. R. 355, 96 Fed. 190; *In re Romanow*, 92 Fed. 510, 1 N. B. N. 213, 1 A. B. R. 461; *In re Sargent*, 13 N. B. R. 144, Fed. Cas. No. 12361; *In re Rosenfields*, 11 N. B. R. 86, Fed. Cas. No. 12061.

his claim,<sup>35</sup> or obtains a settlement from the bankrupt,<sup>36</sup> it is too late to withdraw from the proceedings. When, however, a creditor's name has been signed to the petition without his knowledge, he may repudiate the proceedings and the petition will be dismissed as to him<sup>37</sup> or if he join therein through misrepresentation, he may be allowed to withdraw at any time before adjudication;<sup>38</sup> though not if the misrepresentation is not substantial and intentionally false.<sup>39</sup> A party having once appeared cannot withdraw his appearance on the ground that the court did not have jurisdiction, but must raise that question by demurrer.<sup>40</sup>

A creditor who has petitioned for leave to join may, in the discretion of the court be allowed to withdraw his petition.<sup>41</sup>

#### § 144. Process.

#### § 145. — Form of.

All process, summons and subpoenas shall issue out of the court, under its seal, and be tested by the clerk; and upon application, blanks with the signature of the clerk and seal of the court, may be furnished to referees.<sup>42</sup> The memorandum to the effect that "the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso," required by Equity Rule 12 need not be contained in the writ of subpoena.<sup>43</sup>

#### § 146. — By whom issued.

The referee has no power to issue a subpoena,<sup>44</sup> but the same may be issued by the clerk.<sup>45</sup>

35—But see *In re Western Savings & Tr. Co.*, 17 N. B. R. 413, Fed. Cas. No. 17442.

36—*In re Ryan*, 114 Fed. 373, 7 A. B. R. 562.

37—*In re Rosenfields*, 11 N. B. R. 86, Fed. Cas. No. 12061.

38—*In re Sargent*, 13 N. B. R. 144, Fed. Cas. No. 12361; *In re Heffron*, 6 Biss. 156, Fed. Cas. No. 632.

39—*In re Vogel*, 18 N. B. R. 165, Fed. Cas. No. 16981.

40—*In re Ulrich*, 3 N. B. R. 34, 3 Ben. 355, Fed. Cas. No. 14327.

41—*Moulton v. Coburn*, 131 Fed. 201, 12 A. B. R. 553, aff'g 126 Fed. 218, 11 A. B. R. 212.

Dismissal of petition, see *post*, Chap. VIII.

42—G. O. III; Official Forms 4 and 5, §§ 1690, 1691, *post*.

43—*In re Wing Yick Company*, 13 A. B. R. 360.

44—*In re Pierce*, 111 Fed. 516, 6 A. B. R. 747.

45—*In re Abbey Press*, 134 Fed. 51, 13 A. B. R. 11.

### § 147. — When issued.

No process of subpoena will issue from the clerk's office in any suit in equity until the bill is filed in the office.<sup>46</sup> that is, in bankruptcy proceedings until the petition is filed; and, whenever, a bill or petition is filed, the clerk must issue the process of subpoena thereon, as of course, upon the application of the plaintiff or petitioner.<sup>47</sup>

Where there is more than one defendant or respondent, a writ of subpoena may, at the election of the plaintiff or petitioner, be issued out separately for each defendant or respondent, except in the case of husband and wife defendants, or a joint subpoena against all the defendants or respondents.<sup>48</sup>

No process need be issued on an intervening petition, if issued on the original petition.<sup>49</sup>

### § 148. — Personal service.

Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time.<sup>50</sup>

46—Equity Rule 11.

47—Equity Rule 12.

48—Equity Rule 12.

49—In re Taylor, 1 N. B. R. 412; In re Lacey, 10 N. B. R. 477, 483, 492.

50—Act of 1898, § 18a.

Analogous provision of Act of 1867.

“Sec. 40. . . . That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunctions, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's

property not excepted by this act from the operation thereof and from any interference therewith. . . . A copy of the petition and of such order to show cause shall be served upon such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.”



The quashing of a subpoena returnable after the statutory fifteen days does not, however, oust the court of jurisdiction.<sup>51</sup>

In determining the return day of a writ of subpoena, Sundays and holidays are included in the computation.<sup>52</sup>

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, toties quoties, against such defendant if he shall require it, until the due service is made; <sup>53</sup> and the service of all process, mense and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process must make affidavit thereof. Upon the return of the subpoena as served and executed upon any defendant, the clerk must enter the suit upon his docket as pending in the court, and state the time of the entry.<sup>54</sup>

The duplicate petition with a writ of subpoena must be served upon the alleged bankrupt. An order to show cause why the prayer of the petition should not be granted is provided,<sup>55</sup> which also orders a copy of the petition with a subpoena to be served<sup>56</sup> upon the alleged bankrupt by delivering to him personally or "by leaving the same at his last usual place of abode in said district" at least five days before the time fixed for the hearing. The mode of service directed in the order to show cause <sup>57</sup> must be construed to mean "last" in time, that is, the existing, present, dwelling-house, or the existing, present, usual, customary place of abode,<sup>58</sup> and if he has had more than one place of abode in the district, it would be the last, in common parlance, though correctly used "last" signifies past and done with. However, if inquiry at the "last" and usual abode of an alleged bankrupt elicits no information as to his present whereabouts beyond the fact that he is not in, service is sufficiently made by leaving the papers with some adult person who is a member of or resident in the family, stating that they are for the bankrupt.<sup>59</sup>

51—In re Levy Outfitting Co., 29 A. B. R. 13.

52—In re Levy Outfitting Co., 29 A. B. R. 13.

53—Equity Rule 14. Gleason v. Smith, Perkins & Co., 145 Fed. 895, 16 A. B. R. 602.

54—Equity Rule 15.

55—Official Form 4, § 1690, *post*.

56—See Equity Rule 13.

57—Official Form 4, § 1690, *post*.

58—Hyslop v. Hoppock, 6 N. B. R. 552, 5 Ben. 447, Fed. Cas. No. 6988.

59—In re Norton, 148 Fed. 301, 17

Service on the cashier of a corporation which has passed into the hands of a receiver,<sup>60</sup> or upon the agent or attorney appointed to receive service of process within the state, in case of a foreign corporation, is sufficient,<sup>61</sup> but service upon a director of a corporation not authorized to accept service has been held insufficient.<sup>62</sup>

Service may be made outside the district,<sup>63</sup> but where service is so made without an appearance on defendant's part, no order can be made which will apply to him in person, but the proceeding will affect only property which can come into possession of the trustee.<sup>64</sup>

The court does not lose jurisdiction by reason of the fact that the subpoena accompanying the original petition is returned with the endorsement that the debtor cannot be found, and nothing further is done.<sup>65</sup>

### § 149. — By publication.

In case personal service cannot be made, notice must be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien, in the courts of the United States, except that unless the judge shall otherwise direct, the order need not be published more than once a week for two consecutive weeks,<sup>66</sup>

A. B. R. 504; *In re Derby*, 8 N. B. R. 106, Fed. Cas. No. 3815; Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126.

60—*Platt v. Archer*, 6 N. B. R. 465, 9 Blatch. 559, Fed. Cas. No. 11213; Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126; *Isett v. Stewart*, 16 N. B. R. 191; *Stuart v. Hines*, 6 N. B. R. 416.

61—*In re Magid Hope Silk Mfg. Co.*, 110 Fed. 352, 6 A. B. R. 610.

62—*In re Plasmon Co.*, 14 A. B. R. 487.

63—*Hills v. F. D. McKinniss Co.*, 188 Fed. 1012, 26 A. B. R. 329.

64—*In re Appel*, 103 Fed. 931, 2 N. B. R. 907.

65—*In re Stein*, 105 Fed. 749, 5 A. B. R. 288.

66—Act of 1903, § 18a,

The act prior to the amendment of February 5, 1903, read as follows:

"Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States."

The provision is satisfied by two publications, one on a certain day of the week and another on the same day of the week

and the return day shall be ten days after the last publication unless the judge shall fix a longer time.<sup>67</sup> An order designating a day upon which the defendant is required to appear and plead, must be made by the court, and it is such order that must be published.<sup>68</sup>

Service by publication is only authorized where the party to be served cannot be found or his place of residence ascertained,<sup>69</sup> and is not authorized where an adult person who is a member or resident of his family can be found at his last place of residence.<sup>70</sup> Notwithstanding the fact that a lunatic has been personally served, the better practice is to supplement it by the usual publication.<sup>71</sup>

Publication is constructive notice to the person in possession as well as to the defendant, and hence it is not necessary that the order directing service by publication be served upon a state receiver in possession of the alleged bankrupt's property.<sup>72</sup>

### § 150. Notice to creditors.

#### § 151. — In general.

The proceeding is in a large sense in rem. The filing of the petition by proper parties, containing the jurisdictional allegations, operates as *lis pendens*, and no notice to creditors is necessary.<sup>73</sup>

If a party holding an adverse claim is made a defendant, and it sets up no cause of action and prays no special relief against him, the purpose merely being to put an end to further action by him, he does not by such procedure continue to be subject to the orders of the bankruptcy court without further process.<sup>74</sup>

following. In *re McDonald*, 30 A. B. R. 120.

67—"Return day" used in section 18 means the day appointed by law when writs are to be returned and filed by the marshal and not answer day or appearance day. In *re McDonald*, 30 A. B. R. 120.

68—As to form of order, see In *re McDonald*, 30 A. B. R. 120.

The mere publication of a citation issued by the clerk directing the marshal to summon the bankrupt by making publication of the citation is insufficient though the citation contains a direction

for the bankrupt to appear before the court at the time and place named therein to answer the petition in bankruptcy. *Bauman Diamond Co. v. Hart*, 192 Fed. 498, 27 A. B. R. 632.

69—*Stuart v. Hines*, 6 N. B. R. 416.

70—In *re Norton*, 148 Fed. 301, 17 A. B. R. 509.

71—In *re Burka*, 107 Fed. 674, 5 A. B. R. 843.

72—*Bauman Diamond Co. v. Hart*, 192 Fed. 498, 27 A. B. R. 632.

73—In *re Billing*, 145 Fed. 395, 17 A. B. R. 80.

74—*Louisville Trust Co. v. Cominger*,

### § 152. — Creditors named in answer.

Section 59d of the act provides that: "If it be averred in the petition the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition."

The duty of sending out the notices to creditors prescribed in this subdivision is in the first instance on the respondent; but, on his default, the duty devolves on the petitioner. It is in the court's discretion to decide what effect failure to send out such notices in a reasonable time shall have.<sup>75</sup> The mode of service, whether personally or by mail, is discretionary.<sup>76</sup>

### § 153. Form of petition.

All petitions and the schedules filed therewith must be printed or written out plainly, without abbreviation or interlineation, except where such may be necessary for the purpose of reference,<sup>77</sup> and it has been held that petitions in bankruptcy will not be filed nor considered unless they are the prescribed printed forms, and that written or typewritten petitions and schedules will be returned to the parties without action;<sup>78</sup> but such requirement is governed entirely by rule of court and not by any provision of the law.

A defective caption does not deprive the court of jurisdiction of the proceedings.<sup>79</sup>

The general form of petition in involuntary bankruptcy<sup>80</sup> should be used as the form of an involuntary petition against a partnership with the necessary adaptations to meet the particular case, no special form being prescribed, and the bankrupt's answer should also be in the form prescribed.<sup>81</sup>

184 U. S. 18, 46 L. ed. 413, 7 A. B. R. 421, aff'g 107 Fed. 898, 5 A. B. R. 537.

75—In re Barrett Pub. Co., 2 N. B. N. R. 80.

76—In re Tribelhorn, 137 Fed. 3, 14 A. B. R. 491.

77—G. O., V.; Official Forms 1, 2, and 3, §§ 1669, 1682, 1683, *post*.

78—Mahoney v. Ward, 2 N. B. N. R. 538, 3 A. B. R. 770, 100 Fed. 278; see also 1 N. B. N. 239, 396.

79—In re Gorman, 15 A. B. R. 587.

80—Official Form 3, § 1683, *post*.

81—Official Form 6, § 1695, *post*; Mather v. Coe, 1 N. B. N. 554, 1 A. B. R. 504, 92 Fed. 333.

## § 154. Allegations of petition.

## § 155. — In general.

A petition in involuntary bankruptcy is in the nature of a pleading and should set forth all the facts material to the claim of the petitioner for an adjudication so that the alleged bankrupt may be distinctly apprised of what he is required to answer;<sup>82</sup> though the allegations may be made upon information and belief especially if the sources of information and the grounds of belief are given.<sup>83</sup> The statute contemplates that a trial by jury may be had upon the allegations of the petition in case the alleged bankrupt so chooses and therefore the allegations must be of issuable facts, made with reasonable and sufficient certainty.<sup>84</sup> A petition is insufficient if it states disjunctively, or in the alternative several facts, any one of which would be sufficient if alleged unqualifiedly.<sup>85</sup>

The authority under which he acts need not be set forth by the agent of a petitioner in bankruptcy.<sup>86</sup>

Where the petition in involuntary bankruptcy is filed by a partnership, the names of the partners should be disclosed.<sup>87</sup>

The petition need not allege that property to be seized is not exempt.<sup>88</sup>

82—Clark v. Henne & Meyer, 127 Fed. 288, 11 A. B. R. 583; In re Hallin, 199 Fed. 806, 28 A. B. R. 708; In re Sig. H. Rosenblatt & Co., 193 Fed. 638, 28 A. B. R. 401; In re Blumberg, 133 Fed. 845, 13 A. B. R. 343; In re Raynor, 7 N. B. R. 527, 11 Blatch. 43, Fed. Cas. No. 11597; In re Randall, 3 N. B. R. 4, Deady 557, Fed. Cas. No. 11551; In re Chappel, 4 N. B. R. 176, Fed. Cas. No. 2612.

83—Orem v. Harley, 3 N. B. R. 62, Fed. Cas. No. 10567; In re Scammon, 10 N. B. R. 66, 6 Biss. 130; Mueller v. Brentano, 3 N. B. R. 329; In re Scull, 7 Ben. 371.

Insertion of the words in the petition, that it is made upon information and belief, neither add or detract to the strength of the allegation. In re Ball, 156 Fed. 682, 19 A. B. R. 609.

84—In re Hark Bros., 135 Fed. 603, 14 A. B. R. 400; In re Butterfield, 5 Biss.

120, Fed. Cas. No. 2247; In re Rathbone, 1 N. B. R. 50, 65, Fed. Cas. No. 11580; In re Beardsley, 1 N. B. R. 52, Fed. Cas. No. 1183; In re Mawson, 1 N. B. R. 115, Fed. Cas. No. 9318; Ex parte Potts, Fed. Cas. No. 11344.

85—In re Laskaris, 1 N. B. N. 209, 1 A. B. R. 480; In re Hannibal, 15 N. B. R. 233, Fed. Cas. No. 6023; Arnat v. Wright, 55 Hun. 561.

86—In re Taylor, 102 Fed. 728, 2 N. B. N. R. 929, 49 B. R. 515; In re Oregon Bull. Pr. and Pub. Co., 14 N. B. R. 405, 3 Sawy. 614, Fed. Cas. No. 10561, s. c. 13 N. B. R. 503, Fed. Cas. No. 10550; Ala. and Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126. But see, In re Livingston, 13 A. B. R. 357.

87—In re Livingston, 13 A. B. R. 357.

88—Hoffschlaeger Company, Ltd., v. Young Nap, alias Young Lap, 12 A. B. R. 510.

The fact that a petition contains a prayer for intervention will not deprive it of its character as an original petition if it is otherwise sufficient as such.<sup>89</sup>

A false statement of a jurisdictional fact for the purpose of making the bankrupt file a statement of his creditors constitutes a fraud upon the court which should set aside any process obtained by such deception, as where a petition in involuntary bankruptcy was signed by six creditors, the first five of whom verified it, alleging that they believed they were one-fourth of the creditors when they knew it was untrue.<sup>90</sup>

### § 156. — Residence or place of business of debtor.

Having a principal place of business, residence or domicile<sup>91</sup> within the territorial jurisdiction of the particular court of bankruptcy in which the petition is filed is jurisdictional and must be alleged in the petition and proved. It is not sufficient to allege these facts disjunctively in a petition because in such case it states neither one fact nor the other, but a positive statement of any one of these facts, or a conjunctive statement of any two or all three would be sufficient; and, it has been held that if upon examination of the petition and schedules,<sup>92</sup> the referee finds them insufficient, he should return them to the clerk with a statement of the defects noted thereon.<sup>93</sup>

89—In re Haff, 136 Fed. 78, 13 A. B. R. 362.

90—In re Keiler, 18 N. B. R. 10, Fed. Cas. No. 7647; In re Scammon, 11 N. B. R. 280, 6 Biss. 195, Fed. Cas. No. 12429.

91—*Under the act of 1867.* A petitioner in bankruptcy, carried on business for many years in one city and then retired and moved to another, but was employed in the former place, his petition was properly filed in the district where his business was conducted (In re Belcher, 1 N. B. R. 202, 2 Ben. 463, Fed. Cas. No. 1237). A clerk employed in one state and residing in another was held not to have carried on business in the former (In re Magie, 1 N. B. R. 153). The fact that a person has an office at which he receives mail and settles up the old business of an insolvent firm of which he was a member, and which had gone out

of business, was not sufficient to sustain an allegation of carrying on business within the jurisdiction (In re Little, 2 N. B. R. 97, 3 Ben. 25, Fed. Cas. No. 8391); and, where a person acted as agent and attorney in buying and selling merchandise, at an office with a sign having his brother's name on it, and was well known by those dealing with him to be doing such business at that office, he carried on business within the meaning of the term used (In re Bailey, 1 N. B. R. 177, 2 Ben. 437, Fed. Cas. No. 753). As to office of a corporation, see In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, Fed. Cas. No. 2315.

92—Act of July 1, 1898, § 39a (2).

93—In re Laskaris, 1 N. B. R. 209, 1 A. B. R. 480; In re Clisdell, 2 A. B. R. 24; In re Beals, 17 N. B. R. 108, 9 Ben. 223, Fed. Cas. No. 1165.

**§ 157. — Nature of petitioners' claim.**

The nature of the petitioners' claim should be set out with such particularity as will enable the court to find from the petition the essential jurisdictional facts.<sup>94</sup> As creditors must have been such at the time of filing the petition, this must appear in the petition.<sup>95</sup> Facts, not conclusions of law, must be alleged, so that it is not sufficient to allege that petitioner has a "provable claim" but the facts showing that it is one must be alleged.<sup>96</sup> To uphold a demurrer to a petition on the ground that the claim of a petitioner is barred by the statute of limitations it must affirmatively appear that the claim is so barred.<sup>97</sup>

**§ 158. — Number and amount of claims.**

It must appear that there is the requisite number of creditors under the law<sup>98</sup> and that their claims are of the required amount, but an averment to that effect may be made upon information and belief.<sup>99</sup> That the petitioners should know such to be the

94—*In re Farthing*, 202 Fed. 557, 29 A. B. R. 732. Petition should set out with reasonable particularity the nature of petitioner's claim, the dates, to whom payable, whether acquired by assignment, etc. *Id.*

95—*In re Western Sav. & Tr. Co.*, 17 N. B. R. 413, 4 Sawy. 190, Fed. Cas. No. 17442.

96—*In re White*, 135 Fed. 199, 14 A. B. R. 241; *In re Hadley*, 12 N. B. R. 366, Fed. Cas. No. 5894. But see, *In re Brett*, 130 Fed. 981, 12 A. B. R. 492.

An allegation of debt as "balance due upon goods, wares and merchandise sold and delivered to respondent by petitioner at respondent's request" is sufficient as to the nature of the petitioner's claim. *Hoffschlaeger Company, Ltd., v. Young Nap, alias Young Lap*, 12 A. B. R. 510.

A petition stating that the claims of the petitioners are provable and are for goods sold and delivered within one year of the date of the execution of the petition is sufficient without an allegation as to when the claims became due or as to the amount of the securities held, or as to the manner in which the value of the securities are fixed. *In re Hark Bros.*, 135 Fed. 603, 14 A. B. R. 400.

An allegation of the alleged bankrupt's place of business for six months prior to the filing of the petition is a sufficient allegation as to the place where the debt of the alleged bankrupt for goods sold and delivered accrued. *Hoffschlaeger Company, Ltd., v. Young Nap, alias Young Lap*, 12 A. B. R. 510.

A petition averring that a firm were manufacturers and had made and delivered certain notes which were negotiated but not paid, need not allege that the notes were given for the purpose of their business. *In re Kenyon*, 6 N. B. R. 238; *contra*, *In re Cap. Pub. Co.*, 18 N. B. R. 319.

97—Allegation that petitioners "hold and own negotiable notes" executed by the bankrupt for the amounts named, "now due and owing to petitioners" is too indefinite. *In re Farthing*, 202 Fed. 557, 29 A. B. R. 732; *In re R. L. Radke Co.*, 193 Fed. 735, 27 A. B. R. 950.

98—*In re Scammon*, 11 N. B. R. 280, 6 Biss. 195, Fed. Cas. No. 12429; *Taft Co. v. Century Savings Bank*, 141 Fed. 369, 15 A. B. R. 594.

99—*Perin & Gaff Mfg. Co. v. Peale*, 17 N. B. R. 377, Fed. Cas. No. 10981.

fact cannot in the very nature of the case be required, and when the petition is alleged upon belief, without charging either information or knowledge, that the petitioners constitute the requisite proportion of creditors, it will nevertheless be sufficient.<sup>1</sup>

Where a petition shows on its face a sufficient petitioning creditor, and there is established on the trial a sufficient petitioning creditor, the absence of a statement of the amount of his claim in the petition may be disregarded.<sup>2</sup>

### § 159. — Business or occupation of debtor.

A court of bankruptcy is a court of record, and, although its jurisdiction is limited, it is not an inferior court in the sense that all facts essential to its jurisdiction must affirmatively appear on the face of the record, and a decree cannot be impeached collaterally, as for want of jurisdiction, merely because the petition omitted to allege that the corporation belonged to one of the classes that might be adjudged an involuntary bankrupt.<sup>3</sup> While there is some diversity of opinion as to whether the petition should aver the bankrupt's business or that he does not come within the excepted classes, the better practice is to set forth such information,<sup>4</sup> though its omission would not be fatal, if the form of petition prescribed by supreme court,<sup>5</sup> is otherwise followed, since that makes no provision for such information.<sup>6</sup> The principal business of the alleged bankrupt must be

1—In re Mann, 14 N. B. R. 572, 13 Blatchf. 401, Fed. Cas. No. 9033.

2—In re Pangborn, 185 Fed. 673, 26 A. B. R. 40.

3—In re Columbia Real Estate Co., 101 Fed. 965, 4 A. B. R. 411; In re Elmira Steel Co., 109 Fed. 456, 5 A. B. R. 484; In re Stern, 116 Fed. 604, 8 A. B. R. 569; In re Taylor, 102 Fed. 728, 2 N. B. N. R. 929, 4 A. B. R. 515; In re Pilger, 118 Fed. 206, 9 A. B. R. 244; In re White, 135 Fed. 199, 14 A. B. R. 241; Rise v. Bordner, 140 Fed. 566, 15 A. B. R. 297; Woolford v. Diamond State Steel Co., 138 Fed. 582, 15 A. B. R. 31; In re Livingston, 13 A. B. R. 357; In re Mero, 128 Fed. 630, 12 A. B. R. 171.

4—It is essential that the petition show by a negative averment that the

alleged bankrupt is not one of the excepted classes or that it appear from a specific statement of the business in which he is engaged that his principal business is not within the exceptions. In re Brett, 130 Fed. 981, 12 A. B. R. 492.

Defect in this respect may be cured by amendment. Conway v. German, 166 Fed. 67, 21 A. B. R. 577.

5—Official Form 3, § 1683, *post*.

6—In re Broadway Savings Trust Co., 152 Fed. 152, 18 A. B. R. 254; In re First Nat. Bank of Belle Fourche, 152 Fed. 64, 18 A. B. R. 265; In re Callison, 130 Fed. 987, 12 A. B. R. 344; In re Columbia Real Estate Co., *supra*; Green River Deposit Bank v. Craig, 3 N. B. N. R. 897, 110 Fed. 137, 6 A. B. R. 381; *contra*, In re Taylor, 102 Fed. 728, 2 N. B. N. R.



stated. It is not sufficient to allege merely that a part of the business of the alleged bankrupt was within the statute.<sup>7</sup>

### § 160. — Act of bankruptcy.

The rule is that the specific facts relied on as an act of bankruptcy should be alleged with time, place, person and circumstances. An averment couched in the general language of the statute is insufficient.<sup>8</sup> No greater detail, however, is required than it is probable the creditors can furnish,<sup>9</sup> and if the names of the creditors receiving a preference alleged as an act of bankruptcy are not known, it is sufficient to allege the fact of the preference, adding the reason why a more specific allegation is not possible.<sup>10</sup> So, in case of fraudulent concealment, where the evidence is wholly circumstantial, it is impossible and unreasonable, and therefore unnecessary, to aver in the petition the precise details of the act of concealment.<sup>11</sup> The intent to defraud should be alleged as a fact and not as a matter of information and belief in a petition setting up a preference or a fraudulent conveyance as an act of bankruptcy.<sup>12</sup>

Insolvency at the time of the transfer alleged as an act of bankruptcy must be alleged.<sup>13</sup> Where a transfer within the

929, 4 A. B. R. 515; *In re Pilgr*, 118 Fed. 206, 9 A. B. R. 244.

7—*In re Imperial Film Exchange*, 198 Fed. 80, 28 A. B. R. 815.

8—*In re Condon*, 209 Fed. 800, 31 A. B. R. 754, *aff'g* 198 Fed. 947, 29 A. B. R. 907; *In re Stone*, 206 Fed. 356, 30 A. B. R. 392; *In re Deer Creek Co.*, 205 Fed. 205, 29 A. B. R. 356; *In re Radke Co.*, 193 Fed. 735, 27 A. B. R. 950; *In re Pressed Steel Wagon Goods Co.*, 193 Fed. 811, 27 A. B. R. 44; *In re Pure Milk Co. of Mobile*, 154 Fed. 682, 18 A. B. R. 735; *In re Hark Bros.*, 135 Fed. 603, 14 A. B. R. 400; *In re White*, 135 Fed. 199, 14 A. B. R. 241; *In re Nelson*, 98 Fed. 76, 1 N. B. N. 567, 1 A. B. R. 63; *In re Cliffe*, 1 N. B. N. 509, 2 A. B. R. 317, 94 Fed. 354.

Concealment of assets held sufficiently alleged as an act of bankruptcy. *In re Glazier*, 195 Fed. 1020, 28 A. B. R. 391.

An allegation that the defendant committed an act of bankruptcy, in that, on

a certain day, because of insolvency a receiver was put in charge of its property under the laws of the State of Tennessee in the chancery court thereof is not an allegation of a conclusion of law. *In re Kennedy Tailoring Co.*, 175 Fed. 871, 23 A. B. R. 656.

9—*In re Mero*, 128 Fed. 630, 12 A. B. R. 171.

10—*In re Lackow*, 140 Fed. 573, 14 A. B. R. 514.

11—*In re Bellah*, 116 Fed. 69, 8 A. B. R. 310.

12—*Orem v. Harley*, 3 N. B. R. 62, Fed. Cas. No. 10567.

13—*In re New Chattanooga Hardware Co.*, 190 Fed. 241, 27 A. B. R. 77.

And see, *In re Ward*, 161 Fed. 755, 20 A. B. R. 482.

An allegation that the debtor applied for a receiver for its property followed by an allegation that the corporation was then and there insolvent is a sufficient allegation that the debtor was insolvent

four-month period is the act of bankruptcy relied on, the petition should allege an intent to hinder, delay or defraud, or to prefer one creditor over another.<sup>14</sup> The petition in such case, should also allege that there were other creditors, and that the debts or indorsements secured by the mortgage were pre-existing, or, if then incurred or made, that the mortgages were given for an adequate consideration.<sup>15</sup> Failure to recite the particular payments alleged to constitute a preference or to allege that the transfer referred to was made with intent to prefer renders the petition demurrable.<sup>16</sup>

A petition which charges the obtaining of a judgment and levying of an execution against the debtor while insolvent as an act of bankruptcy but which fails to allege the failure on his part within five days before a sale or final disposition of the property levied on, to have the same vacated or discharged, is demurrable.<sup>17</sup>

A petition charging that the application for a receiver in the name of a stockholder was the act and deed of the corporation, and that the directors and officers thereof accepted the service issued in the case sufficiently alleges that the corporation committed an act of bankruptcy in applying for a receiver.<sup>18</sup>

### § 161. — When multifarious.

Multifariousness consists in the inclusion in one bill of several matters perfectly distinct and independent and is generally forbidden.<sup>19</sup> A petition in involuntary bankruptcy which unites with a prayer for the adjudication against the debtor a prayer for the provisional seizure of his property by the marshal and a prayer for an injunction against attaching creditors and a receiver of a state court forbidding them to dispose of certain property in their hands, is multifarious;<sup>20</sup> but a petition charg-

when the application for a receiver was made. *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

14—*In re Hammond*, 163 Fed. 548, 20 A. B. R. 776; *In re Flint Hill Stone & Const. Co.*, 149 Fed. 1007, 18 A. B. R. 81; *In re Ewing*, 115 Fed. 707.

15—*In re Flint Hill Stone & Const. Co.*, 149 Fed. 1007, 18 A. B. R. 81.

16—*In re Hammond*, 163 Fed. 548, 20 A. B. R. 776.

17—*In re Vastbinder*, 126 Fed. 417, 11 A. B. R. 118; *In re Pressed Steel Wagon Goods Co.*, 193 Fed. 811, 27 A. B. R. 44.

18—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

19—*Cooper*, Eq. Pl. 182, 18 Ves. 80, 2 Mass. 201, 4 Cow. 682, 2 Gray 467.

20—*Mather v. Coe*, 1 N. B. N. 554, 1 A. B. R. 504, 92 Fed. 333.

ing different acts of fraud, connected with different parts of the estate, but done with a common fraudulent purpose,<sup>21</sup> or different acts of bankruptcy, is not.

### § 162. — Waiver of defects.

Entering a general appearance and joining issue on the merits waives all formal or modal defects, and all questions which might have been raised by demurrer or plea in abatement. Thereafter it is too late to raise the objection that the petition does not state the special facts constituting an alleged preference since such defect might have been raised by motion to dismiss or answer and is amendable;<sup>22</sup> or to object to the petition for any irregularity.<sup>23</sup>

### § 163. Filing of petition.

By section 59c of the act of 1898 it is provided: "Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt."<sup>24</sup> This section does not say when the duplicate must be filed; but elsewhere<sup>25</sup> it is provided that "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made, etc.,"<sup>26</sup> that the prayer shall be for "service of this petition with a subpoena,"<sup>27</sup> that "a copy of said petition, together with a writ of subpoena, be served," and<sup>28</sup> that the clerk's docket shall contain a memorandum of the filing of the petition, but says nothing about the copy, while if the petition is to be filed in duplicate the docket should show it,<sup>29</sup> since the day and hour of filing must be endorsed on each paper filed with the clerk. The duplicate therefore should be filed with the original, or to speak more correctly duplicate originals should be filed within the four months, and failure to so file a duplicate petition is a fatal error which cannot be cured by amendment, or by a filing nunc pro

21—*Norcross v. Nathan*, 2 N. B. N. R. 405, 99 Fed. 414, 3 A. B. R. 613; *Carter v. Hobbs*, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594; *Robinson v. White*, 1 N. B. N. 513, 97 Fed. 333, 3 A. B. R. 88.

22—*In re Cliffe*, 1 N. B. N. 509, 2 A. B. R. 317, 94 Fed. 354.

23—*In re McNaughton*, 8 N. B. R. 44, Fed. Cas. No. 8912.

24—*In re Stevenson*, 1 N. B. N. 313, 2 A. B. R. 66, 94 Fed. 110; *In re Dupree*, 1 N. B. N. 513, 97 Fed. 28.

25—Act of 1898, § 18.

26—Official Form No. 3, § 1683, *post*.

27—Official Form No. 4, § 1690, *post*.

28—G. O. I.

29—G. O. II.

tunc, and the filing of the duplicate must be entered by the clerk on his docket,<sup>30</sup> though it has been held that the failure to file a duplicate is waived by answering to the merits.<sup>31</sup>

The statute is fully satisfied when an original and a copy are both filed in the clerk's office before the expiration of the four months' period after the act of bankruptcy. It is not necessary that two originals be filed.<sup>32</sup> Where the last day of the four-month period falls on Sunday, the petition may be filed on Monday.<sup>33</sup>

A petition alleging as an act of bankruptcy a preference given by the bankrupt, which is filed within five days before the sale of final disposition of the property affected, excluding the day of such sale or disposition, is prematurely filed.<sup>34</sup>

It is sufficient that the petition be delivered in duplicate to the clerk of the bankruptcy court and by him marked "Filed," though it is done outside of his office and after office hours,<sup>35</sup> but if the duplicate is not filed until after the expiration of four months from the act of bankruptcy, it will be fatal and incurable, consequently the clerk's docket should show the filing of both copies.<sup>36</sup>

The petition should be filed with the clerk direct and not with the judge.<sup>37</sup> If the issuing of the subpoena is delayed until after the expiration of the four months, though the petition was filed within that time, the proceeding will nevertheless be valid.<sup>38</sup>

A petition signed, verified and presented by all the members of a firm and accompanied by schedules of firm creditors and firm assets, no adjudication being made thereon, which is subsequently in part withdrawn, and a new petition filed, with

30—In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 Fed. 110; In re Dupree, 1 N. B. N. 513, 97 Fed. 28.

31—In re Plymouth Cordage Co., 135 Fed. 1000, 13 A. B. R. 665.

32—Millan v. Exchange Bank of Man-  
nington, 183 Fed. 753, 24 A. B. R. 889.

33—Ravenna Nat. Bank v. Curtiss, 30 A. B. R. 818.

34—Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 18 A. B. R. 756.

35—In re Stevenson, 1 N. B. N. 313,

2 A. B. R. 66, 94 Fed. 110; In re Von Boreke, 1 N. B. N. 505, 2 A. B. R. 322, 94 Fed. 352.

36—In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 Fed. 110; In re Dupree, 1 N. B. N. 513, 97 Fed. 28; see In re Bellah, 116 Fed. 69, 8 A. B. R. 310.

37—In re Sykes, 106 Fed. 669, 6 A. B. R. 264.

38—In re Appel, 103 Fed. 931, 2 N. B. N. R. 907; In re Lewis, 1 N. B. N. 135, 556, 1 A. B. R. 458, 91 Fed. 632, citing In re Bear, 5 Fed. 53.

certain parts of the old petition pasted thereon accompanied by the individual schedules of all the partners by way of amendment, and an adjudication made, within the meaning of the act the petition was filed on the later, and not the earlier date.<sup>39</sup>

### § 164. Amendment of petition.

#### § 165. — By whom allowed and form of application.

The court, or referee, may allow amendments to the petition and schedules; but such amendments must be printed or written, signed and verified, like the original petitions and schedules, and if made to separate schedules, must be made separately, with proper references; and, if made on application of the petitioner, the cause of error in the paper originally filed must be stated.<sup>40</sup>

#### § 166. — Requires special showing.

Special reasons are required for amendments to sworn petitions or other pleadings required to be verified by the oath of the party; and, where the object is to introduce new facts or to change essentially the grounds of the prosecution or defense, the courts are disinclined to allow such amendments except for very special reasons, and in cases where they are clearly required in the furtherance of justice, and are applied for without unreasonable delay.<sup>41</sup>

A formal application for leave to amend should be made,<sup>42</sup> setting forth the reason for the omission or error in the original petition.<sup>43</sup> Where, however, the petition fails to state the reasons, the petitioners may be allowed time to make the insertion in their application.<sup>44</sup>

#### § 167. — Time of filing.

An amended petition will not be stricken from the files merely because an order allowing an extension of time within which to

39—In re Washburn, 99 Fed. 84, 3 A. B. R. 585.

40—G. O. XI; In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 Fed. 814; In re Harris, 1 N. B. N. 384, 2 A. B. R. 359; In re Strait, 2 A. B. R. 308, 1 N. B. N. 354.

41—In re Reed, 1 N. B. R. 137, Fed. Cas. No. 11644; In re Keiler, 18 N. B. R. 10, Fed. Cas. No. 7647; In re Wood,

13 N. B. R. 96, 6 Ben. 339, Fed. Cas. No. 17935; White v. Bradley Timber Co., 116 Fed. 768.

42—In re Pressed Steel Wagon Goods Co., 193 Fed. 811, 27 A. B. R. 44.

43—G. O. XI. In re Pure Milk Co. of Mobile, 154 Fed. 682, 18 A. B. R. 735.

44—In re Portner, 149 Fed. 799, 18 A. B. R. 89.

file it was not filed within the time originally allowed for the amendment.<sup>45</sup>

### § 168. — Objections to.

Objections can only be made to defects which have not been waived, expressly or by proceeding regardless of them, and by persons who have not acted so as to estop themselves. A creditor who joined in an involuntary petition in good faith, cannot afterwards object to an amendment which is necessary to its prosecution,<sup>46</sup> but, although no objection was made to a fault contained in the original petition, it may be objected to in an amended petition.<sup>47</sup>

A creditor who fails to appear or answer a petition in bankruptcy within the statutory time thereby waives all objections to subsequent amendments thereto which do not change the substance of the cause of action nor the extent of relief sought, and renounces his right to contest the cause of action, and his right to notice of a hearing upon the amended petition.<sup>48</sup>

Where certain persons executed a petition as an amended petition and as auxiliary to pending proceedings which were dismissed, it cannot be filed as an amended petition because there is nothing to amend nor as an original petition because not executed as such.<sup>49</sup>

### § 169. — When allowed.

The general orders in bankruptcy with reference to amendments were not intended to abrogate or restrict the general power of amendment in other respects vested in courts.<sup>50</sup>

The granting or not granting of an application to file an amendment to the pleadings of a case in equity or at law, rests largely within the judicial discretion of the court, and the exercise of that discretion will not be interfered with by a reviewing court, unless it appears to have been practically abused.<sup>51</sup>

45—In re R. L. Radke Co., 193 Fed. 735, 27 A. B. R. 950.

46—In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12361.

47—In re W. S. Tr. Co., 17 N. B. R. 413, 4 Sawy. 190, Fed. Cas. No. 17442.

48—In re Broadway Sav. T. Co., 152 Fed. 152, 18 A. B. R. 254.

49—In re Hyde & Gload Mfg. Co., 2

N. B. N. R. 1122, 102 Fed. 617, 4 A. B. R. 602.

50—In re Bellah, 116 Fed. 69, 8 A. B. R. 310.

51—In re Sig. H. Rosenblatt & Co., 193 Fed. 638, 28 A. B. R. 401; Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 18 A. B. R. 756.

Under the act of 1867 the following

Where the facts are such as to make it apparent to the revising court that the right to amend could not have been denied by the court below except upon such a mistaken view of the facts disclosed by the record as would amount to an abuse of the discretion exercised by the court, its action in that regard should be reversed and the amendment allowed.<sup>52</sup> The right to amend exists at any stage of the proceeding,<sup>53</sup> if otherwise authorized, regardless of the time that has elapsed, but this right cannot go further than to bring forward and make effective that which is in some shape already in the record.<sup>54</sup>

A mistake in the name of the alleged bankrupt,<sup>55</sup> or the failure to join a non-resident partner,<sup>56</sup> may be cured by amendment. So the petition may be amended with respect to the residence or place of business of the alleged bankrupt, and an averment as to

amendments were allowed and would doubtless be allowed now: Supplying the residence of his co-partner omitted in a petition by one partner against his co-partner (*In re Vanderhoof*, 18 N. B. R. 543, Fed. Cas. No. 16841; *In re Jersey City Window Glass Co.*, 1 N. B. R. 113, Fed. Cas. No. 7292); to conform to proof which differed from the allegations of the petition (*In re Houghton*, 1 N. B. R. 121, Fed. Cas. No. 6223); to supply an allegation that suffering property to be taken on legal process with intent to give a preference was done when the debtor was insolvent or in contemplation of insolvency (*In re Craft*, 1 N. B. R. 89, 2 Ben. 214, Fed. Cas. No. 3316); to supply the amount where the name of a creditor is stated in a petition asserting a claim by a proper averment but the amount is omitted, if done in good faith (*In re Blair*, 17 N. B. R. 492, Fed. Cas. No. 1481); to supply the formal assertion of an averment which appeared in substance in the petition and of which evidence was received at the trial without objection (*In re Craft*, 2 N. B. R. 44, 6 Blatch. 177, Fed. Cas. No. 3317; *In re McKibben*, 12 N. B. R. 97, Fed. Cas. No. 8859); after adjudication to bring in his co-partner so as to effect a discharge of partnership debts (*In re Little*, 1 N. B. R. 74, 2 Ben. 86, Fed. Cas. No.

6390); after the first meeting of creditors to bring in certain judgment creditors (*In re Ratcliffe*, 1 N. B. R. 98, Fed. Cas. No. 11578). In general, petitioning creditors may amend their petition on the trial (*Hardy v. Bininger*, 4 N. B. R. 77, Fed. Cas. No. 6057); or those whose rights accrue after admitted proof of claim (*In re Jones*, 2 N. B. R. 20, Fed. Cas. No. 7447). The court may allow supplemental affidavits or proofs to be filed, if the affidavits to the petition or the depositions as to indebtedness and acts of bankruptcy are not sufficient (*In re Hanibel*, 15 N. B. R. 233, Fed. Cas. No. 6023). That justice might be done to all parties, great latitude of amendment was allowed up to a discharge in bankruptcy (*In re Pierson*, 10 N. B. R. 193, Fed. Cas. No. 11154); but a new cause of action would not be permitted under guise of amendment (*In re Leonard*, 4 N. B. R. 182, Fed. Cas. No. 8255; *In re Gallinger*, 4 B. R. 729).

52—*In re Carley*, 8 A. B. R. 720.

53—*In re Waite*, 1 N. B. R. 84; *May v. Harper*, 4 N. B. R. 156.

54—*In re Mercur*, 116 Fed. 655, 8 A. B. R. 275.

55—*Gleason v. Smith, Perkins & Co.*, 145 Fed. 895, 16 A. B. R. 602.

56—*In re Schwartz*, 204 Fed. 326, 30 A. B. R. 344.

residence within the judicial district for a period of more than six months prior to the filing of the petition substituted for one inadvertently, but erroneously, made, setting forth a conduct of business.<sup>57</sup>

A petition against a partnership and the members thereof may be amended by striking out all reference to the partnership, where it appears that no partnership in fact existed.<sup>58</sup> On the other hand, a petition filed by all the members of a firm in the form prescribed for partnership cases except that it does not ask for the adjudication of the firm but only of the members may be amended by inserting a prayer for the adjudication of the firm<sup>59</sup> and where the petition and schedules filed by one member of a firm seeking to be discharged from both firm and individual debts did not originally include them, to include petitioner's firm as well as individual indebtedness, the names of the members of the firm, and a prayer for discharge from partnership debts, the schedules to contain a list of the firm's property and debts.<sup>60</sup>

An amendment relating to the number of petitioning creditors,<sup>61</sup> and nature and amount of their claims,<sup>62</sup> to the occupation or business of the debtor,<sup>63</sup> and to errors and deficiencies

57—In re Weinman, 2 N. B. N. R. 51; In re Blair, 2 N. B. N. R. 364, 99 Fed. 76, 3 A. B. R. 588; In re Vanderhoff, 18 N. B. R. 543, Fed. Cas. No. 16841; Woolford v. Diamond State Steel Co., 138 Fed. 582, 15 A. B. R. 31.

58—In re Richardson, 192 Fed. 50, 27 A. B. R. 590.

59—In re Meyers, 2 N. B. N. R. 111, 3 A. B. R. 260, 97 Fed. 757; see In re McFaun, 96 Fed. 592, 3 A. B. R. 66.

60—In re Laughlin, 96 Fed. 589, 3 A. B. R. 1; In re Hartman, 96 Fed. 593, 3 A. B. R. 65.

61—Petition by a single creditor may be amended by alleging that creditors are less than twelve in number. In re Plymouth Cordage Co., 135 Fed. 1000, 13 A. B. R. 665; In re Haff, 136 Fed. 78, 13 A. B. R. 362.

62—Millan v. Exchange Bank of Man-nington, 183 Fed. 753, 24 A. B. R. 889; Conway v. German, 166 Fed. 67, 21 A. B. R. 577; Ryan v. Hendricks, 166 Fed.

94, 21 A. B. R. 570; In re White, 135 Fed. 199, 14 A. B. R. 241.

Motion to amend petition by setting out petitioner's claim with more particularity denied where creditors representing 97 per cent of the indebtedness had assented to general assignment and objected to amendment. In re Farthing, 202 Fed. 557, 29 A. B. R. 732.

63—In re Marion Contract & Construction Co., 166 Fed. 618, 22 A. B. R. 81; Conway v. German, 166 Fed. 67, 21 A. B. R. 577; In re Broadway Savings Trust Co., 152 Fed. 152, 18 A. B. R. 254; In re First Nat. Bank of Belle Fourche, 152 Fed. 64, 18 A. B. R. 265; In re Crenshaw, 156 Fed. 638, 19 A. B. R. 502; Armstrong v. Fernandez, 208 U. S. 324, 52 L. ed. 514, 19 A. B. R. 746; In re Brett, 130 Fed. 981, 12 A. B. R. 492; In re White, 135 Fed. 199, 14 A. B. R. 241; In re Plymouth Cordage Co., 135 Fed. 1000, 13 A. B. R. 665.



in the verification of the original petition <sup>64</sup> can be made though more than four months has elapsed since the commission of the act of bankruptcy. When so made they relate back to the date of the filing of the original petition.<sup>65</sup> The referee may require a petition to be amended because the verification failed to show that it was made within the jurisdiction of the notary taking it, was indefinite in that it stated that the petitioner was "duly sworn or affirmed" and was defective and unavailing because of the disqualification of the notary, or for other good and sufficient reasons, and the judge will not interfere with his order; <sup>66</sup> or on motion he may require schedules filed prior to the promulgation of the rules, forms and orders to be amended and supplemented to conform thereto.<sup>67</sup>

The petition may be amended to specify the details of the alleged act of bankruptcy in accordance with evidence adduced at the hearing <sup>68</sup> or otherwise procured,<sup>69</sup> or, if it sets forth facts which, if properly alleged and proved, would justify an adjudication, but the allegations are not sufficiently specific, and such petition is verified by the attorney instead of the creditors; <sup>70</sup> or to insert an act of bankruptcy before the expiration of the four months' period,<sup>71</sup> though subsequent to the filing of the original petition.<sup>72</sup>

A petition alleging as an act of bankruptcy a transfer of property with intent to defraud creditors may be amended by alleging that the transfer was with intent to prefer the cred-

64—*Millan v. Exchange Bank*, 183 Fed. 753, 24 A. B. R. 889; *In re Nelson*, 98 Fed. 76, 1 N. B. N. 567, 1 A. B. R. 63. ' See also *post*, § 187.

Petition defective because verified on information and belief may be amended. *In re Farthing*, 202 Fed. 557, 29 A. B. R. 732; *In re Keet*, 128 Fed. 651, 11 A. B. R. 117.

A mere clerical error in the jurat of one of the duplicate originals may be cured by amendment. *In re Bellah*, 116 Fed. 69, 8 A. B. R. 310.

65—See *post*, § 171.

66—*In re Brumelkamp*, 1 N. B. N. 360, 2 A. B. R. 318, 95 Fed. 814.

67—*In re Ogles*, 1 N. B. N. 326, 93 Fed. 426, 1 A. B. R. 671; *In re Harris*, 1 N. B. N. 384, 2 A. B. R. 359.

68—*Hark v. Allen Co.*, 146 Fed. 665, 17 A. B. R. 3.

69—*In re Hammond*, 163 Fed. 548, 20 A. B. R. 776; *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, 141 Fed. 518, 15 A. B. R. 804; *In re Lange*, 2 N. B. N. R. 85, 3 A. B. R. 231, 97 Fed. 197; *In re Miller*, 104 Fed. 764; *In re Cliffe*, 1 N. B. N. 509, 2 A. B. R. 317, 94 Fed. 354.

70—*In re Nelson*, 98 Fed. 76, 1 N. B. N. 567, 1 A. B. R. 63.

71—*In re Haff*, 136 Fed. 78, 13 A. B. R. 362; *In re Nusbaum*, 152 Fed. 835, 18 A. B. R. 598; *In re Mercur*, 1 N. B. N. 527. See *White v. Bradley Timber Co.*, 116 Fed. 768, 8 A. B. R. 671.

72—*In re Hamrick*, 175 Fed. 279, 23 A. B. R. 721.

itors.<sup>73</sup> The failure to allege insolvency at the time of the making of a transfer alleged as an act of bankruptcy is curable by amendment.<sup>74</sup>

Where two or more petitions are filed against the same individual, the petition in the district in which the debtor has his domicile may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than the first alleged, if such earlier act is charged in either of the other petitions, and the same is true with reference to proceedings against a partnership, except that in such a case the petition first filed may be amended.<sup>75</sup> In view of General Orders VI, the power of amendment in such case is limited to the case where an earlier act of bankruptcy is sought to be incorporated.<sup>76</sup>

### § 170. — When denied.

The same principles which govern the allowance of amendments in similar cases in other courts control the matter of amendment in bankruptcy cases; and consequently amendments will not be permitted for the purpose of introducing new acts of bankruptcy into the petition after the four months' period has expired;<sup>77</sup> or a new cause of action;<sup>78</sup> nor can an involuntary petition be amended by adding a new party after all the testimony has been taken and the case is on hearing before the court;<sup>79</sup> nor will creditors, who have recklessly and falsely made and sworn to a petition, knowing it to be false, be permitted to have others join in and carry it on.<sup>80</sup> A petition setting forth the total amount of the creditor's claims at less

73—In re Hark Bros., 142 Fed. 279, 15 A. B. R. 460; In re Hammond, 163 Fed. 548, 20 A. B. R. 776.

74—In re Hammond, 163 Fed. 548, 20 A. B. R. 776.

75—G. O. VI.

76—In re Sears, 117 Fed. 294, 8 A. B. R. 713, rev'g 112 Fed. 58, 7 A. B. R. 279.

77—In re Haff, 136 Fed. 78, 13 A. B. R. 362; Wilder v. Watts, 138 Fed. 426, 15 A. B. R. 57; In re Walker, 164 Fed. 680, 21 A. B. R. 132; White v. Bradley Timber Co., 116 Fed. 768; In re Reed, 1 N. B. R. 137, Fed. Cas. No. 11164; see

In re Bellah, 116 Fed. 69, 8 A. B. R. 310.

Proposed amendment which does not show that alleged act of bankruptcy was committed within four months prior to the filing of the original petition will be disallowed. In re Jones, 209 Fed. 717, 31 A. B. R. 693.

78—In re Leonard, 4 N. B. R. 182, Fed. Cas. No. 8255.

79—In re Pitt, 14 N. B. R. 59, 8 Ben. 389, Fed. Cas. No. 11188.

80—In re Keiler, 10 N. B. R. 10, Fed. Cas. No. 7647.

than \$500 cannot be amended by adding the claim of another creditor so as to raise the total above the jurisdictional amount.<sup>81</sup>

An amendment may be refused where all the creditors joining in the petition were parties to insolvency proceedings in another court and nothing could be gained by the administration of the debtor's estate in the bankruptcy court.<sup>82</sup>

Withdrawals from a firm cannot be set up by amendment where made more than four months prior to the amended petition thereto.<sup>83</sup> After a proceeding against an individual has been commenced and testimony taken, the title thereof cannot be amended, by mere order, so as to direct the proceeding against a partnership of which the individual is a member.<sup>84</sup>

### § 171. — Effect of amendment.

An amended petition which sets up the same cause of action asserted in the original pleading, merely giving greater precision to charges already made, is regarded as a continuation of the original and relates back so as to take effect as of the date of the original.<sup>85</sup> But where the original petition sets up no act of bankruptcy, an amendment thereof will not relate back to the date of the original so as to effect transactions entered into more than four months prior to the filing of the amendment though within four months of the filing of the original.<sup>86</sup>

The filing of an amended pleading is not the commencement of a new suit, unless it states a new cause of action or seeks more extensive relief or brings in new parties, and the issuance of a new subpoena to parties already before the court is not necessary.<sup>87</sup>

### § 172. — Amended petition not treated as original.

An amended petition, executed as such by a creditor to be filed in proceedings previously instituted, cannot, after such

81—In re Stein, 130 Fed. 377, 12 A. B. R. 364.

82—Woolford v. Diamond State Steel Co., 138 Fed. 582, 15 A. B. R. 31.

83—In re Perlhefter & Shatz, 177 Fed. 299, 25 A. B. R. 576.

84—In re Kaufman, 176 Fed. 93, 23 A. B. R. 429.

85—Armour & Co. v. Miller, 209 Fed. 784, 31 A. B. R. 356; Millan v. Exchange Bank, 183 Fed. 753, 24 A. B. R. 889; In re Pure Milk Co. of Mobile, 154 Fed. 682,

18 A. B. R. 735; Ryan v. Hendricks, 166 Fed. 94, 21 A. B. R. 570; In re Shoemsmith, 135 Fed. 684, 13 A. B. R. 645; First State Bank of Corwith v. Haswell, 174 Fed. 209, 23 A. B. R. 330; Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 518, 15 A. B. R. 804.

86—Armour & Co. v. Miller, 209 Fed. 784, 31 A. B. R. 356.

87—In re Broadway Sav. T. Co., 152 Fed. 152, 18 A. B. R. 254.

execution, and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and be made the basis of a new and independent proceeding; and where it has been so filed it will be dismissed on the facts being made to appear to the court.<sup>88</sup>

### § 173. — Demurrer or answer to amended pleading.

Parties who have appeared are entitled to a reasonable time to demur to or answer an amended pleading.<sup>89</sup>

### § 174. Appearance and plea.

### § 175. — Who may defend.

The bankrupt or any creditor,<sup>90</sup> that is one having a provable claim which may be established at this stage by affidavit or verified pleadings may appear and plead; and there is nothing in the act to prevent him though he may be secured or have been given a preference which could be avoided by the adjudication.<sup>91</sup>

Anyone whose interests may be affected should be allowed to do so, though it would seem only a "creditor" may be heard, though he need not be the original petitioner.<sup>92</sup> But a creditor cannot oppose an adjudication under an ordinary voluntary petition.<sup>93</sup> A stockholder as such has no standing either as a representative of the corporation or as a creditor to appear and defend in behalf of the corporation whose stock he owns.<sup>94</sup> A receiver appointed by a state court may contest the adjudication.<sup>95</sup>

88—In re Hyde v. Gload Mfg. Co., 103 Fed. 617, 2 N. B. N. R. 1122, 4 A. B. R. 602.

89—In re Broadway Sav. T. Co., 152 Fed. 152, 18 A. B. R. 254.

90—Act of 1898, §§ 18b, 59f. In re Ives, 113 Fed. 911, 7 A. B. R. 692; In re Jones, 16 N. B. R. 452, Fed. Cas. No. 7442.

91—In re Jack, 13 N. B. R. 296, 1 Woods 549, Fed. Cas. No. 7119; Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2899.

92—In re Williams, 3 N. B. R. 74, 1 Lowell 406, Fed. Cas. No. 17703; In re

Scrafford, 14 N. B. R. 184, Fed. Cas. No. 12557; In re Derby, 8 N. B. R. 106, 6 Ben. 232; In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342.

See, In re Boston, etc., R. R. Co., 5 N. B. R. 232, Fed. Cas. No. 1679; In re Columbia Real Estate Co., 112 Fed. 643, 7 A. B. R. 441.

93—In re Carleton, 115 Fed. 246; In re Ives, 113 Fed. 911, 7 A. B. R. 692.

94—In re Eureka Anthracite Coal Co., 197 Fed. 216, 28 A. B. R. 758.

95—In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 A. B. R. 563.

An attaching creditor may intervene to contest an adjudication on the merits as well as to claim lack of jurisdiction,<sup>96</sup> or that the requisite number and amount of creditors have not joined, as well as any other material fact in the case.<sup>97</sup> Such creditor may take advantage of any defense available to respondent;<sup>98</sup> but this would not be true where the attachment was obtained after the filing of the petition.<sup>99</sup>

The service of an injunction on a person does not make him a party in interest in the bankruptcy proceedings, except to the extent that he may move to dissolve a wrongful injunction.<sup>1</sup>

### § 176. — Bringing in additional parties.

The court has power to bring in and substitute additional persons or parties when necessary for the complete determination of a matter in controversy. Thus it may permit an amendment to the petition adding the name of a non-resident partner,<sup>2</sup> or it may issue an order to a non-joining partner requiring him to show cause why the petitioning partner should not be discharged from the liability incurred as a member of the firm,<sup>3</sup> even though such non-joining partner be non compos;<sup>4</sup> though it has been held that where partners are not named in the petition, the court will not order their joinder on a bill filed by the creditors, but the creditors may have the same remedy against them as they would have had before the petition was filed.<sup>5</sup>

It is questionable whether a corporation in which the bankrupt was for years a stockholder, can be brought in so as to enable its books to be examined.<sup>6</sup>

The power to bring in parties would not authorize the court

96—In re Jack, 13 N. B. R. 296, 1 Woods 549, Fed. Cas. No. 7119; In re Williams, 14 N. B. R. 132, Fed. Cas. No. 17706; In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342, Fed. Cas. No. 9420; In re Burton, 17 N. B. R. 212, 9 Ben. 324, Fed. Cas. No. 2214.

97—In re Hatje, 12 N. B. R. 548, 6 Biss. 436, Fed. Cas. No. 6215; In re Broich, 15 N. B. R. 11, 7 Biss. 303, Fed. Cas. No. 1921; contra, In re Scrafford, 15 N. B. R. 104, Fed. Cas. No. 12556, rev'g 14 N. B. R. 184, Fed. Cas. No. 12557.

98—In re Williams, 14 N. B. R. 132, Fed. Cas. No. 17706.

99—In re Vogel, 18 N. B. R. 165, Fed. Cas. No. 1698.

1—Karr v. Whittaker, 5 N. B. R. 123, Fed. Cas. No. 7612.

2—In re Schwartz, 204 Fed. 326, 30 A. B. R. 344.

3—In re Elliot, 2 N. B. N. R. 350.

4—In re O'Brien, 2 N. B. N. R. 312.

5—Bank v. Cass, 18 N. B. R. 279, Fed. Cas. No. 2732.

6—See In re Post, 1 N. B. N. 294.

to direct a creditor to join in a petition for the purpose of making the requisite number or amount of claims to give the court jurisdiction. Under the act of 1867, it was held where there appeared to be an adverse interest in any one not before the court, that it could not adjudicate on the same without that person being properly before it, and without setting in motion its machinery for the purpose of litigating any supposed rights;<sup>7</sup> and strangers to the bankruptcy proceedings, not served with process, and who had not voluntarily appeared and become parties to such litigation, could not be compelled to come into court under a petition for a rule to show cause.<sup>8</sup>

### § 177. — Mode of appearance—Personally.

In bankruptcy proceedings the general rule that a party may appear personally prevails and provision is expressly<sup>9</sup> made for their conduct by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. In the case of proceedings against a lunatic, if there be no regular guardian or committee, a guardian ad litem should be appointed to protect his interests.<sup>10</sup>

Every party may appear and conduct the proceedings by attorney,<sup>11</sup> who must be an attorney or counsel authorized to practice in the Federal courts, and the right and power of an attorney in good standing to make a reasonable request or motion will be presumed.<sup>12</sup> The fact that the bankrupt's attorneys had not been admitted to practice in the Federal courts would not invalidate the proceedings when the petition and schedules had been duly signed and verified and filed in the clerk's office, the court thereby acquiring jurisdiction over the case and person of the bankrupt.<sup>13</sup> The name of the attorney with his place of business must be entered upon the docket, which the clerk is required to keep,<sup>14</sup> with the date of entry, and

7—In re Pierce, 15 N. B. R. 449, 7 Biss. 426, Fed. Cas. No. 11139.

8—Smith v. Mason, 6 N. B. R. 1, 14 Wall. 419, 20 L. ed. 748.

9—G. O. IV.

10—In re Burke, 107 Fed. 674, 5 A. B. R. 843.

11—Leiter v. Payson, 9 N. B. R. 205, Fed. Cas. No. 8226.

12—In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333; In re Herzikopf, 118 Fed. 101; In re Goldenberg, 117 Fed. 692, 9 A. B. R. 156; G. O. IV; see In re Gasser, 5 A. B. R. 32.

13—In re Kindt, 2 N. B. N. R. 373, 98 Fed. 867, 3 A. B. R. 546.

14—G. O. I.

all papers and proceedings offered by an attorney to be filed, must be endorsed with the day and hour of filing and a brief statement of their contents.<sup>15</sup> Orders granted on motion must contain the name of party or attorney making the motion; and notices and orders, not required by the act or the orders to be served on the party personally, may be served on the attorney.<sup>16</sup>

The petition and other pleadings may be signed and verified by the attorney in proper cases,<sup>17</sup> and if duly authorized by power of attorney, he may prove his client's claim<sup>18</sup> and vote in his behalf.<sup>19</sup> Ordinarily corporations may appear by attorney, who is supposed to have his client's confidence, and who is presumed to act within the scope of his authority; so that it is not necessary to give him authority to appear and admit the alleged acts of bankruptcy or that the corporators or shareholders should previously by vote authorize or direct him to do so:<sup>20</sup> and a duly appointed receiver of a corporation is its proper representative in bankruptcy proceedings.<sup>21</sup>

It is competent for a corporation or an individual against whom a petition was filed, whose attorney appeared and gave any waiver of time or other right and admitted the charge brought against it, to appear within a reasonable time and move the court to have the proceedings set aside, provided there has been no unreasonable delay, an attorney's authority not extending to a waiver of his client's right.<sup>22</sup>

### § 178. — Time for appearance.

The bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.<sup>23</sup> The requirement of five days as the time within which parties may appear and plead is mandatory,<sup>24</sup> though it might be proper to waive it if all the

15—G. O. II.

16—G. O. IV.

17—Act of 1898, § 18c. See, also, § 186, *post*.

18—Act of 1898, § 57.

19—Act of 1898, § 56.

20—*Leiter v. Payson*, 9 N. B. R. 205, Fed. Cas. No. 8226.

21—*In re Gold Run Mining & Tunnel Co.*, 200 Fed. 162, 29 A. B. R. 563; *In*

*re Republic Mfg. Co.*, 8 N. B. R. 197, Fed. Cas. No. 11705.

22—*In re Republic Ins. Co.*, 8 N. B. R. 317, Fed. Cas. No. 11706.

23—Act of 1898, § 18b.

Subdivision "b" was amended by the act of February 5, 1903, by changing the time for pleading from 10 to 5 days.

24—*Day v. Beck & Gregg Hardware Co.*, 114 Fed. 834, 8 A. B. R. 175; *In re*

creditors of the bankrupt consented; but a creditor cannot be deprived of the right to appear and plead by the act of the bankrupt in admitting the act of bankruptcy and consenting to the adjudication.<sup>25</sup> Nor can the attorneys for the petitioning creditors and for the bankrupt, by agreement between themselves, without the consent of other creditors or the leave of court, extend the time for two months or similar period, from the return day, especially where the allegations of the petition are few and simple and easily answered and the court, if applied to, would not have extended the time. Where the pleading, technically considered, is offered too late, as during an extension of the time to plead, which extension the court found unauthorized, it is within the sound discretion of the court to allow, or not to allow, its filing; but, if it contain any defense whatever, that discretion should be exercised toward permitting such defense to be made.<sup>26</sup>

The time to plead or answer may be extended, as where demurrer is filed, but not for purposes of delay and is later waived by filing an answer.<sup>27</sup> If the five days has expired and the time has not been extended, a creditor would not be authorized to appear and file an answer raising new issues, especially if the matter has already been heard on the issues already framed.<sup>28</sup>

Since creditors as well as the bankrupt have the right to appear and plead to the petition within five days after the return day, that day must be fixed by the issuance of a subpoena;<sup>29</sup> so where a subpoena was made returnable and served December 1, that was the return day and an answer and demand for a jury trial filed December 17 were too late and the adjudication should have been made as on a default.<sup>30</sup>

Good reason should be presented in order to justify the granting of a request for the delay of bankruptcy proceedings.<sup>31</sup>

Mutual Mercantile Agency, 111 Fed. 152, 6 A. B. R. 607; *Neustadter v. Dry Goods Co.*, 1 N. B. N. 552, 3 A. B. R. 96, 96 Fed. 830.

25—*In re Elmira Steel Co.*, 109 Fed. 546, 5 A. B. R. 484.

26—G. O. XXXVII.

27—*In re Cooper Bros.*, 159 Fed. 956, 20 A. B. R. 392.

28—*In re Mutual Mercantile Agency*, 111 Fed. 152, 6 A. B. R. 607.

29—*In re Humbert*, 100 Fed. 439, 4 A. B. R. 76.

30—*Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102.

31—*In re Heinsfurter*, 1 N. B. N. 510, 3 A. B. R. 109.



Where service of the petition was not had within the time limited, other creditors may subsequent thereto be permitted to join in the petition and contest the propriety of the adjudication.<sup>32</sup>

### § 179. — Voluntary appearance.

The voluntary appearance of the alleged bankrupt, either in person or by attorney, will give the court jurisdiction<sup>33</sup> if it has jurisdiction of the subject matter which latter must be conferred by statutory authority and cannot be given by consent of the parties and may be questioned by the court *sua sponte*, or on motion, at any time or collaterally.<sup>34</sup> If he once appears generally, such appearance cannot be withdrawn so as to divest the court of jurisdiction<sup>35</sup> as any irregularity in the service is thereby waived.<sup>36</sup>

The bankrupt cannot be deprived of his right to appear and contest the adjudication merely because of his failure to comply with orders of the court, though if he fails to appear and an order adjudicating him a bankrupt is entered he cannot upon appeal raise the question of jurisdiction to enter the order.<sup>37</sup> But if one or more of the members of a firm are not made parties, the adjudication will not be made,<sup>38</sup> and such jurisdictional defect is not cured by a consent signed for the non-joining partners filed after the adjudication.<sup>39</sup>

If due notice be served on a non-petitioning partner and he enters no appearance and is defaulted, further proceedings will be deemed voluntary on the part of all partners.<sup>40</sup>

32—In re Stein, 105 Fed. 749, 5 A. B. R. 288.

33—In re Western Inv. Co., 170 Fed. 677, 21 A. B. R. 367; In re Worsham, 142 Fed. 121, 15 A. B. R. 672; In re Frischberg, 8 A. B. R. 607.

34—Shutts v. Bk., 2 N. B. N. R. 320, 98 Fed. 705, 3 A. B. R. 492; In re Mason, 2 N. B. N. R. 425, 99 Fed. 256, 3 A. B. R. 599; In re Penn, 3 N. B. R. 582, 4 Ben. 99; In re Little, 2 N. B. R. 294, 3 Ben. 25; In re Leighton, 5 N. B. R. 95; Jobbins v. Montag, 6 N. B. R. 509; In re Weyhausen, 1 Ben. 397.

35—In re Frischberg, 8 A. B. R. 607; In re Ulrich, 3 Ben. 355.

36—In re McNaughten, 8 N. B. R. 44.

37—Young & Holland Co. v. Brande Bros., 162 Fed. 663, 20 A. B. R. 612.

38—In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; In re Pitt, 14 N. B. R. 59, 8 Ben. 389, Fed. Cas. No. 11188; In re Lewis, 1 N. B. R. 19, 2 Ben. 96, Fed. Cas. No. 8311; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re Elliott, 2 N. B. N. R. 350; Citizens' Nat. Bk. v. Cass, 18 N. B. R. 279, Fed. Cas. No. 2732.

39—In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; s. c. 1 N. B. N. 407, 95 Fed. 263, 2 A. B. R. 407.

40—In re Carleton, 115 Fed. 246, 8 A. B. R. 270.

### § 180. — Demurrer.

When the proceedings are equitable, the rules of equity practice established by the supreme court of the United States are to be followed as near as may be, and, when they are legal, the practice and procedure in cases at law,<sup>41</sup> and accordingly, the same considerations must govern the pleader as in other law and equity cases. Under the new equity rules<sup>42</sup> the demurrer to the petition has been abolished and every defense formerly raised by demurrer must be made by motion to dismiss or by answer.<sup>43</sup>

Under the old practice a petition which failed to show any of the material allegations required by law was demurrable,<sup>44</sup> but an objection attacking the sufficiency of the petition could not be availed of by demurrer after the court had appointed a receiver upon facts appearing to give jurisdiction.<sup>45</sup> The sustaining of a demurrer to a petition in involuntary bankruptcy did not prevent the filing of a new petition.<sup>46</sup> A demurrer was waived by answering to the merits.<sup>47</sup>

### § 181. — Plea or answer.

There is no provision in the law authorizing a creditor to file an answer to a petition in voluntary bankruptcy.<sup>48</sup>

Where a creditor other than the original petitioner enters his appearance by a petition alleging that he is a creditor, stating the purpose of his petition and nothing more, the bankrupt may answer denying that such person is a creditor, but need answer for no other purpose.<sup>49</sup>

Under the act of 1867 if the respondent desired to controvert the petition on the return day of the order to show cause, he had to appear and deny the facts set forth in the petition and demand a hearing by the court, or a trial by jury, and it was held that the court should make a record of such appearance, allegation

41—G. O. XXXVII.

42—Rule 29.

43—In re Jones, 209 Fed. 717, 31 A. B. R. 693.

44—See In re Taylor, 102 Fed. 728, 2 N. B. N. R. 929, 4 A. B. R. 515; Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 24 A. B. R. 216.

45—In re Excelsior Cafe Co., 175 Fed. 294, 23 A. B. R. 701.

46—In re Toledo Portland Cement Co., 17 A. B. R. 375.

47—In re Cooper Bros., 159 Fed. 956, 20 A. B. R. 392.

48—In re Jehu, 1 N. B. N. 509, 2 A. B. R. 498, 94 Fed. 638.

49—In re Taylor, 1 N. B. N. 412; In re Lacey, 10 N. B. R. 477.

and demand; but no portion of this previous to the making of the record by the clerk was required to be in writing, except the demand for a trial by jury,<sup>50</sup> which is equally true under the act of 1898 except that he must appear and plead within five days after return day. If, on the return day of the rule to show cause why a person should not be adjudged a bankrupt, he appears and obtains a continuance but does not file either demurrer, plea or demand for jury trial, he is not entitled on the day to which the case is continued to demand such trial but may be allowed to file a plea and have the issues tried by the court.<sup>51</sup> Where the debtor fails to answer or plead to a petition the allegations contained therein are taken as confessed,<sup>52</sup> but the default of the respondent to a petition in involuntary bankruptcy, through failure to appear,<sup>53</sup> or his admission of insolvency and prayer for an adjudication,<sup>54</sup> does not convert the proceeding into a voluntary one.

Where it is necessary to reform a contract in order to sustain a petition, the alleged bankrupt should be made a party to the suit to reform, though it has failed to answer the petition in bankruptcy proceedings.<sup>55</sup>

The forms and orders prescribed by the supreme court<sup>56</sup> indicate the form, in substance, of the answer to be filed by the alleged bankrupt, but the respondent is not confined to that particular form and is not limited in the facts he may set out in his answer to those suggested by the order, but may set out all the available facts with all necessary particularity.<sup>57</sup> Each distinct charge may be denied in a general manner where several distinct allegations of bankruptcy are set forth in the petition, if an answer of denial in the nature of a special plea to each allegation is not filed;<sup>58</sup> and as many defenses as there are may be set up to the petition, but each defense must be pleaded separately.<sup>59</sup>

50—In re Heydette, 8 N. B. R. 332, Fed. Cas. No. 6444.

51—In re Sherry, 8 N. B. R. 142.

52—In re Harris, 155 Fed. 216, 19 A. B. R. 204.

53—In re Taylor, 2 N. B. N. R. 929, 102 Fed. 728, 4 A. B. R. 515.

54—In re Condon, 209 Fed. 800, 31 A. B. R. 754, aff'g 198 Fed. 947, 29 A. B. R. 907.

55—In re Imperial Corp., 133 Fed. 73, 13 A. B. R. 199.

56—Official Form No. 6, § 1695, *post*.

57—In re Paige, 2 N. B. N. R. 110, 99 Fed. 538, 3 A. B. R. 678.

58—In re Hawkeye Smelting Co., 8 N. B. R. 385.

59—In re Quimette, 3 N. B. R. 140, 1 Sawy. 47, Fed. Cas. No. 10622.

While it has been held that an answer to a petition is sufficient which contains a general denial, and states that the respondent has not committed the acts of bankruptcy set forth and avers that he should not be declared bankrupt for any cause alleged,<sup>60</sup> the better rule is that the answer should not be limited to a general denial but should reply to each allegation of the petitioner; or set up a special and sufficient defense to one or more of the material facts alleged in the petition; nor should it be a simple denial of "insolvency" based solely on opinion as to the value of the estate and not a bona fide issue of fact as to solvency;<sup>61</sup> nor contain a negative pregnant,<sup>62</sup> nor an averment of an agreement to compromise which had not been carried out;<sup>63</sup> nor allege that the notes evidencing the petitioner's claim were given on a wagering contract, in the purchase of stocks, when the contract and rules of the board of trade contradicted respondent.<sup>64</sup> Where the petition charges a preferential transfer as an act of bankruptcy, an answer denying the commission of an act of bankruptcy is sufficient to put insolvency in issue.<sup>65</sup>

An answer alleging that a creditor is not an innocent holder of a claim must allege the facts from which such conclusion can be drawn.<sup>66</sup>

The allegation by intervening creditors that the respondent is engaged "chiefly in farming and tillage of the soil" sets up a good defense to a petition which fails to show respondent's business or that he was not within the excepted classes.<sup>67</sup>

An allegation in the answer reserving the rights "to move to dismiss for irregularities and want of notice" is too indefinite to be considered.<sup>68</sup>

An informal and improper answer filed before the promulga-

60—*In re Hawkeye Smelting Co.*, 8 N. B. R. 385.

61—*Cummins Grocery Co. v. Talley*, 187 Fed. 507, 26 A. B. R. 484; *Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102.

62—*Cummins Grocery Co. v. Talley*, 187 Fed. 507, 26 A. B. R. 484; *Leidigh Car Co. v. Stengel*, 1 N. B. N. 387, 2 A. B. R. 383, 95 Fed. 637.

63—*In re Simonson*, 95 Fed. 948, s. c. 1 N. B. N. 230, 1 A. B. R. 197, 92 Fed. 904.

64—*Hill v. Levy*, 2 N. B. N. R. 180, 98 Fed. 94, 3 A. B. R. 374.

65—*Troy Wagon Works v. Vastbinder*, 130 Fed. 232, 12 A. B. R. 352.

66—*In re Eureka Anthracite Coal Co.*, 197 Fed. 216, 28 A. B. R. 758.

67—*Rise v. Bordner*, 140 Fed. 566, 15 A. B. R. 297; *In re Taylor*, 2 N. B. N. R. 929, 102 Fed. 728, 4 A. B. R. 515.

68—*Brinkley v. Smithwick*, 126 Fed. 686, 11 A. B. R. 500.

tion of the General Orders will not be dismissed but will be retained and amended to conform.<sup>69</sup>

The granting of an extension of the time to answer is discretionary.<sup>70</sup>

The sufficiency of an answer cannot be raised by a demurrer; but only by setting the case for hearing on bill and answer, as where the answer admitted the transfer alleged in the petition as preferential, but set up facts to show it was not preferential,<sup>71</sup> though if a demurrer is filed and no objection is raised, it should be treated as an application to set the case for hearing on bill and answer.<sup>72</sup>

If the case is heard on the petition and answer, the statements in the answer must be taken as true.<sup>73</sup> If any allegation is to be taken as true simply because it is not denied, it is only an allegation of some fact which is presumed to be within the knowledge of the party answering.<sup>74</sup>

### § 182. — Replication.

If the petitioning creditors wish to contest the questions raised by the answer they should file a replication denying the allegations of the answer, and have a trial before an adjudication is made.<sup>75</sup>

### § 183. Verification of pleadings.

### § 184. — Verification necessary.

All pleadings setting up matters of fact shall be verified under oath.<sup>76</sup> The provisions of the act must be strictly followed. It

69—*In re Ogles*, 1 A. B. R. 671, 93 Fed. 426, 1 N. B. N. 326; see *In re Kelly*, 1 A. B. R. 306, 91 Fed. 504.

70—*Blackstone v. Everybody's Store*, 207 Fed. 752, 30 A. B. R. 497; *Butler & Co. v. Palmenberg*, 207 Fed. 705, 30 A. B. R. 502.

71—*Goldman v. Smith*, 1 N. B. N. 160, 1 A. B. R. 266, 93 Fed. 182, citing *Genther v. Wright*, 23 C. C. A. 500; *Crouch v. Kerr*, 38 Fed. 549; *Banks v. Manchester*, 128 U. S. 244, *Travers v. Ross*, 14 N. J. Eq. 254; *Winter v. Claiter*, 54 Miss. 341; *Edwards v. Drake*, 15 Fla. 666; *Barry v. Abbott*, 100 Mass. 396; *Brown v. Mortgage Co.*, 110 Ill. 235; *Stone v. Moore*, 36 Ill. 165.

72—*Goldman v. Smith*, 1 N. B. N. 160,

1 A. B. R. 266, 93 Fed. 182; *Barry v. Abbott*, 100 Mass. 396.

73—*Jordan v. Downey*, 12 N. B. R. 427; *Hill v. Levy*, 2 N. B. R. 180, 98 Fed. 94, 3 A. B. R. 374.

74—*White v. Jones*, 6 N. B. R. 175, Fed. Cas. No. 17550.

75—*In re Taylor*, 102 Fed. 728, 2 N. B. N. R. 929, 4 A. B. R. 515, citing *Geo. M. West Co. v. Lea Bros.*, 1 N. B. N. 409, 2 A. B. R. 463, 174 U. S. 590, 43 L. ed. 1098; *Leidigh Car Co. v. Stengel*, 1 N. B. N. 387, 2 A. B. R. 383, 95 Fed. 637; *Simpson v. Ready*, 12 Mees & W. 740; *Grant Co. v. Dawson*, 151 U. S. 586; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 362.

76—Act of 1898, § 18c.

is matter of substance and right and is not to be dispensed with under cover of an apparent compliance with the act;<sup>77</sup> and when several join in a petition in separate and distinct rights, each stands individually, and a verification by each is required;<sup>78</sup> and the petition is imperfect if the name of a petitioner which appears in the petition is omitted from the verification.<sup>79</sup> Where the petition is verified by only two out of three creditors, a motion should be made for a rule to require a proper verification, and if it is not complied with, a motion to dismiss would doubtless lie.<sup>80</sup>

The schedules attached to a voluntary petition need not be separately verified. It is sufficient that the petition is properly verified.<sup>81</sup>

### § 185. — Corporations.

The verifications, like proof of claim, should be made by the treasurer, or, if there be no treasurer, by the officer whose duties most nearly correspond to those of treasurer;<sup>82</sup> though, as under the act of 1867, such verification may be by an agent,<sup>83</sup> not an officer of the corporation, or by an attorney personally acquainted with the facts,<sup>84</sup> but his authority must be set forth in the affidavit or be otherwise established.

### § 186. — By agent, attorney or partner.

An agent or attorney if duly authorized and the facts are within his knowledge may verify pleadings, though if the allegations are those of the petitioning creditors and are in positive form, the presumption is that the truth of the allegations is within their knowledge and they should verify the petition in person; but the rule is different when the facts are within the attorney's knowledge and he was authorized by them to make

77—In re Keiler, 18 N. B. R. 10, Fed. Cas. No. 7647; see In re Bellah, 116 Fed. 69, 8 A. B. R. 310.

78—In re Simmons, 10 N. B. R. 253, Fed. Cas. No. 12864; In re Scull, 10 N. B. R. 165, 7 Ben. 371.

79—In re Rosenfield, 11 N. B. R. 86, Fed. Cas. No. 12061.

80—Green River Deposit Bank v. Craig, 110 Fed. 137, 6 A. B. R. 381.

81—In re McConnell, 11 A. B. R. 418.

82—G. O. XXI (1).

President of corporation may verify petition. In re Walker, 164 Fed. 680, 21 A. B. R. 132.

83—In re Hannibal, 15 N. B. R. 233, Fed. Cas. No. 6023; In re Bellah, 116 Fed. 69, 8 A. B. R. 310.

84—In re Chequasset Lumber Co., 112 Fed. 56, 7 A. B. R. 87.

it.<sup>85</sup> Hence while it may be preferable that a petition be verified by the creditors personally, neither the statute nor the general orders makes this obligatory, consequently the verification may be by an agent or attorney having knowledge of the facts,<sup>86</sup> but where the petition is so verified the verification should be in positive terms and not upon mere information and belief, though a defect in this regard is amendable.<sup>87</sup> No other evidence of the attorney's authority need appear than the fact that he is admitted to practice in the federal court.<sup>88</sup>

Where the verification to a petition by an agent or attorney at law is good upon its face, but in fact was without authority, objection should be made before answering to the merits, as otherwise it will be waived.<sup>89</sup> Such verification may be made before one of the attorneys for the petitioning creditors as notary<sup>90</sup> and a petition signed by the creditor's attorney and not verified is demurrable.<sup>91</sup>

An involuntary petition filed by a partnership may be verified by a partner.<sup>92</sup>

### § 187. — Defects and objections.

A defect in the verification is a mere irregularity and may be cured by amendment;<sup>93</sup> and the failure to verify pleadings may be supplied *nunc pro tunc*.<sup>94</sup>

85—In re Neilson, 98 Fed. 76; 1 N. B. N. 577, 1 A. B. R. 63; In re Chequasset Lumber Co., 112 Fed. 56, 7 A. B. R. 87, see In re Goldberg, 117 Fed. 692, 9 A. B. R. 156, where an application for an injunction was verified by an attorney.

86—In re Livingston, 13 A. B. R. 357; Rogers v. DeSoto Placer Mining Co., 136 Fed. 407, 14 A. B. R. 252; In re Herzikopf, 118 Fed. 101, 9 A. B. R. 90; In re Chequasset Lumber Co., 112 Fed. 56, 7 A. B. R. 87; In re Hunt, 118 Fed. 282, 9 A. B. R. 251; see In re Simonson, 1 A. B. R. 197, 92 Fed. 904.

87—In re Keet, 128 Fed. 651, 11 A. B. R. 117.

In re Farthing, 202 Fed. 557, 29 A. B. R. 732.

88—In re Herzikopf, 118 Fed. 101, 9 A. B. R. 90; G. O. IV.; see In re Gasser, 5 A. B. R. 32.

89—In re Herzikopf, 118 Fed. 101,

9 A. B. R. 90; In re Simonson, 92 Fed. 904, 1 A. B. R. 197.

90—In re Kindt, 2 N. B. N. 339.

91—In re Carter, 1 N. B. N. 162, 1 A. B. R. 160.

92—In re Walker, 164 Fed. 680, 21 A. B. R. 132.

93—Armstrong v. Fernandez, 208 U. S. 324, 52 L. ed. 514, 19 A. B. R. 746; Millan v. Exchange Bank of Manington, 183 Fed. 753, 24 A. B. R. 889; In re Harris, 155 Fed. 216, 19 A. B. R. 204; In re Keet, 128 Fed. 651, 11 A. B. R. 117; In re Nelson, 98 Fed. 76, 1 N. B. N. 567, 1 A. B. R. 63; In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 Fed. 814; In re Simonson et al., 1 A. B. R. 197; Green River Deposit Bank v. Craig Bros., 110 Fed. 137, 6 A. B. R. 381; In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12361.

94—In re Wolfstein, 1 N. B. N. 202.

A statement in the verification that the petitioners believe the allegations made upon information and belief are true is surplusage, and is no ground for dismissing the petition.<sup>95</sup>

Objection to the form of the verification must be seasonably made and if it is not raised until after an answer on the merits it is too late and the defect is thereby waived.<sup>96</sup> A case is pending so as to admit of the offer of composition notwithstanding a defect in the verification, such defect not being jurisdictional.<sup>97</sup>

### § 188. — Verification of answer.

Where the petition is verified on information and belief, the answer may be similarly verified.<sup>98</sup>

## C. PROCEEDINGS BY OR AGAINST PARTNERSHIPS AND MEMBERS THEREOF

### § 189. Voluntary petition by partnership or members.

### § 190. — Form and allegations.

The general form of the creditor's petition,<sup>99</sup> adapted to the particular case, should be used in partnership proceedings, and the answer in the form prescribed.<sup>1</sup> However, a voluntary proceeding by partners requires no act of bankruptcy to be alleged, but merely an averment that they owe debts and are willing to surrender their estate.<sup>2</sup> If the adjudication be against the firm and administration of its assets in bankruptcy is sought, the petition should so state.<sup>3</sup>

95—*In re Ball*, 156 Fed. 682, 19 A. B. R. 609.

96—*Leidigh Car Co. v. Stengel*, 1 N. B. N. 296, 387, 2 A. B. R. 383, 95 Fed. 637; *In re Herzikopf*, 118 Fed. 101, 9 A. B. R. 90; *In re Baerneopf*, 117 Fed. R. 975; *In re Simonson*, 1 N. B. N. 230, 1 A. B. R. 197, 92 Fed. 904; s. c. 95 Fed. 948; following *In re Raynor*, 7 N. B. R. 527, 11 Blatch. 43, Fed. Cas. No. 11597; *In re McNaughton*, 8 N. B. R. 44, Fed. Cas. No. 8912; *In re Simmons*, 10 N. B. R. 254, Fed. Cas. No. 12864; and disapproving *Hunt v. Pooke*, 5 N. B. R. 161, Fed. Cas. No. 6896; *In re Butterfield*, 6 N. B. R. 257; and *Moore v. Harley*, 4 N. B. R. 71, Fed. Cas. No. 9764.

97—*Ex p. Jewett*, 11 N. B. R. 443, 2 Low. 393, Fed. Cas. No. 7303.

98—*Lackawanna Leather Co. v. La-Porte Carriage Co.*, 211 Fed. 318, 31 A. B. R. 658.

99—Official Form 3, § 1683, *post*.

1—Official Form 6, § 1695, *post*.

2—*In re Penn*, 5 N. B. R. 30, 5 Ben. 89, Fed. Cas. No. 10927.

3—*In re Miller*, 104 Fed. 764; *Davis v. Stevens*, 3 N. B. R. 131, 104 Fed. 235; *In re Blair*, 2 N. B. N. R. 364, 99 Fed. 76, 3 A. B. R. 588; *In re Meyer*, 98 Fed. 976, 3 A. B. R. 559; *aff'g* 1 N. B. N. 304, 1 A. B. R. 565, 92 Fed. 896; *In re Bennett*, 12 N. B. R. 181, 2 Lowell 400, Fed. Cas. No. 1314.



### § 191. — Necessity of separate petitions.

A voluntary petition, presented in the names of a partnership and the individual partners, and accompanied by schedules setting forth the debts and assets of the firm and also of the partners, is sufficient without individual petitions, and the court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and grant discharges from separate and joint debts.<sup>4</sup>

If there are distinct firms of A and B, and A and C, the three persons cannot be joined in one proceeding, though the latter firm has assumed the debts of the former.<sup>5</sup>

### § 192. — Necessary parties.

If one or more of the ostensible members of a firm are not made parties, the adjudication will not be made,<sup>6</sup> and such jurisdictional defect is not cured by a consent signed for the non-joining partners filed after the adjudication.<sup>7</sup> It has been held that where partners are not named in the petition, the court will not order their joinder on a bill filed by the creditors, but the creditors may have the same remedy against them as they would have had before the petition was filed.<sup>8</sup>

It is not essential, however, to the validity of an adjudication against a partnership that a secret or dormant partner should be made a defendant, since the firm property is bound by an adjudication made against the ostensible partners.<sup>9</sup>

In the event of the after discovery of a dormant partner, an adjudication against the nominal firm will permit the opening of the proceedings and bringing in the dormant partner without requiring a new petition to be filed.<sup>10</sup> To charge a person as a

4—In re Gay, 3 A. B. R. 529, 98 Fed. 870; In re Langslow, 1 N. B. N. 232, 1 A. B. R. 258, 98 Fed. 869; but see Mahoney v. Ward, 2 N. B. N. R. 538, 100 Fed. 278, 3 A. B. R. 770; In re Barden, 2 N. B. N. R. 741, 4 A. B. R. 31, 101 Fed. 553; In re Farley, 115 Fed. 359, 8 A. B. R. 266; In re City Con. & Bldg. Co., 30 A. B. R. 133.

5—In re Wallace, 12 N. B. R. 191, Fed. Cas. No. 17095.

6—In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; In re Pitt, 14 N. B. R. 59, 8 Ben. 389, Fed. Cas. No. 11188; In re

Lewis, 1 N. B. R. 19, 2 Ben. 96, Fed. Cas. No. 8311; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re Elliott, 2 N. B. N. R. 350; Citizens' Nat. Bk. v. Cass, 18 N. B. R. 279, Fed. Cas. No. 2732.

7—In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; s. c. 1 N. B. N. 407, 95 Fed. 263, 2 A. B. R. 407.

8—Bank v. Cass, 18 N. B. R. 279, Fed. Cas. No. 2732.

9—Metcalf v. Officer, 5 Dillons c. c. Rep. 565; In re Harris, 2 N. B. R. 868.

10—In re Scott, 1 N. B. N. 327.

silent partner, and thus debar him from his claims as a creditor, an actual and definite agreement, binding on all parties, must be proved.<sup>11</sup>

A member of a defunct partnership, desiring adjudication and discharge from partnership debts, must make the other members parties, and the fact that partnership creditors have filed their claims against his estate does not remove the necessity. A petition may be amended to include the firm and its other members,<sup>12</sup> even after adjudication,<sup>13</sup> since for the purposes of the law a partnership is in existence so long as there are outstanding assets or liabilities and the joint affairs are unsettled, and just so long will a retired partner remain subject to proceedings in bankruptcy.<sup>14</sup>

### § 193. Proceedings against firm by member thereof.

While a creditor cannot compel partners to petition for the adjudication of copartners,<sup>15</sup> yet a partner may file a petition against the partnership without the consent of the other partners; but such other partners cannot be adjudged individual bankrupts where it is not alleged that they committed an act of bankruptcy within the statutory period.<sup>16</sup>

A partnership may be adjudicated on a petition filed by one partner though the same does not allege a technical act of bankruptcy where the contesting partners fail to prove that the partnership is solvent or has not committed an act of bankruptcy.<sup>17</sup> So, a petition praying adjudication against a partnership either on the sole ground of insolvency of the partnership and all of its members, or on the sole ground that the partnership has, through one or more of the nonassenting partners, committed an act of bankruptcy, may be filed by a single partner.<sup>18</sup> In such case, the nonassenting partner cannot set up

11—In re Clark, 111 Fed. 893, 7 A. B. R. 96; In re Harris, 108 Fed. 517, 4 A. B. R. 132.

12—In re Elliott, 2 N. B. N. R. 350; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25.

13—In re McFaun, 3 A. B. R. 66, 96 Fed. 592.

14—In re Grady, 3 N. B. R. 227, Fed. Cas. No. 5654; Parker v. Phillips, 2 Cush. 175; In re Crockett, 2 Ben. 514, Fed. Cas. No. 3402.

15—In re Harbaugh, 15 N. B. R. 246, Fed. Cas. No. 6045; In re Forbes, 128 Fed. 137, 11 A. B. R. 787.

16—In re Ceballos & Co., 161 Fed. 445, 20 A. B. R. 459.

17—In re Junck & Balthazard, 169 Fed. 481, 22 A. B. R. 298.

18—In re Ceballos & Co., 161 Fed. 445, 20 A. B. R. 459.

the want of an act of bankruptcy, but may deny the insolvency of the firm and thus defeat an adjudication.<sup>19</sup>

Notice must be given the non-petitioning partners the same as in involuntary proceedings,<sup>20</sup> and if personal service cannot be had, notice should be given by publication.<sup>21</sup> Any member of a partnership refusing to join in a petition to have the firm adjudicated bankrupt is entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership. He has the right to appear at the time fixed by the court for the hearing, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to make; and in case an adjudication of bankruptcy is made upon the petition, such partner must file a schedule of his debts and an inventory of his property in the same manner as is required in case of debtors against whom adjudication of bankruptcy is made.<sup>22</sup>

#### § 194. Adjudication of individual partners.

One or more of the partners may be adjudged bankrupt without the others, on the partnership being so adjudged; but, in such case, if a discharge from firm as well as individual debts is sought, the petition should aver individual and firm indebtedness, giving the firm name and the names of the partners, and should ask for a discharge from both firm and individual debts, and be accompanied by schedules, setting out firm debts and property, and other matters required in case all the partners join, and the notices and application for discharge should specifically state that a discharge is asked from both firm and individual debts, and be given to firm creditors and non-joining partners,<sup>23</sup> though, when all are insolvent and there are no firm

19—*In re Forbes*, 128 Fed. 137, 11 A. B. R. 787.

20—G. O. VIII; *In re Laughlin*, 96 Fed. 589; *In re McFaun*, 96 Fed. 592; *In re Meyers*, 1 N. B. N. 515, 96 Fed. 408; *In re Lewis*, 1 N. B. R. 19, 2 Ben. 96, Fed. Cas. No. 8311; *In re Penn*, 5 N. B. R. 30, 5 Ben. 89, Fed. Cas. No. 10927; *In re Noonan*, 10 N. B. R. 330, 3 Biss. 491, Fed. Cas. No. 10292; *In re Prinkard*, 1 N. B. R. 51, Fed. Cas. No.

11366; *In re Moore*, 5 Biss. 79, Fed. Cas. No. 11366; *In re Moore*, 5 Biss. 79, Fed. Cas. No. 9750; *In re Hartman*, 96 Fed. 593.

21—*In re Murray*, 1 N. B. N. 532, 3 A. B. R. 90; *In re Russell*, 1 N. B. N. 532, 97 Fed. 32, 3 A. B. R. 91; *In re Temple*, 17 N. B. R. 345, 4 Saw. 62, Fed. Cas. No. 13825.

22—G. O. VIII.

23—*In re Hartman*, 96 Fed. R. 593;

assets whatever, the proceeding may be without reference to the other partners.<sup>24</sup>

### § 195. Involuntary petition against firm or members.

### § 196. — In general.

A partnership is a distinct entity requiring a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication of the partnership itself, in addition to any that may be made against the individual members.<sup>25</sup> The converse of this is equally true.<sup>26</sup>

In a proceeding against a partnership it is not necessary to allege that the solvent partners, if any, consent to the adjudication.<sup>27</sup>

Where insolvency is an essential part of the act of bankruptcy, the insolvency of the firm and every member must be averred, since a partnership is not insolvent so long as the joint, together with the separate property of the partners liable for the joint debts is sufficient to pay its debts, and this is true though the only partner whose individual estate is sufficient to render the partnership solvent is dead.<sup>28</sup>

The averment that "the partnership is insolvent," where it seems to be meant thereby that the joint assets are not sufficient to pay the joint obligations, is ambiguous and insufficient, for,

In re Laughlin, 96 Fed. 589, 3 A. B. R. 1; In re McFaun, 96 Fed. 592, 3 A. B. R. 66; In re Russell, 1 N. B. N. 532, 3 A. B. R. 91, 97 Fed. 32; Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395; G. O. VIII.

24—In re Hirsch, 2 N. B. N. R. 137, 3 A. B. R. 344, 97 Fed. 571; In re Abbe, 2 N. B. R. 26, Fed. Cas. No. 4; In re Marks, Fed. Cas. No. 9094; Crompton v. Conkling, 15 N. B. R. 417, 420, 9 Ben. 225, Fed. Cas. No. 3407-8; In re Meyers, 1 N. B. N. 515, 96 Fed. 408, 2 A. B. R. 707; In re Winkens, 2 N. B. R. 113, Fed. Cas. No. 17875; In re Downing, 3 N. B. R. 182, 1 Dill. 33, Fed. Cas. No. 4044.

25—In re Mercur, 115 Fed. 655, 8 A. B. R. 275, and cases cited.

26—In re Hale, 107 Fed. 432, 6 A. B.

R. 35, In re Ceballos & Co., 161 Fed. 445, 20 A. B. R. 459.

A prayer "that said copartnership may be adjudged a bankrupt" is a prayer solely for the adjudication of the partnership. In re Wing Yiek Company, 13 A. B. R. 757.

27—In re Everybody's Grocery & Meat Market, 173 Fed. 492, 21 A. B. R. 925.

28—In re Wing Yiek Company, 13 A. B. R. 757; Vaccaro v. Bk., 2 N. B. N. R. 1037, 103 Fed. 436; In re Blair, 2 N. B. N. R. 364, 99 Fed. 76, 3 A. B. R. 588; Davis v. Stevens, 104 Fed. 235; Hanson v. Paige, 3 Gray 239.

Contra: In re Everybody's Grocery & Meat Market, 173 Fed. 492, 21 A. B. R. 925.

as each partner is liable for all of the debts, a partnership cannot, with strictness, be said to be insolvent while any one of the partners is able to pay all of the firm's liabilities, and the supreme court rules and forms contemplate that an adjudication of the firm imports an adjudication of all its members as well.<sup>29</sup>

The creditors of a firm being by law also creditors of each member of the firm may join in a petition to have the members of the firm individually adjudged bankrupt.<sup>30</sup>

### § 197. — Partnership creditors.

The creditors of a partnership are also the creditors of each individual member and may therefore petition against any one member as well as against the firm.<sup>31</sup> Where the ultra vires acts of a corporation in entering into and executing the contract of partnership induced general creditors to extend credit to a firm, the corporation cannot repudiate such acts, and transform itself into a general creditor.<sup>32</sup>

29—In re Blair, 2 N. B. N. R. 364, 99 Fed. 76, 3 A. B. R. 588.

30—In re Melick, 4 N. B. R. 26, Fed. Cas. No. 9399; In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626, 95 Fed. 634.

31—In re L. Hee, 13 A. B. R. 8. In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626,

95 Fed. 634; In re Lloyd, 15 N. B. R. 257, Fed. Cas. No. 8429; In re Malot, 16 N. B. R. 485, Fed. Cas. No. 9282.

32—In re Ervin, 109 Fed. 135, 6 A. B. R. 356, 3 N. 763, aff'd Wallerstein v. Ervin, 112 Fed. 124, 7 A. B. R. 256, and cases cited.

## CHAPTER VII

### PROVISIONAL SEIZURE OF PROPERTY—RECEIVERSHIPS

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§ 239. — Right of removal and discharge.

§ 240. — Effect of dismissal of proceedings.

§ 241. — Effect of appointment of trustee.

§ 242. Ancillary receivers.

## § 198. Jurisdiction of bankruptcy court prior to adjudication.

Immediately upon filing the petition in bankruptcy, the whole assets of the bankrupt come within the jurisdiction and control of the bankruptcy court to be applied and disposed of according to the terms of the bankruptcy act for the benefit of the bankrupt's creditors, provided the proceedings should result in an adjudication of bankruptcy. Pending and prior to the adjudication, title to the bankrupt's property still remains in him.<sup>1</sup> But pending the adjudication, the court of bankruptcy has the power, and it is its duty, upon its own motion, in a proper case, to take actual possession of his estate through a receiver or by a direction to the marshal.<sup>2</sup>

The act expressly provides that: "A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders."<sup>3</sup>

The purpose of section 69a is to enable the creditors to have the bankrupt's property taken into custody by the United States marshal after the petition has been filed, and prior to adjudication, where the bankrupt has committed an act of bankruptcy, and has neglected or is neglecting his property, so that it is deteriorating in value. While the section does not specifically provide for the seizure of property of a bankrupt who is wasting it, it is evidently the intention of congress by this provision to

<sup>1</sup>—Sec. 70a Act of 1898.

<sup>2</sup>—Whittlesey v. Becker Co., 142 App. Div. (N. Y.) 313, 25 A. B. R. 672. In re Abrahamson & Bretstein, 1 N. B. N. 23, 1 A. B. R. 44.

<sup>3</sup>—Act of 1898, § 69a.

Analogous provision of Act of 1867.

"Section 40. . . . If it shall appear that there is probable cause for believing that the debtor is about to leave

the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district . . . and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. . . ."

prevent not only the deterioration in value but also the wastage and loss of property, pending the adjudication.<sup>4</sup>

The authority of the bankruptcy court to appoint a receiver for the preservation of the estate pending the adjudication, to authorize the receiver temporarily to conduct the business of the alleged bankrupt, and to make all orders necessary for the accomplishment of those objects, applies to the entire estate of the bankrupt, wheresoever it may be situated in the United States, and is not confined to such property as may be within the district wherein the petition in bankruptcy is filed. Wherever the estate is in the United States, there the authority to take precautions for the preservation of the estate pending the adjudication extends.<sup>5</sup> A temporary receiver appointed in bankruptcy has no authority, however, to institute in a court other than that of his appointment, an ancillary proceeding to confirm his appointment and secure for him the custody of property in the district.<sup>6</sup>

### § 199. Rights and duties of marshal.

A marshal has no authority under a warrant issued under a petition asking that the debtor's property be seized provisionally to seize property outside of his district,<sup>7</sup> and, if in executing a warrant for the seizure of property, he seize that of a stranger, he becomes liable to an action for trespass in a state court.<sup>8</sup>

Since the estate is in custodia legis, the officer appointed to manage it is accountable to the court appointing him and to that court alone.<sup>9</sup>

### § 200. Appointment of receiver.

#### § 201. — When proper.

Upon proper application showing the liability of the estate to deterioration or waste pending action upon the petition and appointment of a trustee, section 2(3) authorizes the court of

4—In re Rockwood, 1 N. B. N. 134.  
91 Fed. 363, 1 A. B. R. 272.

5—In re Dempster, 172 Fed. 353, 22  
A. B. R. 751.

6—In re Tygarts River Coal Co., 203  
Fed. 178, 30 A. B. R. 183.

See, also, § 329, *post*, for power of

referees with reference to seizure of prop-  
erty.

7—Carr v. Phillips, 18 N. B. R. 527.

8—Marsh v. Armstrong, 11 N. B. R.  
125.

9—In re Carow, 4 N. B. R. 178, Fed.  
Cas. No. 2426.



bankruptcy to appoint a receiver or the marshal to take immediate possession of bankrupt's property.<sup>10</sup>

The power to appoint receivers should be exercised not as a matter of course, but cautiously, circumspectly, and always upon proof that the appointment is absolutely necessary. The reasons for the appointment should be clear, positive and certain, and a receiver should not be appointed prior to the adjudication unless it clearly appears either that the property of the alleged bankrupt is perishable or that it is apt to become wasted, disputed or misappropriated.<sup>11</sup>

Unless something is shown to the contrary the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee, the property will be entirely safe in the hands of the assignee, especially if he be enjoined from disposing of it *pendente lite*.<sup>12</sup>

Section 3e does not authorize the appointment of a receiver in voluntary cases,<sup>13</sup> nor does the act make any provision for the appointment of a receiver by the consent of the alleged bankrupt.<sup>14</sup> The appointment, by the terms of the act, is only authorized when it is absolutely essential for the preservation of the estate.<sup>15</sup> However, after adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver to preserve the assets of the estate, otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion, and where the creditors and other persons interested make no objection whatever.<sup>16</sup>

The appointment of a receiver is proper where the bankrupt confesses judgment upon an agreement and makes a general assignment for the benefit of creditors,<sup>17</sup> or where he makes a general assignment within four months prior to the filing of the petition;<sup>18</sup> or is secretly disposing of the property or the like.

10—See *Lansing v. Manton*, 14 N. B. R. 127, Fed. Cas. No. 8077.

11—In re *Standard Cordage Co.*, 184 Fed. 156, 30 A. B. R. 448; In re *Oakland Lumber Co.*, 174 Fed. 634, 23 A. B. R. 181.

12—In re *Oakland Lumber Co.*, 174 Fed. 634, 23 A. B. R. 181.

13—In re *Rosenthal*, 144 Fed. 548, 16 A. B. R. 448.

14—*T. S. Faulk & Co. v. Steiner*, 165 Fed. 861, 21 A. B. R. 623.

15—*Faulk & Co. v. Steiner*, 165 Fed. 861, 21 A. B. R. 623.

Act of 1898 § 2 (3).

16—In re *Huddleston*, 167 Fed. 428, 21 A. B. R. 669.

17—*Rautman v. Hopkins*, 1 N. B. N. 41.

18—In re *Gutwillig*, 1 N. B. N. 18; In

Upon a proper showing the court is endowed with authority to prevent the loss of good will, trade and depreciation, which follows the closing of a business, as well as to prevent a sacrifice of the estate at times of money depression, absence of a market, and the like, by permitting its continuance for a limited period.

The court will not appoint a provisional receiver to receive the surrender of a preference,<sup>19</sup> or upon the ground that the debtor removed goods in fulfilment of an existing contract made long before the commencement of the bankruptcy proceedings, as such act is not fraudulent.<sup>20</sup> The mere fact that a corporation has made application to a state court for a voluntary dissolution, with proof of its insolvency or the dissipation of its assets, will not justify the appointment of a receiver by the bankruptcy court, prior to an adjudication.<sup>21</sup>

## § 202. — Property subject to seizure.

Prior to the amendatory act of February 5, 1903, summary process for the seizure of property could be invoked only where the property was in the possession of the bankrupt or his agent, and never where it was in the control of a third party, holding it under an adverse claim of right or title prior to the filing of the petition,<sup>22</sup> but the mere refusal to surrender without other evidence was insufficient to constitute an adverse holding.<sup>23</sup> Hence the court would not order possession to be taken of property which may have been illegally transferred to another, nor issue a warrant commanding the marshal to take possession provisionally of goods and property so conveyed prior to the filing of the petition,<sup>24</sup> but where the conveyance was subsequently

re *Etheridge Fur. Co.*, 1 N. B. N. 139, 92 Fed. 329, 1 A. B. R. 112; *Sedgwick v. Place*, 3 N. B. R. 35, 3 Ben. 360, Fed. Cas. No. 12619.

19—In re *Thompson*, 2 N. B. N. R. 1016.

20—*Bk. v. Brady's Bend Iron Co.*, 5 N. B. R. 491, Fed. Cas. No. 9018.

21—In re *Standard Cordage Co.*, 184 Fed. 156, 30 A. B. R. 448.

22—In re *Kelly*, 91 Fed. 504, 1 A. B. R. 306; In re *Rockwood*, 1 N. B. N. 134, 91 Fed. 363.

23—*Mueller v. Nugent*, 184 U. S. 1, 7 A. B. R. 224, 1 A. B. R. 372; In re *Grif-*

*fith*, 1 N. B. N. 546; *Bardes v. Bank*, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; In re *Ward*, 104 Fed. 985; In re *Brodbyne*, 1 N. B. N. 279, 326, 93 Fed. 643, 2 A. B. R. 53; In re *Buntrock Clothing Co.*, 1 N. B. N. 291, 92 Fed. 886, 1 A. B. R. 454; In re *Pearson*, 1 N. B. N. 474, 2 A. B. R. 819; In re *Fowler*, 1 N. B. N. 265, 93 Fed. 417, 1 A. B. R. 555; In re *Bender*, 106 Fed. 873, 5 A. B. R. 632, and cases cited under § 23b, Act of 1898; but see *Marshall v. Knox*, 8 N. B. R. 97, 16 Wall. 551, 21 L. ed. 481; In re *Smith*, 1 N. B. N. 61.

24—Sec. 23b, Act of 1898; In re

avoided by the adjudication, as in the case of a general assignment, the property would be restored upon summary petition in the court of bankruptcy.<sup>25</sup>

Under the act as it now reads, however, the receiver is entitled to possession of whatever is plainly the property of the bankrupt and against which no third person makes claim with color of title,<sup>26</sup> and may take possession of property in the hands of an adverse claimant where necessary for the preservation of the estate,<sup>27</sup> as where the facts clearly show the dishonest, fraudulent and corrupt character of the transfer to the claimant and an imminent danger of loss and dissipation of the property transferred.<sup>28</sup>

Property of the bankrupt upon which a lien is claimed must nevertheless be turned over to the receiver.<sup>29</sup> The holder of a chattel mortgage is not entitled to possession of the mortgaged property as against the receiver before the determination of his suit to foreclose, but if the parties agree the property may be sold and the proceeds held by the receiver.<sup>30</sup>

A receiver appointed by a state court is bound, upon being ordered to do so by the federal court, to turn over the property of the bankrupt in his possession to the federal receiver, unless he is holding it under an honest adverse claim.<sup>31</sup> So, a general assignment gives the assignee no title or right to possession of the bankrupt's property as against the receiver, who may sum-

Harthill, 4 N. B. R. 131, 4 Ben. 488, Fed. Cas. No. 6161; *In re Holland*, 12 N. B. R. 403, Fed. Cas. No. 6605.

25—*Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 3 N. B. N. R. 482, 5 A. B. R. 623.

26—*In re Muncie Pulp Co.*, 139 Fed. 546, 14 A. B. R. 70; certiorari denied 202 U. S. 621, 50 L. ed. 1175. *In re Michaelis & Lindeman*, 196 Fed. 718, 27 A. B. R. 299.

Receiver held entitled to possession of goods of bankrupt as against one claiming through a fictitious sale made prior to the filing of the petition. *In re Siegel*, 164 Fed. 559, 21 A. B. R. 154.

27—*In re Moody*, 131 Fed. 525, 12 A. B. R. 718; *In re Dempster*, 172 Fed. 353, 22 A. B. R. 751.

But see *In re Kolin*, 134 Fed. 557, 13 A. B. R. 531.

The court may order the receiver to take possession of property transferred shortly before bankruptcy and to hold same pending adjudication and subsequent suit by the trustee to set aside the transfer through which it was acquired. *In re Haupt Bros.*, 153 Fed. 239, 18 A. B. R. 585.

28—*Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. 295, 17 A. B. R. 257.

29—*Matter of Eurich's Ft. Hamilton Brewery*, 158 Fed. 644, 19 A. B. R. 798.

30—*In re Victor Color & Varnish Co.*, 175 Fed. 1023, 23 A. B. R. 177.

31—*In re Zeigler Co.*, 189 Fed. 259, 26 A. B. R. 761.

marily take the property from the possession of the assignee, or a third party who has tortiously taken it from the assignee.<sup>32</sup>

That property is in the hands of the state officer does not prevent its seizure.<sup>33</sup>

### § 203. — Application, notice and hearing.

A petition for involuntary adjudication in bankruptcy should be confined to that purpose and should not also contain an application for a warrant of seizure, the act indicating by implication that the proceedings are distinct and separate; at any rate, the better practice is to make them such. Under the act a warrant of seizure can issue only after a petition has been filed by the creditor.<sup>34</sup> The petition to appoint a receiver should allege that the appointment is absolutely necessary for the preservation of the estate, and the facts should be stated either in a sworn petition, or in accompanying affidavits showing the necessity.<sup>35</sup>

The affidavit required to support a petition for seizure of property should specify all of the essential facts, and it has been held that it should be as fully satisfactory in exhibiting proof of the act of bankruptcy as the testimony to be produced at the hearing of the petition for adjudication in a contested case, in order that the court may be fully apprised of the facts in reaching a conclusion as to whether the alleged bankrupt has been neglecting his property as charged. Warrant for the seizure should not be made upon the mere opinions of witnesses that an act of bankruptcy has been committed, but only on a full showing of the facts of the case.<sup>36</sup>

The court is not ordinarily justified in appointing a receiver and seizing the property of a defendant without giving him notice and an opportunity to be heard,<sup>37</sup> and except where delay will result in irreparable loss or will defeat the very purpose of

32—Whittlesey v. Becker & Co., 142 App. Div. (N. Y.) 313, 25 A. B. R. 672.

33—U. S. marshal is entitled to seize property of bankrupt, under arrest from hands of sheriff. LeMaster v. Spencer, 203 Fed. 210, 29 A. B. R. 264.

34—In re Kelly, 91 Fed. 504, 1 A. B. R. 306.

35—T. S. Faulk & Co. v. Steiner, 165 Fed. 861, 21 A. B. R. 623.

36—In re Kelly, 91 Fed. 504, 1 A. B. R. 306.

37—T. S. Faulk & Co. v. Steiner, 165 Fed. 861, 21 A. B. R. 623; In re Kelly, 91 Fed. 504, 1 A. B. R. 306; Bauman Diamond Co. v. Hart, 192 Fed. 498, 27 A. B. R. 632.

the receivership, notice should be given to the bankrupt.<sup>38</sup> However, the appointment of a receiver without notice to him is not a deprivation of property without due process of law.<sup>39</sup>

Notice of the application for a receiver should also be given to any other person found in possession of the property of the alleged bankrupt,<sup>40</sup> but no notice to creditors of the appointment of a receiver is required.<sup>41</sup>

#### § 204. — Bond of petitioners.

The creditors petitioning for the appointment of a receiver may be required to furnish a bond conditioned upon the payment of the expenses of the receivership, if sufficient assets applicable to that purpose are not discovered,<sup>42</sup> and upon the payment to the respondent in case the petition is dismissed, or the seizure proves to have been wrongfully obtained, of all costs, expenses and damages caused by the seizure, taking and detention of the property.<sup>43</sup>

An order appointing a receiver which fixes no time within which the moving creditor must file his bond, and does not require it to be filed before the receiver takes possession, is erroneous.<sup>44</sup> The fact that a bond has been filed in another proceeding against the same debtor will not excuse a failure to file a bond.<sup>45</sup>

Recovery upon bonds so given is treated in a subsequent chapter.<sup>46</sup>

#### § 205. — Forthcoming bond of alleged bankrupt.

Property seized prior to the adjudication must be released, if the bankrupt gives bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to

38—*Latimer v. McNeal*, 142 Fed. 451, 16 A. B. R. 43.

39—*Latimer v. McNeal*, 142 Fed. 451, 16 A. B. R. 43; *In re Francis*, 136 Fed. 974, 14 A. B. R. 676.

40—*Bauman Diamond Co. v. Hart*, 192 Fed. 498, 27 A. B. R. 632; *In re Sunseri*, 156 Fed. 103, 18 A. B. R. 231.

41—*In re Abrahamson & Bretstein*, 1 N. B. N. 23, 1 A. B. R. 44.

42—*In re McKane*, 152 Fed. 733, 18 A. B. R. 594.

43—Act of 1898, §§ 3 (e), 69a; *In re Sunseri*, 156 Fed. 103, 18 A. B. R. 231; see *Beach v. Macon Grocery Co.*, 116 Fed. 143.

44—*In re Haff*, 135 Fed. 742, 13 A. B. R. 354.

45—*In re Haff*, 135 Fed. 742, 13 A. B. R. 354.

46—See Chap. IX.

turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.<sup>47</sup> The parties to such bond are estopped from questioning the appointment as receivers of the parties named in the bond as such, and the sureties thereon will not be released by the action of the alleged bankrupt in instituting voluntary proceedings and obtaining a second seizure of the property.<sup>48</sup>

### § 206. — Appeal and review.

The propriety of the appointment of a receiver and the effect of the dismissal of the proceedings upon the receivership are judicial questions to be determined primarily by the bankruptcy court and are not reviewable by mandamus.<sup>49</sup>

No appeal lies from an order appointing a receiver, but where a receiver is appointed by the same order which adjudicated the bankrupt, and such order is reversed and set aside upon the appeal, the appointment of the receiver falls with it.<sup>50</sup>

### § 207. — Collateral attack.

The validity or propriety of the receiver's appointment, or the scope of his authority prescribed in the order of his appointment, cannot be questioned in another tribunal or in a collateral proceeding unless the decree or order is void.<sup>51</sup>

### § 208. Interference with bankrupts' property.

### § 209. — Before appointment of receiver.

The bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition in bankruptcy is filed, so far as to prevent a seizure of the property in a replevin action after the time of such filing though before the appointment of a receiver or trustee.<sup>52</sup>

47—Act of 1898, § 69a.

48—*Moore Bros. v. Cowan*, 173 Ala. 536, 26 A. B. R. 902.

49—*Edinburg Coal Co. v. Humphreys*, 134 Fed. 839, 13 A. B. R. 593.

50—*Bauman Diamond Co. v. Hart*, 192 Fed. 498, 27 A. B. R. 632.

51—*Slaughter v. Louisville & N. R. Co.*, 125 Tenn. 292, 27 A. B. R. 570; *In*

*re Isaacson*, 174 Fed. 406, 23 A. B. R. 98.

*In replevin against the receiver, neither his official status nor the regularity of the proceedings leading to his appointment may be collaterally attacked.* *Ross v. Stroh*, 165 Fed. 628, 21 A. B. R. 644.

52—*In re Weinger, Bergman & Co.*, 126 Fed. 875, 11 A. B. R. 424.

§ 210. — After appointment of receiver.

The entry of a decree appointing a receiver gives the bankruptcy court jurisdiction of the property of the bankrupt irrespective of the fact that there has been no adjudication or that the receiver has not filed his bond, or of the fact that the property is not held by the bankrupt, and any subsequent seizure of the property is an interference with the possession of the bankruptcy court.<sup>53</sup> Property in the hands of the receiver cannot be attached<sup>54</sup> or replevied.<sup>55</sup>

On a proper showing the court may issue an injunction or restraining order, upon an application making the third person a party, thereby restraining the sale or other disposition of the property until the hearing upon the petition for adjudication and the appointment of a trustee.<sup>56</sup>

Where property belonging to the estate has been levied on, and the pendency of the sale is not discovered by the receiver until it is too late to apply to the court of his appointment for an injunction, there are still several courses open to him: (1) he may apply to the state court out of which the execution issued to restrain further proceedings thereon, in which case it is the imperative duty of that court, under section 11 of the Bankruptcy Act, to grant the relief; (2) inasmuch as the sheriff holds the property as the property of the bankrupt, it is his duty, upon demand of the receiver, to acknowledge his right and suspend further proceedings under the writ, and any priorities which the creditor secured by the levy will be fully protected by the bankruptcy court; (3) if the state authorities refuse to accede to the demands of the receiver, he may file a plenary suit to enforce his right to the possession of the property and to restrain its dissipation and waste by the execution sale.<sup>57</sup>

Trust funds which have been fraudulently diverted or appro-

<sup>53</sup>—In re Alton Mfg. Co., 158 Fed. 367, 19 A. B. R. 805; In re Plant, 148 Fed. 37, 17 A. B. R. 272.

<sup>54</sup>—In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 A. B. R. 66; In re Renda, 149 Fed. 614, 17 A. B. R. 521.

<sup>55</sup>—Murphy v. John Hofman Co., 211 U. S. 562, 53 L. ed. 327, 21 A. B. R. 487, aff'g 187 N. Y. 548.

<sup>56</sup>—Sec. 11, Act of 1898 (In re Rockwood, 91 Fed. 363, 1 N. B. N. 134, 1 A.

B. R. 272; In re Kelly, 91 Fed. 504, 1 A. B. R. 306; In re Holland, 12 N. B. R. 403, Fed. Cas. No. 6605.).

<sup>57</sup>—In re Dempster, 172 Fed. 353, 22 A. B. R. 751.

The amendment to § 47a does not make the receiver a bona fide purchaser entitling him to hold property received by the bankrupt in trust and misappropriated and commingled with other funds by the bankrupt.

priated can be recovered from the receiver whenever such funds are capable of identification, or, if they have been intermingled with the general funds of the estate so as to render their identification impossible, the court of bankruptcy will decree their restitution to the *cestui que* trust if the unlawful appropriation of the trust funds resulted in increasing the assets of the estate.<sup>58</sup> On the other hand, if, at any time after the misappropriation of the funds and mingling them with those of the bankrupt, all money is withdrawn, including that wrongfully commingled, the equities are lost, although moneys from other sources are subsequently placed in the same place.<sup>59</sup> Or if a part of the funds so commingled is withdrawn, and the fund reduced to a smaller amount than the trust fund, the latter must be regarded as dissipated except as to this balance. Sums subsequently added to the fund from other sources cannot be subjected to the equitable claim of the *cestui que* trust.<sup>60</sup>

A receiver may assail a chattel mortgage void under the laws of the state where executed because not filed within the statutory period after its execution.<sup>61</sup>

Vessels belonging to the bankrupt cannot be taken from the receiver in bankruptcy and given over to the marshal, in any admiralty proceeding, without the court's consent.<sup>62</sup>

### § 211. Powers, duties, rights and liabilities of receiver.

#### § 212. — Outside of district.

A receiver has no authority to discharge any official function outside of his own district.<sup>63</sup>

#### § 213. — Title to property.

The receiver is not invested with the title, but is a mere custodian with authority to inventory, receive, and retain in his possession all the assets of the alleged bankrupt.<sup>64</sup> He has no

58—In re M. E. Dunn & Co., 193 Fed. 212, 28 A. B. R. 127.

59—60—In re Dunn & Co., 193 Fed. 212, 28 A. B. R. 127.

61—In re Schmidt, 181 Fed. 73, 24 A. B. R. 687.

62—In re Hughes, 170 Fed. 809, 22 A. B. R. 303.

63—In re Benedict, 140 Fed. 55, 15 A. B. R. 232.

Receiver cannot sue in another district. In re Nat. Mercantile Agency, 128 Fed. 639, 12 A. B. R. 189.

In re Dunseath & Son Co., 168 Fed. 973, 22 A. B. R. 75.

64—In re Rubel, 166 Fed. 131, 21 A. B. R. 566; In re Leonard, 177 Fed. 503, 24 A. B. R. 97.



greater rights or better title than the bankrupt had,<sup>65</sup> and takes the assets of the bankrupt, in the absence of fraud, subject to all equitable liens in favor of third persons to the extent that such assets have been augmented by the wrongful act of the bankrupt.

The receiver has no title to a liquor license granted to the debtor after the adjudication.<sup>66</sup>

#### § 214. — Contracts and leases.

The receiver may adopt or reject contracts of the bankrupt, leaving the other party to his claim against the estate for its breach,<sup>67</sup> and where he takes possession of the property of the bankrupt and seasonably exercises an option to adopt a contract of the bankrupt, and gives notice to the seller that he will, on delivery of the subject-matter thereof, pay therefor, he succeeds to all the rights of the bankrupt and the seller becomes liable upon his failure to deliver the subject-matter as agreed.<sup>68</sup>

While, ordinarily, a receiver acting within his powers is not personally liable upon his contracts, yet he may so contract as to bind himself; and if he acts beyond his powers he necessarily assumes individual responsibility.<sup>69</sup> Where, however, he specifically contracts to pay for services rendered out of the estate or fund of the bankrupt, he is not personally liable for any unpaid balance after the expiration of the receivership.<sup>70</sup> An action may be maintained on the bond of a receiver to recover for goods purchased by him in excess of his authority.<sup>71</sup>

The receiver must pay reasonable rental for time during which he occupies property under a lease.<sup>72</sup> A provision in an order of the court requiring the receiver to give security for rent in the event he elects to continue in possession of premises leased by the bankrupt may be waived by the lessor.<sup>73</sup> Where a

65—*In re Muncie Pulp Co.*, 151 Fed. 732, 18 A. B. R. 56.

66—*Whitlock's License*, 39 Pa. Super. Ct. Rep. 34, 22 A. B. R. 262.

67—*Southern Steel & Iron Co. v. Hickman, Williams & Co.*, 190 Fed. 888, 27 A. B. R. 203.

68—*In re Niagara Radiator Co.*, 164 Fed. 102, 21 A. B. R. 55.

69—*In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 21 A. B. R. 393.

70—*Weller v. Stengel*, 146 App. Div. (N. Y.) 317, 26 A. B. R. 751.

71—*In re Erie Lumber Co.*, 150 Fed. 817, 17 A. B. R. 689.

72—*In re Yodleman-Walsh Foundry Co.*, 166 Fed. 381, 21 A. B. R. 509.

73—*Brooklyn Improvement Co. v. Lewis*, 136 App. Div. (N. Y.) 861, 24 A. B. R. 122.

receiver is ordered by the court to either surrender the premises or give security for the rent, and elects to retain possession, he becomes personally liable for the rent.<sup>74</sup>

The receiver may assign a lease held by the bankrupt.<sup>75</sup>

### § 215. — Participation in examination of bankrupt.

In case of an examination of bankrupt at the application of creditors before a trustee is elected, the provisionally appointed receiver should intervene, as, if any property is discovered and recovered, he would be entitled to its possession.<sup>76</sup>

An examination to discover assets should not be prolonged unnecessarily at the expense of the estate. The receiver must approve of the stenographer's bill incurred at such hearing, and to certify that all of the examination was necessary. The compensation of the stenographer at such hearing may, in a proper case, exceed the amount fixed by section 38 for stenographers employed by a referee.<sup>77</sup>

### § 216. — Adjustment and compromise of claims against bankrupt.

Receivers prior to adjudication are in no condition to adjust claims, liquidated or unliquidated, and have no power to do so. They may not compromise claims or reject them. The act contemplates that all claims against the bankrupt which are provable shall be presented to the referee or court.<sup>78</sup>

### § 217. — Claims against receiver.

The rejection of claims against the receiver is within the discretion of the court, and no appeal lies therefrom.<sup>79</sup>

### § 218. — Payments, loans and deposits.

The receiver is merely the agent of the court in handling the funds of the estate and is without authority to consent to or direct a misappropriation of them,<sup>80</sup> and the court may order

74—*Brooklyn Improvement Co. v. Lewis*, 136 App. Div. (N. Y.) 861, 24 A. B. R. 122.

75—*In re Sherwood's, Inc.*, 210 Fed. 754, 31 A. B. R. 769.

76—*In re Franklin Syndicate*, 2 N. B. N. R. 522, 101 Fed. 402, 4 A. B. R. 511.

77—*In re Morris Stark*, 155 Fed. 694, 18 A. B. R. 467.

78—*In re Heim Milk Product Co.*, 183 Fed. 787, 25 A. B. R. 746; *Southern Steel & Iron Co. v. Hickman, Williams & Co.*, 190 Fed. 888, 27 A. B. R. 203.

79—*O'Brien v. Ely*, 195 Fed. 64, 28 A. B. R. 247.

80—*In re C. M. Burkhalter & Co.*, 182 Fed. 353, 25 A. B. R. 378.

restored any money paid by the receiver without its authority and contrary to its instructions, regardless of the state of account between the parties.<sup>81</sup> Whether money deposited by a receiver in designated depositories is entitled to preference over claims of other creditors upon insolvency of the depository depends upon the state law.<sup>82</sup>

The receiver may be authorized to borrow money and issue certificates therefor to conduct the business for the purpose of preserving the assets of the bankrupt estate.<sup>83</sup> However, when express power is conferred upon the receiver to borrow money up to a certain amount, loans made by him in excess of that amount will bind the estate only upon a showing that the proceeds were used in conducting its business, and then only ratably with the claims of the other creditors of the receiver. A receiver's certificate is not an absolute promise to pay: It is a promise to pay only from a fund in court in process of administration and subject only to the orders of the court which is administering it. The payment of the certificate in full is conditioned upon the sufficiency of the fund to answer all claims of equal priority. If insufficient to pay all, proportionate payment only can be demanded.<sup>84</sup>

### § 219. — Employment of attorney.

The receiver should always apply to the court for leave before employing an attorney at the expense of the estate,<sup>85</sup> and in the absence of special circumstances and authorization, should select counsel not identified with any of the parties to the bankruptcy proceedings.<sup>86</sup> He should not, however, pay money out

81—A third party is charged with notice of the receiver's power to borrow money, and of his want of authority to use the trust funds to pay unauthorized loans made to him. *In re C. M. Burkhalter & Co.*, 182 Fed. 353, 25 A. B. R. 378.

A party to whom the receiver makes a payment, though ignorant of the limitation on the receiver's authority to make the payment, cannot complain of the jurisdiction of the bankruptcy court to order it restored upon condition that it is shown that there was no existing indebtedness when it was made, and to de-

termine for itself in a summary proceeding the issue of the existence of such indebtedness. *Id.*

82—*Morris v. Carnegie Trust Co.*, 154 App. Div. (N. Y.) 596, 29 A. B. R. 884.

83—*In re Restein*, 162 Fed. 986, 20 A. B. R. 832; *In re Erie Lumber Co.*, 150 Fed. 817, 17 A. B. R. 689.

84—*In re C. M. Burkhalter & Co.*, 179 Fed. 403, 24 A. B. R. 553.

85—*In re Leonard*, 177 Fed. 503, 24 A. B. R. 97.

86—*In re Hill Co.*, 159 Fed. 73, 20 A. B. R. 73; *In re Strobel*, 160 Fed. 916, 20 A. B. R. 22.

of the estate to his attorney without the order or authority of the court. He may, however, pay for legal services out of his own funds, and ask reimbursement from the estate.<sup>87</sup>

The attorney of a receiver is not authorized in the absence of special authority to make a sale of the assets and receive the proceeds.<sup>88</sup>

### § 220. — Receiver's sales.

The receiver cannot sell real property of the estate without an order of the court. In event he sells without an order, the defect will not be cured by a motion to confirm a sale and to quiet adverse claims to the property.<sup>89</sup>

A sale of perishable goods<sup>90</sup> by a receiver, without notice to creditors, may be ordered in the discretion of court, to be exercised only upon such showing as will satisfy the court that immediate sale is necessary to preserve value.<sup>91</sup>

The court may with the consent of an adverse claimant, authorize its receiver after adjudication, though out of possession, to consent to a sale of the property in the interests of its preservation.<sup>92</sup>

Where the receiver sells the property in pursuance of an order of the court and the petition is subsequently dismissed, the court is bound to see that the rights of creditors, of the alleged bankrupt, to the balance of the fund after deducting the necessary expenses, are not prejudiced.<sup>93</sup>

The approval of a sale by the receiver upon terms offered by a

87—In *re McKenna*, 137 Fed. 611, 15 A. B. R. 4.

88—*Mason v. Wolkowich*, 150 Fed. 699, 17 A. B. R. 709.

Allowances to attorney for receiver, see *post*, § 1324.

89—In *re Fulton*, 153 Fed. 664, 18 A. B. R. 591.

90—The word "perishable" as used in G. O. authorizing the receiver to sell perishable property, with leave of court, means property which, for any reason, will deteriorate in value, and includes a stock of merchandise. In *re Pedlow*, 209 Fed. 841, 31 A. B. R. 761.

91—In *re Garner & Co.*, 153 Fed. 914, 18 A. B. R. 733; In *re Harris*, 156 Fed. 875, 19 A. B. R. 635; In *re Duke & Son*,

28 A. B. R. 195; In *re Desrochers*, 183 Fed. 991, 25 A. B. R. 103; In *re Carothers & Co.*, 193 Fed. 687, 27 A. B. R. 921. In *re Becker*, 2 N. B. N. R. 245, 98 Fed. 407, 3 A. B. R. 412.

Sale by receiver before adjudication of the entire plant of the alleged bankrupt held justified, it appearing that the price received was nearly 75 per cent of the appraised value thereof, and that less than one-tenth of the stockholders and creditors in number and amount objected. In *re Peerless Finishing Co.*, 199 Fed. 350, 28 A. B. R. 429.

92—*Ommen v. Talcott*, 175 Fed. 261, 23 A. B. R. 572.

93—*Re De Lancey Stables Co.*, 170 Fed. 860, 22 A. B. R. 406.

prospective purchaser renders the transaction a judicial sale as fully as if the sale had been ordered before any offer were made, and the offer subsequently made had been considered and approved.<sup>94</sup> Whenever the receiver, by direction of the court, makes a sale of property in his possession, the court has power to compel the completion of the contract of sale by summary proceedings.<sup>95</sup>

If by reason of a sale of their claims, creditors lose their interest in the administration of the bankrupt estate, and do not attend the sale of the bankrupt's property, and bid with others for that property, such non-attendance and possible elimination of bidders and the resultant loss to the estate are not to be charged up against the receiver, in the absence of a showing of fraud in inducing the sale of the claim.<sup>96</sup>

Ordinarily a lien on personal property can only be transferred to the proceeds of its sale by an order of the court directing its sale free from liens, after notice to the lienholder. Without such provision in the decree of sale, the property is presumed to be sold subject to the lien.<sup>97</sup>

Where the receiver sells all the goods upon which the landlord's lien rests, the lien should be transferred by decree of court to the proceeds of the sale, even though the decree of sale makes no such provision. However, the lien so created is not of the same character as the original lien on the property itself, which is a contractual lien and, therefore, not subject to displacement by decree of court. Where a lien on the proceeds of the sale is created by an order of the court, it is competent for the court to mould its order so as to do equity between the landlord and the trustee, and where the lease is transferred by the trustee and the transferee gives ample security for the payment of rent for the unexpired term, the landlord is not entitled to present payment without discount out of the fund in the hands of the trustee or to have it held in the hands of the trustee to await the unexpired term, especially where the rental value of the

94—In re J. Jungman, Inc., 186 Fed. 302, 26 A. B. R. 401.

95—Mason v. Wolkowich, 150 Fed. 699, 17 A. B. R. 709; In re J. Jungman, Inc., 186 Fed. 302, 26 A. B. R. 401.

96—In re Schoenfeld, 183 Fed. 219, 25 A. B. R. 748.

97—In re Varley & Bauman Clothing Co., 188 Fed. 761, 26 A. B. R. 104.

property has increased in excess of the stipulated rental in the lease.<sup>98</sup>

The right of a purchaser of a liquor license at receiver's sale to a return of the purchase price, where the authorities refuse to make the transfer, depends upon the conditions of sale imposed by the receiver.<sup>99</sup>

### § 221. — Surrender of property to receiver.

While a surrender of property to the receiver in bankruptcy does not affect the creditor's lien thereon,<sup>1</sup> a surrender of goods seized by the sheriff under a writ of replevin is an abandonment thereof and invalidates the levy.<sup>2</sup>

A petition by a receiver for the recovery of assets of the estate should clearly state the grounds upon which a recovery is sought.<sup>3</sup>

### § 222. — Surrender of bankrupt's books.

The mere assertion of the bankrupt that his books will tend to incriminate him will not justify his refusal to turn the same over to the receiver for use in continuing the business.<sup>4</sup> Where the books are turned over, the court may direct the receiver not to permit their use by any other person except for the purpose of the civil administration of the estate in bankruptcy, and to notify the bankrupt of any attempt to obtain possession of them.<sup>5</sup>

### § 223. — Surrender of property to third persons.

Where the receiver improperly turns over property to a third person both he and such third person are primarily liable to the trustee, and it is no defense to a suit by the trustee against such third person to recover the property that the receiver has not first been sued.<sup>6</sup> In such suit an order passing to receiver's

98—*In re Varley & Bauman Clo. Co.*, 188 Fed. 761, 26 A. B. R. 104.

99—*In re Miller*, 171 Fed. 263, 22 A. B. R. 560; *In re Comer & Co.*, 171 Fed. 261, 22 A. B. R. 558.

1—*In re Stroum*, 192 Fed. 762, 27 A. B. R. 721.

2—*In re Hymes Buggy & Implement Co.*, 130 Fed. 977, 12 A. B. R. 477.

3—*In re Brockton Ideal Shoe Co.*, 27 A. B. R. 576.

4—*In re George Harris*, 164 Fed. 292, 20 A. B. R. 911; *In re Rosenblatt*, 143 Fed. 663, 16 A. B. R. 306.

5—*In re Harris*, 164 Fed. 292, 20 A. B. R. 911.

6—*Whitney v. Wenman*, 140 Fed. 959, 14 A. B. R. 591.

account in which he credits himself with the transfers of property to such third person is not *res adjudicata*.<sup>7</sup>

§ 224. Expenses and compensation of receiver and marshal.

§ 225. — Jurisdiction to determine.

The court which appoints the receiver and for which his services were rendered has jurisdiction to examine into and determine the value of the services rendered, even though the debtor is finally adjudicated a bankrupt in another district. In such case the court of the latter district should give full faith and credit to the findings of the court making the appointment.<sup>8</sup>

§ 226. — Care and preservation of estate.

The act provides for different rates of compensation to the receiver in three classes of cases: first, where he discharges general duties as receiver, not limited to those of a custodian, he may be allowed a reasonable compensation within the limits specified in the general provision of section 48(d), that is, six per cent on the first five hundred dollars, etc.;<sup>9</sup> second, where he acts as mere custodian, the proviso in section 48(d) applies and his compensation is limited to two per cent on the first thousand dollars and one-half of one per cent on the excess;<sup>10</sup> and third,

7—Whitney v. Wenman, 140 Fed. 959, 14 A. B. R. 591.

8—In re Isaacson, 174 Fed. 406, 23 A. B. R. 98.

9—Act of 1898, § 48d, amended June 25, 1910.

“Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and also on the moneys turned over by them or afterwards realized by the trustee from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thou-

sand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars; provided that in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions.”

10—Act 1898, § 48d as amended June 25, 1910: “When the receiver or marshal acts as mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive or be allowed in any form or guise more than two per centum on the first two thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned

where he also carries on the business of the bankrupt he may be allowed the additional compensation provided by clause (e).<sup>11</sup>

Under the law as it existed prior to the amendment it was held that where a receiver or marshal was appointed to take charge of the property between the filing of the petition and the appointment of the trustee, the court should, in its discretion, allow for such services a just and reasonable compensation payable out of the estate, which need not necessarily be a *per diem* allowance, but should be governed by the surrounding circumstances.<sup>12</sup>

Under the act as amended, a receiver is required, as an incident to or burden of his office, to act as custodian of the property, and hence is not entitled to extra compensation for the services of a caretaker or watchman. This rule applies equally to a case where the receiver is a corporation. The services of the caretaker or watchman are in either case to be paid by the receiver out of his regular compensation.<sup>13</sup> Under the act prior to the amendment a different rule prevailed.<sup>14</sup>

Where the receiver does not carry on the business of the bankrupt yet is more than a mere custodian, as where he takes charge of a stock of goods and later sells them, his compensation is not limited by the proviso in section 48(d) of the act, but is entitled to a reasonable compensation.<sup>15</sup>

When the marshal himself or an office deputy acts as keeper, the keeper's fees allowed by the court should be collected by the marshal and turned over to the clerk of the court for deposit in the United States treasury. On the other hand, when a field deputy marshal acts as keeper or custodian, the marshal should pay the deputy three-fourths of the compensation allowed by the court, the difference being profit made by the government.

over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee."

11—See *In re Ginsburg*, 208 Fed. 160, 31 A. B. R. 240.

12—*In re Scott*, 99 Fed. 404, 3 A. B. R. 625; *In re Kirkpatrick*, 148 Fed. 811, 17 A. B. R. 594; *In re Gerson*, 1 A. B. R. 251, 2 N. B. N. R. 483.

13—*In re Pickhardt*, 198 Fed. 879, 29 A. B. R. 524.

*In re Tisch*, 202 Fed. 1018, 29 A. B. R. 339.

14—Expense of caring for property preferentially transferred by the bankrupt may, in a proper case, be considered as an expense of the receiver and allowed. *In re Nechamkus*, 155 Fed. 867, 19 A. B. R. 189.

15—*In re Ginsburg*, 208 Fed. 160, 31 A. B. R. 240.



The entire amount allowed by the court is collected and turned over to the clerk of the court for deposit, and the field deputy marshal is paid his share (three-fourths) of the fees from the appropriation "Salaries, fees and expenses of marshals," as in other cases. If the keeper is not a marshal or deputy marshal, the transaction does not enter into any government account; but payment should be made by the litigants to the keeper or custodian direct.<sup>16</sup>

The fact that the marshal is not personally benefited by the compensation allowed does not prevent his having it. He does get personal compensation for all services rendered by him in the way of salary; as does his office deputy; and the fees formerly allowed him as compensation are still collected in suits of all kinds as a fund out of which salaries shall be paid, and the three-fourths of the fees earned by the field deputies, so the fact that there is a salary is immaterial. He should be allowed pay the same as a receiver would have been, had one been appointed. It has been held in a case where he took possession of property and held it 17 days that \$20 was reasonable, in addition to actual expenses;<sup>17</sup> and where the marshal was in charge of the property for a month an allowance for the deputies, actually in charge, of \$2.50 per day was made in addition to actual expenses;<sup>18</sup> and for taking an inventory and otherwise assisting, \$3 a day and actual expenses was allowed.<sup>19</sup>

### § 227. — Continuation of bankrupt's business.

A receiver is also authorized to conduct the business of the bankrupt for a limited period, if necessary, in the interest of the estate. For such services these officers are entitled to compensation. Prior to the amendment of 1910, the statute provided that the rate could not exceed that allowed trustees for similar services. As there was nothing in the law which provides compensation to a trustee other than the usual fees and commissions for taking charge of and conducting the affairs of the bankrupt, the evident intention of congress was that the fee of the receiver or marshal should not exceed that allowed

16—4 Comp. Dec. 637.

17—In re Adams Sartorial Art Co., 2 N. B. N. R. 535, 101 Fed. 215, 4 A. B. R. 107.

18—In re Scott, 2 N. B. N. R. 440, 3 A. B. R. 625, 99 Fed. 404.

19—In re Woodard, 1 N. B. N. 430, 2 A. B. R. 692, 95 Fed. 955.

to the trustee in representing the estate, to which they would be entitled in addition to actual expenses.<sup>20</sup>

Under the act as amended, where the business is conducted by marshals or receivers, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders by them, and, also upon the moneys turned over by them or afterwards realized by the trustee from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. In case of the confirmation of composition, such commissions are not to exceed one-half of one per centum of the amount to be paid creditors thereunder. Under this section a receiver carrying on the business of the bankrupt may be allowed double commission, 12% on the first \$500, 8% on moneys in excess of \$500 and less than \$1500, etc.<sup>21</sup>

### § 228. — Examination of books.

A receiver's claim for examination of bankrupt's books by an expert accountant, has been disallowed.<sup>22</sup>

### § 229. — Discretion of court.

Within the limits fixed by law, the amount to be allowed as commissions is subject to the sound discretion of the court.<sup>23</sup>

20—See *In re Leonard*, 177 Fed. 503, 24 A. B. R. 97; *In re Richards*, 127 Fed. 772, 11 A. B. R. 581; *In re Cambridge*, 136 Fed. 983, 14 A. B. R. 168.

21—*In re Falkenburg*, 206 Fed. 835, 30 A. B. R. 718.

22—*In re Leonard*, 177 Fed. 503, 24 A. B. R. 97.

23—*In re Schoenfeld*, 183 Fed. 219, 25 A. B. R. 748; *In re Borgeson Co.*, 151 Fed. 780, 18 A. B. R. 178; *Dunlap Hardware Co. v. Huddleston*, 167 Fed. 433, 21 A. B. R. 731.

Compensation of receiver continuing business discretionary. *In re Cash-Papworth*, 210 Fed. 24, 31 A. B. R. 709.

\$21,000 held a reasonable compensation for receivers where the amount collected by them was over \$1,000,000. *In re Sully*, 133 Fed. 997, 13 A. B. R. 22.

Services performed by receiver in possession only six days held not to entitle him to a greater fee than two per cent on the first \$1,000 and one-half per cent on the balance. *In re Griesheimer*, 209 Fed. 134, 31 A. B. R. 567.

**§ 230. — Effect of dismissal.**

Where a petition is dismissed or an adjudication set aside upon appeal, the receiver may be allowed his expenses and compensation out of the assets which were in his possession.<sup>24</sup>

**§ 231. — When compensation withheld.**

Where a receiver has been negligent in the performance of his duty, the court may, in a proper case, without the filing of any exceptions, deny him any commissions;<sup>25</sup> and expenses and compensation of receiver, his attorneys and appraisers, will be disallowed where it appears that they acted fraudulently and that a receivership was unnecessary.<sup>26</sup> Proper disbursements made by the receiver or the attorneys, may be allowed where a receivership is vacated because the receiver entered into an agreement with the attorneys to divide fees; but no compensation will be allowed to any of them.<sup>27</sup>

**§ 232. — Extra compensation.**

Neither the receiver nor marshal shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized or prescribed.<sup>28</sup>

**§ 233. — Notice of application.**

Before the allowance of compensation to a receiver or marshal application must be made therefor specifying the amount asked and ten days' notice of the hearing thereon given creditors.<sup>29</sup>

No notice of the application was required prior to the amendment of 1910.<sup>30</sup>

**§ 234. Contempt of receiver.**

A receiver may be punished for misconduct and disobedience of orders.<sup>31</sup> He may be adjudged in contempt for failing to obey an order requiring him to pay a sum with which his account

24—In re Hill Co., 159 Fed. 73, 20 A. B. R. 73; In re Wentworth Lunch Co., 189 Fed. 831, 25 A. B. R. 612.

25—In re Schoenfeld, 183 Fed. 219, 25 A. B. R. 748; In re Tisch, 202 Fed. 1018, 29 A. B. R. 339.

26—In re Desrochers, 183 Fed. 991, 25 A. B. R. 703.

27—In re Oshwitz & Feldstein, 183 Fed. 990, 25 A. B. R. 594.

28—Act 1898, § 72, as amended June 25, 1910.

29—Act of 1898, § 48d, e, as amended June 25, 1910.

30—In re Borgeson, 151 Fed. 780, 18 A. B. R. 178.

31—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689.

was surcharged,<sup>32</sup> and his ability to comply with the order is measured by the funds he can apply thereto, and is not limited to property or funds of the bankrupt estate.<sup>33</sup>

### § 235. Accounts of receiver.

If a creditor desires to object to a receiver's account he should promptly file exceptions thereto with the referee,<sup>34</sup> which should be verified,<sup>35</sup> and should specify the grounds upon which his account is sought to be surcharged.<sup>36</sup>

Insurance premiums paid are a proper subject of credit in receiver's account,<sup>37</sup> and he may be allowed appraiser's fee paid by him though the trustee is dissatisfied with appraisement and orders a second one.<sup>38</sup>

A receiver is not ordinarily to be surcharged for losses during his continuance of the business of the bankrupt,<sup>39</sup> but where he improperly persists in carrying on the business for an unreasonable time at a loss, he may be surcharged with a portion of the loss.<sup>40</sup>

### § 236. Actions by receiver.

The receiver cannot institute suit in a district other than that of his appointment.<sup>41</sup> Accordingly, the court will not, prior to the adjudication, authorize or direct a receiver to bring suit in another state to obtain property of the bankrupt there situated, but the petitioning creditors should apply to the proper court in such state, setting up the pending bankruptcy proceedings as the basis of the action and ask protection for their rights, by injunction, receiver, or other appropriate remedy, in which proceeding the trustee, when appointed, can appear.<sup>42</sup>

32—In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

33—In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

34—In re Reliance Storage & Warehouse Co., 100 Fed. 619, 4 A. B. R. 49.

35—In re Ketterer Mfg. Co., 156 Fed. 719, 19 A. B. R. 646.

36—In re Schoenfeld, 183 Fed. 219, 25 A. B. R. 748.

37—In re Kyte, 158 Fed. 121, 19 A. B. R. 768.

38—In re Kyte, 158 Fed. 121, 19 A. B. R. 768.

39—In re Isaacson, 174 Fed. 406, 23 A. B. R. 98.

40—In re Consumer's Coffee Co., 162 Fed. 786, 20 A. B. R. 835.

And see In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

41—In re Nat. Mercantile Agency, 128 Fed. 639, 12 A. B. R. 189; In re Dunseath & Son Co., 168 Fed. 973, 21 A. B. R. 742, 22 A. B. R. 75.

42—In re Schrom, 91 Fed. 760, 3 A. B. R. 352.

Ordinarily, the receiver cannot maintain a suit to recover property transferred by the bankrupt,<sup>43</sup> or to recover debts due the bankrupt<sup>44</sup> but an order authorizing such suit cannot be collaterally attacked by the defendant in such action.<sup>45</sup> Where, however, it is impossible for the receiver to apply to the court of his appointment to enforce the delivery of possession of property belonging to the estate against persons refusing to acknowledge his rights, and when the property would be dissipated and the estate suffer irreparable loss unless prompt relief be obtained, he may maintain any action or suit necessary for the protection of the estate.<sup>46</sup>

A receiver suing to recover alleged assets of the estate will not be required to give security for costs, nor be held personally liable for same, unless it is made to appear that he is acting in bad faith, or unreasonably or oppressively, in bringing the suit, and this is especially true where the assets of the estate are sufficient to pay the costs. And though there be a showing of no assets out of which to pay the costs, he will not be required to secure them or be personally liable for them, except under circumstances that make it equitable and fair to the adverse party that indemnity be given.<sup>47</sup>

### § 237. Actions against receiver.

An action against the receiver in his representative capacity may be brought in any court otherwise having jurisdiction of the action, without previous leave of the bankruptcy court, where the action originates in any act or transaction of the receiver in carrying on the business of the bankrupt.<sup>48</sup> He

43—*Frost v. Latham & Co.*, 181 Fed. 866, 25 A. B. R. 313; *Guarantee Title & Trust Co. v. Pearlman*, 144 Fed. 550, 16 A. B. R. 461; *Boonville Nat'l Bank v. Blakey*, 107 Fed. 891, 6 A. B. R. 13.

Receiver cannot maintain action in a district other than that of his appointment to recover assets of the bankrupt in the hands of strangers. *In re Dunseath & Son Co.*, 168 Fed. 973, 22 A. B. R. 75.

44—*Greenhall v. Hurwitz*, N. Y. 31 A. B. R. 871.

45—*Greenhall v. Hurwitz*, N. Y. 31 A. B. R. 871.

A decree of the bankruptcy court authorizing the receiver to bring suit in a state court cannot be collaterally attacked in the latter court. *Slaughter v. Louisville & N. R. Co.*, 125 Tenn. 292, 27 A. B. R. 570.

46—*In re Dempster*, 172 Fed. 353, 22 A. B. R. 751.

47—*In re Barrett*, 132 Fed. 362, 12 A. B. R. 626.

48—Act of March 3, 1887, 24 Stat. § 552, c. 373, as corrected by Act of August 13, 1888, 25 Stat. § 443, c. 866.

State court held to have jurisdiction of an action to recover for goods sold to

cannot be sued as such, without leave of court, in respect to acts and transactions not relating to the carrying on of the business connected with the property in his charge. The fact that the act or transaction related to the care and preservation of the property in his possession does not alone confer the right to sue him.<sup>49</sup> He will not be held personally responsible for obedience to orders of the court,<sup>50</sup> and insofar as his acts in the administration of the estate are the acts of an officer of the bankruptcy court, the court has jurisdiction with respect to them, to enforce its decrees and orders, even to the extent of preventing an action of law on the part of any one who is raising no question and relying on no right which was not within the jurisdiction of the court in the bankruptcy proceeding, and where the parties are the same.<sup>51</sup> However, the acts of the receiver beyond his authority and constituting a tort render him liable to an action *in personam*.<sup>52</sup>

### § 238. Removal and discharge of receiver.

### § 239. — Right of removal and discharge.

The mere fact that an attorney for the receiver was at one time attorney for the alleged bankrupt will not justify the removal of the receiver,<sup>53</sup> but where his appointment is brought about by the active interference and procurement of the bankrupt, the appointment will be set aside on proper petition and showing to the court, irrespective of the ability or character of the appointee.<sup>54</sup>

the receiver. *Orr Co. v. Cushman*, 54 Misc. (N. Y.) 121, 18 A. B. R. 535.

49—*In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 21 A. B. R. 393.

50—*In re Carothers & Co.*, 193 Fed. 687, 27 A. B. R. 921.

51—*In re Spechler Bros.*, 185 Fed. 311, 26 A. B. R. 97; *In re Heim Milk Product Co.*, 183 Fed. 787, 25 A. B. R. 746.

An action in the state court to recover damages for an alleged conversion by the receiver will be stayed. *In re Spitzer*, 130 Fed. 879, 12 A. B. R. 346; *In re Mertens*, 131 Fed. 507, 12 A. B. R. 698.

An action in a state court against the receiver in bankruptcy in his individual

capacity to recover the amount of a mortgage upon property sold free of liens will be enjoined where it appears that the mortgagee joined issue with the receiver in the bankruptcy court and applied for the application of the proceeds to his mortgage. *In re Trayna & Cohn*, 195 Fed. 486, 27 A. B. R. 594.

52—*In re Spechler Bros.*, 185 Fed. 311, 26 A. B. R. 97.

53—*In re Champion Wagon Co.*, 193 Fed. 1004, 28 A. B. R. 51.

54—*Birmingham Coal & Iron Co. v. Souther Steel Co.*, 160 Fed. 212, 20 A. B. R. 151.

An order appointing a receiver will be vacated where it is shown that he entered into an agreement with several attorneys to divide fees,<sup>55</sup> or where it is clearly shown that the continuation thereof will take away all hope of immediate funds necessary for the resuscitation of the bankrupt.<sup>56</sup>

A receiver will not be discharged pending an appeal from a decision of the district court that the alleged bankrupt was insane at the time of the commission of the alleged act of bankruptcy.<sup>57</sup>

#### § 240. —Effect of dismissal of proceedings.

Where a receiver is appointed in involuntary proceedings and the debtor is subsequently adjudicated upon a voluntary petition, the rights under the receivership, including liability for fees and expenses, may be fully protected by order of the court.<sup>58</sup>

The effect of the appointment of a receiver is not to oust any party of his right to possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it,<sup>59</sup> And if the appointment is erroneous or void and the adverse party does not acquiesce in it, the latter is entitled to a return of his property seized by the receiver without deduction for the expense of caring for the same.<sup>60</sup> As between persons levying attachments upon property in the hands of a receiver before the termination of the bankruptcy proceedings, the one who first serves the copy warrant upon the receiver is entitled to priority upon subsequent dismissal of the bankruptcy proceedings.<sup>61</sup>

#### § 241. —Effect of appointment of trustee.

Upon the appointment of a trustee the receiver may retain a sufficient sum to cover the probable expenses of the receivership, but any surplus should be turned over to the trustee, immedi-

55—In re Oshwitz & Feldstein, 183 Fed. 990, 25 A. B. R. 594.

56—In re Church Const. Co., 157 Fed. 298, 19 A. B. R. 549.

57—In re Ward, 194 Fed. 179, 28 A. B. R. 36.

58—In re New Chattanooga Hardware Co., 190 Fed. 241, 27 A. B. R. 77; In re Stegar, 113 Fed. 978, 7 A. B. R. 665,

59—In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 A. B. R. 66.

60—Beach v. Macon Grocery Co., 125 Fed. 513, 11 A. B. R. 104; Linstorth Wagon Co. v. Ballew, 149 Fed. 960, 8 L. R. A. (N. S.) 1204, 18 A. B. R. 23.

61—In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 A. B. R. 66.

ately upon the latter's appointment, without waiting until his accounts are passed and he is discharged.<sup>62</sup>

### § 242. Ancillary receivers.

The court in a district other than that in which the bankruptcy proceedings are pending may appoint an ancillary receiver to take and preserve the assets of the bankrupt in that district.<sup>63</sup>

An application to vacate an order appointing an ancillary receiver should be made to the court of original jurisdiction,<sup>64</sup> as should an application to increase the amount of the bond given upon his appointment, especially where the considerations which govern the amount of the bond do not depend alone upon the amount of assets within the jurisdiction but involve generally the merits of the case.<sup>65</sup>

While an ancillary receiver is subject alone to the court that appointed him, and need not account to the court of original jurisdiction,<sup>66</sup> it is held that an application by an ancillary receiver for the sale of assets after the adjudication, should, in the absence of pressing necessity therefor, be made to the court of original jurisdiction.<sup>67</sup>

62—*In re College Clothes Shop*, 192 Fed. 80, 27 A. B. R. 10.

63—*In re Consumer's Coffee Co.*, 162 Fed. 786, 20 A. B. R. 835; *In re Dunseath & Son Co.*, 168 Fed. 973, 21 A. B. R. 742, s. c. 168 Fed. 973, 22 A. B. R. 75. *In re Benedict*, 140 Fed. 55, 15 A. B. R. 232; *In re John L. Nelson & Bro. Co.*, 149 Fed. 590, 18 A. B. R. 66.

64—*In re Hayes*, 192 Fed. 1018, 27 A. B. R. 713.

65—*In re Hayes*, 192 Fed. 1018, 27 A. B. R. 713.

66—*Loeser v. Dallas*, 192 Fed. 909, 27 A. B. R. 733.

67—*In re Brockton Ideal Shoe Co.*, 194 Fed. 233, 27 A. B. R. 577.



## CHAPTER VIII

### HEARING ON PETITION—DISMISSAL OR ADJUDICATION—JURY TRIALS, EVIDENCE.

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- § 279. — Grounds of dismissal.
- § 280. — Voluntary abandonment.
- § 281. — Dismissal after adjudication.
- § 282. — Hearing upon motion.

- § 283. — Right to contest.  
§ 284. — Amendment of order of dismissal.  
§ 285. — Reinstatement of petition.  
§ 286. Notice of dismissal before and after hearing.  
§ 287. Notice of adjudication.  
§ 288. Date of adjudication.  
§ 289. Effect of adjudication.  
§ 290. — In general.  
§ 291. — Parties bound.  
§ 292. — As evidence of bankruptcy.  
§ 293. — Title to property.  
§ 294. — Contracts and claims.  
§ 295. — Partnerships and corporations.  
§ 296. — Collateral attack.  
§ 297. Setting aside adjudication.  
§ 298. — Who may apply.  
§ 299. — Who may oppose application.  
§ 300. — When set aside.  
§ 301. — When not set aside.  
§ 302. — Proceedings for vacating.

### § 243. An equitable proceeding.

A proceeding in bankruptcy is a proceeding in equity, and the rules and practice in equity prevail in its conduct as far as they are consonant with the speedy administration of justice which it prescribes.<sup>1</sup>

### § 244. Venue.

In courts of bankruptcy as in other courts, the facts may be such as to make a change of venue desirable and proper, and in such cases it lies within the sound discretion of the court to allow or refuse the request, and to warrant its allowance the same showing would have to be made as in other cases.<sup>2</sup>

### § 245. Adjournment of Hearing.

Where the parties to bankruptcy proceedings appear on the return day, or the adjourned day, and join issue, and no further proceedings or adjournment is had, the case will be considered as pending from day to day until disposed of.<sup>3</sup> The adjourned day, on which if the petitioning creditor does not appear and proceed to an adjudication, another creditor may appear and

1—In re Broadway Savings Trust Co., 152 Fed. 152, 18 A. B. R. 254.

In re Jones, 209 Fed. 717, 31 A. B. R. 692.

2—See *Bray v. Cobb*, 1 N. B. N. 209, 91 Fed. 102, 1 A. B. R. 153.

3—In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2073,

prosecute, is any day to which the proceedings on the order to show cause may be adjourned for the purpose of inquiring into the facts as to the acts of bankruptcy.<sup>4</sup>

### § 246. Proceedings in case of several petitions.

### § 247. — Order and place of hearing.

Where two petitions are filed alleging separate and distinct acts of bankruptcy, General Order VII, provides that the petition alleging prior acts of bankruptcy should first be heard. This rule should be strictly construed, but has been held not to be applicable where the debtor has failed to answer one of the petitions. In such case it is held that the cause proceeds as it would in the ordinary course of legal procedure, without regard to the rule, and the petitions should be considered in the order of their filing.<sup>5</sup>

In case two or more petitions are filed against the same individual in different districts, the first hearing should be had in the district in which the debtor has his domicile or if against the same partnership or corporation in different courts, each having jurisdiction over the case, the petition first filed should be first heard; and, in either case, the proceedings upon the other petitions should be stayed until an adjudication is made upon the petition first heard, and the court making the first adjudication will retain jurisdiction over all proceedings therein until the same are closed.<sup>6</sup> But the court so retaining jurisdiction, if satisfied that it is for the greatest convenience of the parties in interest that another of said courts should proceed with the case, should order it to be transferred to such other court.<sup>7</sup> The first hearing need not necessarily be held in the district wherein the alleged bankrupt last resided, but in that district wherein the bankrupt resided for the greater portion of the six months prior to the filing of the petition.<sup>8</sup>

Proceedings may be stayed to enable the petitioning creditors

4—In *re Lacey*, 10 N. B. R. 477, Fed. Cas. No. 7965.

5—In *re Harris*, 155 Fed. 216, 19 A. B. R. 204.

6—G. O. VI; In *re Boston H. & E. R. Co.*, 6 N. B. R. 209, 9 Blatch. 101, Fed. Cas. No. 1678.

7—G. O. VI. See, also, *ante*, § 27.

8—G. O. VI; In *re Isaacson*, 161 Fed. 777, 779, 20 A. B. R. 430, 437; see, also, *ante*, §§ 14, 27.

to apply to the court of another district which has first obtained jurisdiction for a transfer of the case.<sup>9</sup>

### § 248. — Consolidation of proceedings.

A proceeding against a partnership and the individual members thereof may be consolidated with a proceeding against a corporation upon evidence showing that the corporation is a mere form under which one of the partners is transacting business, and that all of its property is owned by such partner.<sup>10</sup>

### § 249. Voluntary and involuntary proceedings.

If a bankrupt, against whom an involuntary petition is pending, files his voluntary petition, notice should be given to the creditors filing the involuntary petition, before the adjudication is made upon the voluntary petition.<sup>11</sup>

The filing of a voluntary petition cannot be made the lawful basis for an adjudication or an involuntary petition previously filed, since the proceedings are distinct and require different jurisdictional facts to be shown. It is only where, by reason of the time elapsed between the filing of involuntary petition and a voluntary petition, creditors might not be able to recover property, that the court will suspend the voluntary petition or set aside proceedings had thereon, in order that involuntary proceedings may be pushed. In such cases court may do equity.<sup>12</sup>

### § 250. Issues to be tried.

The only issues upon which a bankruptcy case can be tried and an adjudication had are those presented by the pleadings; and the petitioner cannot be permitted to prove any other act of bankruptcy than that set up in the petition.<sup>13</sup> This is the general rule and applies almost, if not, universally, being based on the principle that the opposite party is entitled to know what he has to meet.<sup>14</sup>

9—In re Tybo Mining & Reduction Co., 132 Fed. 697, 13 A. B. R. 62.

10—Salt Lake Val. Canning Co. v. Collins, 176 Fed. 91, 23 A. B. R. 716.

11—In re Dwyer, 112 Fed. 777, 7 A. B. R. 532.

12—In re Lachenmaier, 203 Fed. 32, 29 A. B. R. 325.

13—In re Sykes, 5 Biss. 113.

14—Doan v. Compton, 2 B. R. 607; James v. Alt. Delaine Co., 11 N. B. R. 390.

Insolvency and the commission of the act of bankruptcy alleged are ordinarily the only issues.<sup>15</sup> The debtor is entitled to a hearing upon the question of solvency notwithstanding the question has been decided against him by a state court in a proceeding for the appointment of a receiver.<sup>16</sup> Nor is the bankruptcy court concluded by the bill and answer in the receivership proceedings, it appearing that the appointment of a receiver was fraudulently procured.<sup>17</sup> However, where there has been a general assignment for the benefit of creditors, an adjudication may be had without averment or proof that the assignor was insolvent at the time of the assignment or of filing the petition.<sup>18</sup>

Creditors who are charged with receiving preferences alleged as acts of bankruptcy are parties to the bankruptcy proceedings and as such are precluded upon the issue of insolvency of the debtor at the time of the alleged preference.<sup>19</sup>

An answer of the alleged bankrupt in involuntary proceedings admitting insolvency and praying for an adjudication does not convert the proceedings into voluntary proceedings so as to dispense with proof of an act of bankruptcy.<sup>20</sup>

### § 251. Defenses.

Any defense available to the bankrupt is equally available to creditors or that they do not possess provable claims to the amount required,<sup>21</sup> which latter might be done by showing that the debtor was entitled to set-offs;<sup>22</sup> that the court has no juris-

15—*Bernard v. Abel*, 156 Fed. 649, 19 A. B. R. 383.

16—*In re Pickens Mfg. Co.*, 158 Fed. 894, 20 A. B. R. 202; *Schumert & Warfield, Ltd., v. Security Brewing Co.*, 199 Fed. 358, 28 A. B. R. 676; *Butler & Co. v. Palmenberg*, 207 Fed. 705, 30 A. B. R. 502.

17—*In re Muir*, 212 Fed. 495, 31 A. B. R. 528.

18—*Lea v. West*, 174 U. S. 590, 43 L. ed. 1098, 1 N. B. N. 409, 2 A. B. R. 463, aff'g 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237; *Leidigh Car Co. v. Stengel*, 1 N. B. N. 387, 2 A. B. R. 383, 95 Fed. 637.

•*Brandenburg*—15

19—*Cook v. Robinson*, 194 Fed. 785, 28 A. B. R. 182.

20—*In re Condon*, 209 Fed. 800, 31 A. B. R. 754, aff'g 198 Fed. 947, 29 A. B. R. 907.

21—*In re Cornwall*, 6 N. B. R. 305, 9 Blatch. 114, Fed. Cas. No. 3250; *In re Williams*, 14 N. B. R. 132, Fed. Cas. No. 17706; *In re Quimette*, 3 N. B. R. 140, 1 Sawy. 47, Fed. Cas. No. 10622; *In re Scrafford*, 14 N. B. R. 184.

22—*In re Osage R. R. Co.*, 9 N. B. R. 281.

diction;<sup>23</sup> that no act of bankruptcy has been committed;<sup>24</sup> that payments, though made since the proceedings began, have reduced the claims below the necessary amount, or that bankrupt's debts do not amount to the required sum;<sup>25</sup> but not that tender of payment of the petitioning creditors' debts has been made, as an insolvent has no right to make such tender.<sup>26</sup> The mere fact that a corporation admits in writing its inability to pay its debts, and its willingness to be adjudicated, and requests certain creditors to file an involuntary petition, is no defense.<sup>27</sup>

In involuntary bankruptcy, an objection that the petitioner and the alleged bankrupt are partners is not determinable on a preliminary objection to the jurisdiction, where the arrangements between the parties is one going to the merits of the controversy.<sup>28</sup>

## § 252. Conduct of trial.

## § 253. — Reference.

If the bankrupt, or any of his creditors, appear and answer, the judge must determine the issues presented by the pleadings.<sup>29</sup> He must exercise his personal judgment in the determination of each issue, and cannot refer issues of fact presented to a referee.<sup>30</sup>

## § 254. — Burden and quantum of proof.

The burden ordinarily rests upon the petitioners to prove all the allegations of the petition,<sup>31</sup> including the bankrupt's place of business or residence,<sup>32</sup> the fact that the alleged bankrupt is

23—In re Williams, 14 N. B. R. 132, Fed. Cas. No. 17706.

Creditor may object to jurisdiction in voluntary proceedings on ground that corporation did not have its principal place of business in district for greater part of six months. In re Guanacevi Tunnel Co., 201 Fed. 316, 29 A. B. R. 229.

24—In re Skelley, 5 N. B. R. 214, 3 Biss. 260.

25—In re Skelley, 5 N. B. R. 214, 3 Biss. 260; In re Quimette, 3 N. B. R. 140, 1 Sawy. 47, Fed. Cas. No. 10622.

26—In re Williams, 3 B. R. 74, 1 Lowell 406, Fed. Cas. No. 17703.

27—In re Duplex Radiator Co., 142 Fed. 906, 15 A. B. R. 324.

28—In re Schenklin, 113 Fed. 421.

29—Act 1898, § 18d.

30—In re King, 179 Fed. 694, 24 A. B. R. 606.

Referees and their jurisdiction in other matters, see *post*, Chap. X.

31—Different rule prevailed under former act, see, In re Peirce, 8 N. B. R. 514, Fed. Cas. No. 11411; In re Jelsh et al., 9 N. B. R. 412, Fed. Cas. No. 7257.

32—Mitchell v. U. S., 21 Wall. 350, 22 L. ed. 584, 588, 353; In re Waxelbaum, 97 Fed. 562, 3 A. B. R. 267.

a partnership,<sup>33</sup> and the commission of an act of bankruptcy. So, the burden is ordinarily on the petitioners to show by a fair preponderance that the corporation was principally engaged in the business mentioned in the petition;<sup>34</sup> but where the facts were shown to be peculiarly in his possession, it has been held that the burden shifted to the bankrupt.<sup>35</sup> An allegation negating the exceptions contained in the statute will be taken as admitted in the absence of a denial thereof.<sup>36</sup>

The petitioner in an involuntary proceeding which alleges that the debtor transferred, while insolvent, a portion of his property to one or more of his creditors with intent to prefer such creditor, has the burden of proving the insolvency of the debtor as well as the intent to create the preference. The intent sufficiently appears from the insolvency and the preference, if no attempt is made by the defendant to show an absence of intent, but he has a right to show such absence by reason of his entire ignorance of insolvency and a reasonable expectation of ability to pay his debts.<sup>37</sup>

Upon an involuntary petition, alleging as an act of bankruptcy, that the debtor has transferred property with intent to give a preference, or that he has suffered or permitted a preference to be obtained through legal proceedings and has not within five days of the final disposition of the affected property vacated such preference, the petitioning creditors must assume the burden of proving, in the former case, the transfer, the debtor's intent to prefer a creditor—the creditor's intent in receiving it, or that he had reasonable cause to believe a preference was intended being immaterial—and the debtor's insolvency at the date of transfer, and, in the latter case, that a preference was obtained by a creditor through legal proceedings, by which are meant any proceeding in a court of justice, interlocutory or

33—*Jones v. Burnham, Williams & Co.*, 138 Fed. 986, 15 A. B. R. 85, rev'g 130 Fed. 475, 12 A. B. R. 453.

34—*In re Hudson River Electric Power Co.*, 173 Fed. 934, 23 A. B. R. 191, aff'd 183 Fed. 701, 25 A. B. R. 504, 33 L. R. A. (N. S.) 454, *Walker Roofing, etc., Co. v. Merchant & Evans Co.*, 173 Fed. 771, 23 A. B. R. 185.

35—*Hoffschlaeger Co., Ltd. v. Young Nap*, alias *Young Lap*, 12 A. B. R. 515.

36—*Hoffschlaeger Co. Ltd. v. Young Nap*, alias *Young Lap*, 12 A. B. R. 515.

37—*In re Bloch*, 109 Fed. 790, 6 A. B. R. 300; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; see *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481, *Parsons v. Topliff*, 119 Mass. 243, 249; *In re Gilbert*, 112 Fed. 951, 8 A. B. R. 101.

final, resulting in the seizure of the debtor's property and its diversion from his general creditors, that the debtor suffered or permitted the preference, which does not require any affirmative act on the debtor's part but that he remain passive, and did not vacate or discharge it at least five days before the sale or final disposition of the property affected, and that he was insolvent at the time the preference was obtained, it not being sufficient that he was insolvent when the petition was filed.<sup>38</sup>

An adjudication of lunacy at the time of the commission of an act of bankruptcy is *prima facie* evidence of such fact and casts the burden of proving that the act was committed during a lucid interval upon the petitioning creditors.<sup>39</sup> Where an inquiry in lunacy, held after the filing of the petition, finds that the bankrupt was insane with lucid intervals at the time of the commission of the alleged act of bankruptcy, the burden is upon the petitioning creditors to show his sanity at the time of the alleged act.<sup>40</sup>

Under the former act the petitioning creditor was not required to make full proof of insolvency but might offer proof tending to show it, and the debtor was obliged to explain it as being best acquainted with his own affairs.<sup>41</sup> Under the present act the burden of proving insolvency, is upon the petitioners,<sup>42</sup> unless the act of bankruptcy charged is that the debtor conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors.<sup>43</sup> The failure of the bankrupt to appear at the hearing, with his books, papers and accounts, which are material in determining his financial condition,<sup>44</sup> and to submit to an examination raises a presumption of insolvency,<sup>45</sup> and throws the burden of proving solvency

38—See *ante*, §§ 43, 51.

39—In *re Ward*, 194 Fed. 174, 28 A. B.

R. 29.

40—In *re Kehler*, 159 Fed. 55, 19 A. B. R. 513.

41—In *re Ore. Bul. & Pub. Co.*, 13 N. B. R. 503, Fed. Cas. No. 10559. See also § 3, Act of 1898, *ante*, §§ 55, 56, 57.

42—*Knittel v. McGowan*, 134 Fed. 498, 14 A. B. R. 209; In *re Electron Chemical Co.*, 208 Fed. 954, 31 A. B. R. 471;

*McGowan v. Knittel*, 137 Fed. 453, 15 A. B. R. 1.

43—Act of 1898, § 3c.

See, also, *ante*, §§ 55, 56, 57.

44—In a proceeding against a partnership, an intervening creditor need not prove the insolvency of a member thereof who is absent and fails to produce his books. In *re Perlhefter & Shatz*, 177 Fed. 299, 25 A. B. R. 576.

45—In *re Donnelly*, 193 Fed. 755, 27 A. B. R. 504.



upon the bankrupt,<sup>46</sup> notwithstanding the fact that the failure was neither wilful nor contumacious,<sup>47</sup> and notwithstanding the fact that the bankrupt's books, papers and accounts were in the custody of the marshal.<sup>48</sup>

The burden is upon the respondent to disprove the implication of fraud arising from an attempted removal of his property to another country while he was insolvent.<sup>49</sup>

The fact that a comparatively inconsiderable minority of the creditors desire the administration of the debtor's estate in bankruptcy does not warrant the court in resolving every doubtful question of fact or law against the petitioning creditors.<sup>50</sup>

### § 255. — Evidence.

The general rules of evidence applicable to suits in equity in federal courts apply to proceedings in bankruptcy. Judgments entered more than four months prior to the filing of the petition are admissible on the issue of insolvency,<sup>51</sup> but a judgment against the bankrupt, which has been opened by the court rendering it, is inadmissible upon such issue.<sup>52</sup> The creditors cannot attack the title of the bankrupt to property standing in his name, for the purpose of minimizing his apparent assets and thereby proving him insolvent.<sup>53</sup>

An adjudication of insanity of the alleged bankrupt by a state court subsequent to the filing of the petition is admissible on the issue of insanity at the time of the commission of the act of bankruptcy, but is not conclusive upon such question.<sup>54</sup>

The examination of the bankrupt and other witnesses, and the admissibility of evidence upon the questions raised by the petition and answer are treated fully in Chapter XV.

46—Act of 1898, § 3d; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50; *Cummins Grocery Co. v. Talley*, 187 Fed. 507, 26 A. B. R. 484; *Bogen & Trummell v. Protter*, 129 Fed. 533, 12 A. B. R. 288; *Louisiana Nat. Life Assur. Society v. Segen*, 196 Fed. 903, 28 A. B. R. 407; *In re Shoesmith*, 135 Fed. 684, 18 A. B. R. 645.

See, also, *ante*, §§ 55, 56, 57.

47—*Cummins Grocery Co. v. Talley*, 187 Fed. 507, 26 A. B. R. 484.

48—*In re Desha & Willfong*, 30 A. B. R. 130.

49—*Hoffschlaeger Company, Ltd., v. Young Nap*, alias *Young Lap*, 12 A. B. R. 517.

50—*In re Lewis I. Perry & Whitney Co.*, 172 Fed. 745, 22 A. B. R. 772.

51—*Knittel v. McGowan*, 134 Fed. 498, 14 A. B. R. 209.

52—*McGowan v. Knittel*, 137 Fed. 453, 15 A. B. R. 1.

53—*Blackstone v. Everybody's Store*, 207 Fed. 752, 30 A. B. R. 497.

54—*In re Ward*, 161 Fed. 755, 20 A. B. R. 482.

### § 256. — Witnesses.

A witness is not disqualified by reason of his having been convicted of a misdemeanor though the conviction may be taken as somewhat affecting his credibility.<sup>55</sup>

The petitioners are estopped to impeach the testimony of a witness called by them to show that they were creditors entitled to file the petition,<sup>56</sup> but the fact that they call the alleged bankrupt as a witness will not preclude them from showing that he had a residence different from that testified to by him.<sup>57</sup>

### § 257. — Questions of law and fact.

If the nature of the debt is set forth in the petition with the averment that it is provable under the act, the question whether it is so provable is a question of law and not of fact.<sup>58</sup>

The question of what business the alleged bankrupt was principally conducting is one of fact, but the classification of that business, under the statute, is one of law.<sup>59</sup>

### § 258. — Instructions.

The court's instructions are entitled to a reasonable construction, and, if correct, when applied to the facts submitted to the jury, will be sustained in an appellate court, though, if standing alone, they would be incomplete in respect to some matter sufficiently explained in the evidence;<sup>60</sup> and it is not error to direct the jury's attention to the distinction between reasonable cause to believe and actual belief.<sup>61</sup>

### § 259. — Directing verdict.

The fact that each party asks for a peremptory instruction does not submit the issues of fact to the court, so as to deprive either party of the right to ask for further instructions, or to have the questions of fact submitted to the jury.<sup>62</sup> But if the evidence is of such a conclusive character that upon it as a whole

55—*Morris v. Taunenbaum*, 26 A. B. R. 368.

56—*In re San Miguel Gold Mining Co.*, 197 Fed. 126, 27 A. B. R. 901.

57—*In re Hurley*, 204 Fed. 126, 29 A. B. R. 567.

58—*Sigsby v. Willis*, 3 N. B. R. 51, 3 Ben. 371, Fed. Cas. No. 12849.

59—*In re Excelsior Cafe Co.*, 175 Fed.

294, 23 A. B. R. 701; *Hill Co. v. Contractors' Supply & Equipment Co.*, 156 Ill. App. 270, 24 A. B. R. 84.

60—*Willis v. Carpenter*, 14 N. B. R. 521, Fed. Cas. No. 17770.

61—*Lawrence v. Graves*, 5 N. B. R. 279, Fed. Cas. No. 8138.

62—*In re Iron Clad Mfg. Co.*, 197 Fed. 280, 28 A. B. R. 628.

the court would be constrained to set aside a verdict in favor of the one party, it may direct a verdict in favor of the other party, although there be conflicting evidence as to details not essential to the conclusion.<sup>63</sup>

### § 260. — Rehearing.

A rehearing should not be granted for the purpose of reviving the right to appeal unless the facts clearly warrant it.<sup>64</sup>

An application for a rehearing cannot be sustained where there has been an order of adjudication which has been affirmed on appeal and the case has been sent back with a mandate that further proceedings be had in the district court in conformity with the judgment of the appellate court.<sup>65</sup>

### § 261. Jury trials.

### § 262. — Decision of issue with or without jury.

The district courts, as courts of bankruptcy, have jurisdiction both at law and in equity;<sup>66</sup> and so it would seem that, under the present act, if the matter in controversy is of legal cognizance, the fact that it is in a bankruptcy proceeding will not prevent the rule as to a jury trial from applying, and that the holding under the former act that bankruptcy proceedings were of equitable cognizance and a jury trial not allowable<sup>67</sup> does not now apply unless the matter in controversy is of equitable cognizance. This distinction seems to have been overlooked in several cases.<sup>68</sup>

It is the province of the judge to hear and determine without the intervention of a jury all issues in cases of contested bankruptcy, unless the alleged bankrupt shall make seasonable application for a jury trial, in which case he is entitled as of right to a jury trial in respect to his insolvency, and any act of bankruptcy alleged to have been committed by him.<sup>69</sup> Any

63—*In re Iron Clad Mfg. Co.*, 197 Fed. 280, 28 A. B. R. 628.

64—*In re Hudson Clothing Co.*, 140 Fed. 49, 15 A. B. R. 254.

65—*In re Lennox*, 181 Fed. 428, 24 A. B. R. 922.

66—Act of 1898, § 2.

67—*Barton v. Barbour*, 104 U. S. (14 Otto) 126, 26 L. ed. 672.

68—*Morss v. Franklin Coal Co.*, 125 Fed. 998, 11 A. B. R. 423; *In re Christensen*, 101 Fed. 243, 4 A. B. R. 99.

69—Act of 1898, § 18d. If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings,

other question of fact involved may in the discretion of the court also be submitted to the jury, and the issues upon which the court desires the jury to pass, formulated; but the findings of the jury upon such an issue, as in cases submitted to a jury by the chancellor in a court of chancery, is merely advisory, and not binding on the court.<sup>70</sup> In such case the verdict of the jury being purely advisory, the court may select its own jury.<sup>71</sup>

### § 263. — Questions submitted.

In a case of involuntary bankruptcy, a jury trial may be had as to the commission of the acts of bankruptcy alleged and the fact of insolvency<sup>72</sup> as a matter of right, and cannot be denied if seasonably demanded.<sup>73</sup> A jury trial upon other issues cannot be demanded as of right.<sup>74</sup> Accordingly the debtor is not entitled to a jury trial to determine whether he was a person

without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

Analogous provision of Act of 1867. "Sec. 41. *And be it further enacted*, That on such return day or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

*Carpenter v. Cudd*, 174 Fed. 603, 23 A. B. R. 463.

70—*In re Neasmuth*, 147 Fed. 160, 17 A. B. R. 128; *Carpenter v. Cudd*, 174 Fed. 603, 23 A. B. R. 463; *Oil Well Supply Co. v. Hall*, 128 Fed. 875, 11 A. B. R. 738.

71—*Oil Well Supply Co. v. Hall*, 128 Fed. 875, 11 A. B. R. 738.

72—Act of 1898, § 19a, provides: "A person against whom an involuntary peti-

tion has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived."

Analogous provision of Act of 1867. "Sec. 41. . . . The court shall proceed summarily to hear the allegation of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

*Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102; *Day v. Beck & Gregg Hardware Co.*, 114 Fed. 834, 8 A. B. R. 175. *Schloss v. A. Strellow & Co.*, 156 Fed. 662, 19 A. B. R. 359.

73—*Duncan v. Landis*, 106 Fed. 839, 5 A. B. R. 649.

74—*Morss v. Franklin Coal Co.*, 125 Fed. 998, 11 A. B. R. 423.

chiefly engaged in farming;<sup>75</sup> nor to try the question of preference where a bankrupt had allowed creditors to take goods from his store and had made a general assignment for the benefit of creditors just preceding his bankruptcy and no explanations of such acts were offered, the preference being conclusively presumed;<sup>76</sup> nor the question whether a judgment is or is not rendered for fraud, that being a question to be determined by an inspection of the record;<sup>77</sup> nor the issue as to the debtor's intention in making a preference.<sup>78</sup> So, questions as to whether the petitioners are in fact creditors and entitled to maintain the proceedings need not be submitted,<sup>79</sup> though it would seem that a jury trial should be allowed to decide if debts included in the petition to make up the requisite number and amount of creditors are fraudulent, since it is a question of fact, and on it depends the important question whether the debtor is to be ruined by a petition filed by trumped-up creditors; and this is especially true if the question of insolvency is involved, as a man is only insolvent when the aggregate value of his property is not equal to his bona fide debts.<sup>80</sup>

The question of insanity should ordinarily be submitted.<sup>81</sup>

Whether a partnership existed may be submitted instead of charged as matter of law,<sup>82</sup> especially where the question of solvency hinges thereon.<sup>83</sup> Where a petition is filed by some of the members of a firm and referred by the clerk to a referee, thus being in its inception a voluntary proceeding, but the non-petitioning partners contest the adjudication,<sup>84</sup> the case must be certified to the judge for hearing and a jury trial will be had if a written demand therefor was filed with the referee at or before the time fixed for the hearing.<sup>85</sup>

A jury trial should not be allowed to try the issues, raised by

75—*Stephens v. Merchants' Nat. Bank*, 154 Fed. 341, 18 A. B. R. 560.

76—*In re Seeley*, 19 N. B. R. 1, Fed. Cas. No. 12628.

77—*Flanagan v. Pearson*, 14 N. B. R. 37.

78—*In re Harris*, 155 Fed. 216, 19 A. B. R. 204.

79—*Morss v. Franklin Coal Co.*, 125 Fed. 998, 11 A. B. R. 423.

80—Consult *In re Rogers*, 10 N. B. R. 444, Fed. Cas. No. 12003.

81—*In re Ward*, 161 Fed. 755, 20 A. B. R. 482.

82—*In re Jelsh*, 9 N. B. R. 412, Fed. Cas. No. 7257.

83—*Buffalo Milling Co. v. Lewisburg Dairy Co.*, 159 Fed. 319, 20 A. B. R. 279; *In re Neasmith*, 147 Fed. 160, 17 A. B. R. 128.

84—G. O. VIII.

85—*In re Forbes*, 128 Fed. 137, 11 A. B. R. 787; *In re Murray*, 1 N. B. R. 570, 96 Fed. 600, 3 A. B. R. 601.

a general answer and a denial of all the acts of bankruptcy alleged, on defendant's demand, after a demurrer filed by such defendant to the whole petition is overruled.<sup>86</sup>

**§ 264. — On insufficient petition.**

The insufficiency of a petition may be taken advantage of by motion to dismiss or answer; but, if the defect is amendable, it is waived by demanding an issue on the merits and requiring the petitioner to prepare for trial on the disputed facts, and objection is too late at the trial, or later, so that a debtor may waive such defect and demand a jury trial on such petition.<sup>87</sup>

**§ 265. — On intervening petitions.**

There is nothing in the act which specifically gives a creditor appearing in opposition to the prayer of the petition of intervention the right to a jury trial as to matters of fact alleged in the petition, but it would seem that such right would not be denied.<sup>88</sup>

**§ 266. — Jury not in attendance.**

Section 19b of the act provides that: "if a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance."

This provision is in line with the general purpose of the act which is to secure a prompt settlement of a bankrupt's estate. It provides for a special venire, if necessary, or in case no advantage is to be gained by postponement until there is a jury in attendance, or for trial in the circuit court sitting at the same place on certificate, or by consent of parties sitting at another place in the district, if such circuit court has a jury in attendance, so that the earliest possible trial may be had. So great is the desire for promptness in these proceedings that, though the act of 1867 made no express provision therefor, the courts never-

86—In re Benham, 8 N. B. R. 94.

88—Act of 1898, § 19.

87—In re Cliffe, 1 N. B. N. 509, 2 A.

B. R. 317, 94 Fed. 354.

theless held that a special venire might issue at any date to try an issue,<sup>89</sup> even during the vacation of the district court proper.<sup>90</sup>

So much of section 19b as relates to the certifying of the case to the circuit court is now obsolete in view of the abolishment of that court by act of Congress.

### § 267. — Waiver of right.

In a case of involuntary bankruptcy, a demand for a trial by jury, as to the commission of the alleged acts of bankruptcy and the fact of insolvency, must be in writing<sup>91</sup> and made by the debtor at or before the expiration of the time allowed for answer, which is five days after the return day, or within such further time as the court may allow,<sup>92</sup> the subpoena which is issued at the time the petition is filed being returnable in fifteen days, unless the time is extended by the judge.<sup>93</sup> This provision is mandatory and must be strictly observed and, if the demand is not made in the manner and within the time prescribed, it is deemed to be waived.<sup>94</sup> So, if the debtor fails to appear on the return day he cannot afterwards demand a jury trial;<sup>95</sup> nor, if he appear by attorney but neither files an answer or other plea nor demands trial by jury, and secures a continuance, can he demand a trial by jury on the adjourned day, the continuance being general and no enlargement of the time for filing the demand having been granted.<sup>96</sup> So the submission of the case to the referee "to hear, take proofs, and report his conclusions" is a waiver of the right to a jury trial.<sup>97</sup>

The revised statutes provide that issues of fact in civil cases in a circuit court may be tried by the court without a jury, whenever the parties file a stipulation in writing waiving the jury. In such case the finding of the court, which may be either

89—In re Findlay, 9 N. B. R. 83, 5 Biss. 480, Fed. Cas. No. 4789; In re Hawkeye Smelting Co., 8 N. B. R. 385.

90—Lehman v. Strassberger, 2 Woods, 554, Fed. Cas. No. 8216.

91—Act of 1898; § 19a, Official Form 7, § 1700, *post*.

92—Act of 1898, §§ 18b, 19a; Day v. Beck & Gregg Hardware Co., 114 Fed. 834, 8 A. B. R. 175; Duncan v. Landis, 106 Fed. 839, 5 A. B. R. 649.

93—Act of 1898, § 18a.

94—Act of 1898, § 19a; In re Nea-

smith, 147 Fed. 160, 17 A. B. R. 128; Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102; In re Heydette, 8 N. B. R. 332, Fed. Cas. No. 6444; In re Sherry, 8 N. B. R. 142; Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2899.

95—In re Gebhardt, 3 N. B. R. 63, Fed. Cas. No. 5294.

96—In re Sherry, 8 N. B. R. 142.

97—Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 518, 15 A. B. R. 804.

general or special, will have the same effect as the verdict of a jury,<sup>98</sup> the appellate court being confined in the latter case to questions of law, except that, on a special finding, the sufficiency of the facts to support the judgment may be inquired into. There is no similar provision as to waiver in the district court;<sup>99</sup> but, if the parties agree on a statement of facts, they can together waive a jury,<sup>1</sup> and judgment in either event may be reviewed by writ of error.<sup>2</sup>

### § 268. — Verdicts.

The court has the same power over verdicts rendered in bankruptcy cases, whether for or against the debtor, as courts of common law, and while it cannot enter judgment contrary to the verdict, the verdict may be set aside and a new trial ordered or the judgment may be reversed for error of law as in common-law cases.<sup>3</sup> If the case is not submitted under section 19a, the verdict is wholly advisory.<sup>4</sup>

### § 269. Action on voluntary petition.

Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee,<sup>5</sup> who should make the adjudication or dismiss the petition.<sup>6</sup>

98—U. S. Rev. Stat., § 649; *Packer v. Whittier*, 1 A. B. R. 621.

99—*Blair v. Allen*, 3 Dill. 101, Fed. Cas. No. 1483; *Kearney v. Case*, 12 Wall. 275, 20 L. ed. 395, R. S. § 700.

1—*Supervisors v. Kennicott*, 103 U. S. (13 Otto) 554, 26 L. ed. 486.

2—*Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96; *Rogers v. U. S.*, 141 U. S. 548, 35 L. ed. 853, 556; *Perego v. Dodge*, 163 U. S. 160, 41 L. ed. 113.

3—*In re Neasmith*, 147 Fed. 160, 17 A. B. R. 128; *In re Corse*, Fed. Cas. No. 3254; *In re Deforrest*, 9 N. B. R. 278, Fed. Cas. No. 3745; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50.

4—*Carpenter v. Cudd*, 174 Fed. 603, 23 A. B. R. 463; *In re Neasmith*, 147 Fed. 160, 17 A. B. R. 128; *Oil Well Supply Co. v. Hall*, 128 Fed. 875, 11 A. B. R. 738.

5—Act of 1898, § 18g.

Analogous provision of Act of 1867. "Sec. 42. . . . That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition."

6—Act of 1898, § 38a.



A voluntary bankrupt may withdraw his petition where there is no estate and no claims are proved and no trustee appointed;<sup>7</sup> but before entertaining a motion for dismissal, the court must require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and must cause notice to be sent to all creditors of the pendency of the application for dismissal and delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard.<sup>8</sup>

The jurisdictional facts appearing in a voluntary petition, the court cannot refuse an adjudication, though a creditor objects.<sup>9</sup> Where a petition schedules no debt which would not be affected by a discharge, the court in its discretion may dismiss the petition. The court, however, need not in every case, upon a motion to dismiss, determine the nature of the liabilities scheduled, the matter being one wholly within its discretion.<sup>10</sup> A voluntary petition will not be dismissed on the ground that the bankrupt has obtained a discharge in bankruptcy within six years of the filing thereof, where the six years will have elapsed by the time the bankrupt is entitled to apply for his discharge.<sup>11</sup>

## § 270. Partnership cases.

### § 271. — Nature of proceedings.

Where the petition is filed by one or more of the partners, it is, in its initiation, voluntary, and will remain so in its entirety if, on notice, the other partner, or partners, actively join with the petitioners or by acquiescence consent to the adjudication of the partnership, but, if the non-petitioning partner, or partners, refuse to join in the proceedings and contest the adjudication, it becomes as to him, or them, involuntary, and subject to the rules governing involuntary bankruptcy.<sup>12</sup>

7—In re Hebbart, 5 A. B. R. 8.

8—Section 56g as am'd June 25, 1910.

9—In re Carbone, 13 A. B. R. 55.

10—In re Colaluca, 133 Fed. 255, 13 A. B. R. 292.

11—In re Smith, 155 Fed. 688, 19 A. B. R. 63.

12—G. O. VIII. In re Junek & Balthazard, 169 Fed. 481, 22 A. B. R. 298; Medsker v. Bonebrake, 108 U. S. 66; In re Forbes, 128 Fed. 137, 11 A. B. R. 787;

In re Borden, 2 N. B. N. R. 741, 4 A. B. R. 31, 101 Fed. 553; In re Meyers, 2 N. B. N. R. 111, 3 A. B. R. 260, 97 Fed. 757; In re Webster, 2 N. B. N. R. 54; In re Murray, 1 N. B. N. 570, 96 Fed. 600, s. c. 1 N. B. N. 532, 3 A. B. R. 90; In re Russell, 1 N. B. N. 532, 3 A. B. R. 91, 97 Fed. 32; In re Altman, 1 N. B. N. 358, 1 A. B. R. 689, s. c. 1 N. B. N. 407, 2 A. B. R. 407, 95 Fed. 263; In re Meyer, 98 Fed. 976; aff'g 1 N. B. N. 304, 1 A.

### § 272. — Proof of partnership.

It is necessary that a partnership in fact be proved in order to sustain an adjudication. Such a partnership may be proved by circumstantial as well as direct evidence.<sup>13</sup>

### § 273. — Partnership as a question of law or fact.

In the absence of a written agreement of partnership, if the fact of partnership be denied, the court will, on demand, submit to the jury the finding of facts<sup>14</sup> necessary to establish the relation, render instructions from the court as to what in law<sup>15</sup> will constitute a partnership; but if the facts be undisputed, whether the members are in fact partners, is a question of law for the court.

### § 274. — Defenses.

A proceeding instituted by one partner for the purpose of vexing and harassing his copartner,<sup>16</sup> or merely to dissolve the partnership,<sup>17</sup> will be dismissed, but the adjudication of a partnership will not be refused because of fraud practiced on one partner inducing him to enter the firm.<sup>18</sup>

The non-assenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner and against the firm and its members, but may set up the defense of solvency.<sup>19</sup>

### § 275. — Consent and default adjudication.

An order by consent will not authorize the adjudication of other parties than those against whom the petition is filed, though they be connected with the latter as partners.<sup>20</sup>

B. R. 565, 92 Fed. 896; In re Wilson, 13 N. B. R. 253, 2 Lowell, 453, Fed. Cas. No. 17784; Medsker v. Bonebrake, 108 U. S. 66, 27 L. ed. 654; In re Henry, 17 N. B. R. 463, 9 Ben. 449, Fed. Cas. No. 6370; In re Pierce, 2 N. B. N. R. 979; In re Noonan, 10 N. B. R. 330, Fed. Cas. No. 10297; In re Daggett, 8 N. B. R. 433, Fed. Cas. No. 3536; In re Carleton, 115 Fed. 246, 8 A. B. R. 270.

13—In re Hudson Clothing Co., 148 Fed. 305, 17 A. B. R. 826.

14—McDonald v. Matney, 82 Mo. 358; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298.

15—Chisholm v. Cowles, 42 Ala. 179; Kingsbury v. Tharp, 61 Mich. 216.

16—In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, Fed. Cas. No. 5994.

17—Amsinck v. Bean, 11 N. B. R. 496, 22 Wall. 395, 22 L. ed. 801.

18—In re Mitchell & Co., 211 Fed. 778, 31 A. B. R. 814.

19—In re Forbes, 128 Fed. 137, 11 A. B. R. 787.

20—In re Elliott, 2 N. B. N. R. 350; Mahoney v. Ward, 2 N. B. N. R. 538, 100 Fed. 278, 3 A. B. R. 770; In re Kruegar, 5 N. B. R. 539, 2 Lowell, 66, Fed. Cas. No. 7941; In re Prankard, 1

A judgment by default in a proceeding by a partner against the partnership is conclusive upon the other partner.<sup>21</sup>

### § 276. — Separate adjudication of firm and members.

The court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and grant discharges from separate and joint debts.<sup>22</sup> It is not necessary, however, to sustain an adjudication that both the partnership and its members be adjudicated in the same proceeding. The partnership may be adjudicated without an adjudication of its members and vice versa.<sup>23</sup>

### § 277. Adjudication or dismissal on failure to plead.

“If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.”<sup>24</sup> But if the judge is absent the case must be referred to the referee forthwith,<sup>25</sup> who must make the adjudication or dismiss the petition.<sup>26</sup>

In a case of failure to plead, or of a plea made improperly or out of time, it is the imperative duty of the court to make the adjudication as soon as practicable after five days from the return day, but an adjudication before the expiration of this time is premature.<sup>27</sup> This time cannot be extended by agree-

N. B. R. 51, Fed. Cas. No. 11366; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re O'Brian, 2 N. B. N. R. 312; but see as to secret partners, In re Mandenhall, 9 N. B. R. 497, Fed. Cas. No. 9425; In re Harris, 2 N. B. N. R. 868, 4 A. B. R. 132.

21—In re Gorman, 15 A. B. R. 587.

22—In re Gay, 3 A. B. R. 529, 98 Fed. 870; In re Langslow, 1 N. B. N. 232, 1 A. B. R. 258, 98 Fed. 869; but see Mahoney v. Ward, 2 N. B. N. R. 538, 100 Fed. 278, 3 A. B. R. 770; In re Barden, 2 N. B. N. R. 741, 4 A. B. R. 31, 101 Fed. 553; In re Farley, 115 Fed. 359, 8 A. B. R. 266.

23—American Steel & Wire Co. v. Coover, 27 Okla. 131, 25 A. B. R. 58; In re Perlhefter & Shatz, 177 Fed. 299, 25

A. B. R. 576; Francis v. McNeal, 186 Fed. 481, 26 A. B. R. 555, aff'd 30 A. B. R. 244; Mills v. Fisher & Co., 159 Fed. 897, 16 L. R. A. (N. S.) 656, 20 A. B. R. 237.

24—Act of 1898, § 18e. In re Billing, 145 Fed. 395, 17 A. B. R. 80.

25—Act of 1898, § 18f.

26—Act of 1898, § 38a.

27—Day v. Beck & Gregg Hardware Co., 114 Fed. 834, 8 A. B. R. 175.

An adjudication made less than five days after the filing of an involuntary petition is voidable at the instance of creditors though the bankrupt appears and consents thereto. B.-R. Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co., 206 Fed. 885, 30 A. B. R. 424.

ment between counsel for the petitioning creditors and the bankrupt without leave of the court and without the consent of other creditors, especially in a case where the allegations of the petition are simple and easily answered, and the court, if applied to for that purpose, would not have extended the time,<sup>28</sup> and where the answer is filed after the time specified, the case should be adjudicated as in case of a failure to plead.<sup>29</sup> Where the subpoena is not served until long after the five days, but an answer is made within the time by a creditor, the jurisdiction is not lost by reason of the delay in the service or in the adjudication.<sup>30</sup>

A judgment by default is as conclusive an adjudication between parties of whatever is essential to support the judgment; as one rendered after answer and contest, and in such case facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings.<sup>31</sup> An application to set aside an adjudication by default should be made to the court, not the referee,<sup>32</sup> and should be made within a reasonable time;<sup>33</sup> and, in order that a hearing may be had and an opportunity given to determine whether there has been inexcusable laches, or whether reasons appear which are recognized as giving authority for refusing the motion, the respondent should apply by motion for leave to file a supplemental answer, and such leave must be granted unless the papers present a case in which the court may exercise a discretion as to granting or withholding it.<sup>34</sup>

### § 278. Dismissal after hearing.

### § 279. — Grounds of dismissal.

After a petition in involuntary bankruptcy has been filed and the court has acquired jurisdiction of the case, it should not be

28—In re Simonson, 1 N. B. N. 230, 92 Fed. 904, 1 A. B. R. 197.

29—Bray v. Cobb, 1 N. B. N. 153, 91 Fed. 102, 1 A. B. R. 153.

30—In re Freischberg, 8 A. B. R. 607; In re Stein, 105 Fed. 749, 5 A. B. R. 288.

31—In re Billing, 145 Fed. 395, 17 A. B. R. 80; In re American Brewing Co., 112 Fed. 752, 7 A. B. R. 463; Last

Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 39 L. ed. 859; In re Hatcher, 1 N. B. R. 91, Fed. Cas. No. 6210.

32—In re Imperial Corp., 133 Fed. 73, 13 A. B. R. 199.

33—In re Neilson, 7 N. B. R. 505, Fed. Cas. No. 10090.

34—Holyoke v. Adams, 13 N. B. R. 413.

permitted to be made either inept or inoperative by an agreement between the bankrupt and the attorneys for the petitioning creditors, or by dismissing the action on motion of the petitioners, unless all the creditors agree or, after due notice, fail to object.<sup>35</sup>

In determining the propriety of refusing adjudication and dismissing the petition, the exact amount due the petitioning creditors is not material,<sup>36</sup> and though the proceedings should be dismissed where practically all of the creditors assent to dismissal, either affirmatively or by failure to oppose, and the statutory three creditors are not found insisting on a continuance,<sup>37</sup> yet, if one of the petitioning creditors insists upon an adjudication where the statutory grounds therefor exist and there is no fraud, oppression or mistake, the court cannot dismiss the petition although it would be for the best interests of the creditors that the bankrupt should be allowed to settle with them out of court.<sup>38</sup>

A petition otherwise sufficient confers jurisdiction and will not be dismissed on the ground that it was filed by attorneys who had not been admitted to practice in the United States courts;<sup>39</sup> nor on the ground that the attorney for the petitioning creditors agreed personally to pay a creditor's claim if he joined in the petition,<sup>40</sup> nor is the pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, ground for dismissing

35—In re Simonson, 1 N. B. N. 230, 1 A. B. R. 197, 92 Fed. 904; In re Sheehan, 8 N. B. R. 353, Fed. Cas. No. 12738; In re Williams, 3 N. B. R. 285; In re Quimette, 3 N. B. R. 140, Fed. Cas. No. 10622; In re Ind. Cin. & LaFay. R. R. Co., 8 N. B. R. 302, Fed. Cas. No. 7023.

36—In re Hughes, 183 Fed. 872, 25 A. B. R. 556.

37—In re Jemison Mercantile Co., 112 Fed. 966, 7 A. B. R. 588; In re Salaberry, 107 Fed. 95, 5 A. B. R. 847; In re Heffron, 6 Biss. 156, Fed. Cas. No. 632; In re Sig. H. Rosenblatt & Co., 193 Fed. 638, 28 A. B. R. 401.

38—In re Lewis, 129 Fed. 147, 11 A. B. R. 683; In re Cronin, 98 Fed. 584, 3 A. B. R. 552; In re Heffron, 10 N. B.

R. 213, Fed. Cas. No. 6321; In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12361; see In re Ind. C. & L. R. Co., 5 Biss. 287, Fed. Cas. No. 7023; Contra, In re Miller, 1 N. B. R. 105, Fed. Cas. No. 9553.

The fact that the majority of the creditors, in number and amount, do not desire the administration of the debtor's estate in bankruptcy, does not require a dismissal. In re Lewis F. Perry & Whitney Co., 172 Fed. 745, 22 A. B. R. 772. In re Jacobson, 21 A. B. R. 921.

39—In re Kindt, 2 N. B. N. R. 373, 98 Fed. 867, 3 A. B. R. 546.

40—Bernard v. Fromme, 132 App. Div. (N. Y.) 922, 22 A. B. R. 585.

the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, and it appears that one or more of the creditors scheduled by the bankrupt are citizens of states other than that in which the insolvency proceedings were instituted.<sup>41</sup>

Where it appears by affidavit or otherwise that at the time the petition was filed the creditors who filed it knew they did not constitute the requisite number, the court must dismiss the petition.<sup>42</sup>

A motion for an adjudication on the pleadings admits all the averments of fact properly pleaded in the answers, and upon a denial thereof the petition for an adjudication should be dismissed.<sup>43</sup>

### § 280. — Voluntary abandonment.

If a creditor proves his claim in proceedings under a voluntary petition subsequent to the institution of involuntary proceedings by him, he will be deemed to have waived his right to continue the involuntary proceedings.<sup>44</sup>

### § 281. — Dismissal after adjudication.

While ordinarily a motion for leave to dismiss the proceedings and to settle with the debtor comes too late if filed after the debtor has been adjudged a bankrupt,<sup>45</sup> yet, while the sole purpose of a proceeding is shown to be to obtain a discharge which a prior proceeding has conclusively determined the bankrupt is not entitled to, the proceedings may be dismissed even after adjudication.<sup>46</sup> The fact that the bankrupt may be able to pay creditors in full is no ground for dismissing the proceedings after adjudication.<sup>47</sup>

### § 282. — Hearing upon motion.

Where the status of a petitioner objecting to a withdrawal, as a creditor, is dependent upon the outcome of litigation in a state

41—In re Mussey, 2 N. B. N. R. 113, aff'd 99 Fed. 71, 3 A. B. R. 592.

42—In re Scammon, 11 N. B. R. 280, 6 Biss. 195, Fed. Cas. No. 12429.

43—In re Waugh, 133 Fed. 281, 13 A. B. R. 187.

44—In re Nounan & Co., 6 N. B. R. 579.

45—In re Sherburne, 1 N. B. R. 155, Fed. Cas. No. 12758.

46—Kuntz v. Young, 131 Fed. 719, 12 A. B. R. 505.

47—In re Jamaica Slate Roofing & Supply Co., 197 Fed. 240, 28 A. B. R. 763.

court, action upon a motion to dismiss should be deferred until the determination of such litigation.<sup>48</sup>

**§ 283. — Right to contest.**

The trustee has authority to answer a petition to dismiss the proceedings though he is elected after the filing of the same.<sup>49</sup>

**§ 284. — Amendment of order of dismissal.**

An order of dismissal may be amended nunc pro tunc after the expiration of the term in which it was rendered where through mistake it fails to conform to the motion for dismissal<sup>50</sup> and a failure to give the required notice of the motion to amend will be held immaterial where the objecting parties are in no way injured by the amendment.<sup>51</sup>

**§ 285. — Reinstatement of petition.**

If the petition is dismissed by final decree, it cannot be reinstated by an application to join in it.<sup>52</sup>

An order dismissing a petition because it stated no act of bankruptcy will not be set aside and the filing of an amended petition be permitted setting up other acts of bankruptcy, unless good excuse be shown for the omission to assign them in the original petition.<sup>53</sup>

A decree refusing to adjudicate a debtor bankrupt entered after a full hearing on the merits will not be set aside on appeal because of a confession in the alleged bankrupt's answer that he should be declared a bankrupt or because of the insufficiency of the verification attached to the answer.<sup>54</sup>

**§ 286. Notice of dismissal before and after hearing.**

The bankruptcy act provides that a voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after

48—*In re Quincey Granite Quarries Co.*, 147 Fed. 279, 16 A. B. R. 823.

49—*In re Pennsylvania Con. Coal Co.*, 163 Fed. 579, 20 A. B. R. 872.

50—*Bernard v. Abel*, 156 Fed. 649, 19 A. B. R. 383.

51—*Bernard v. Abel*, 156 Fed. 649, 19 A. B. R. 383.

52—*In re Lewis F. Perry & Whitney Co.*, 172 Fed. 744, 22 A. B. R. 770.

53—*White v. Timber Co.*, 116 Fed. 768.

54—*Lackawanna Leather Co. v. La-Porte Carriage Co.*, 211 Fed. 318, 31 A. B. R. 658.

notice to the creditors, and to that end the court shall, before entertaining the application for dismissal, require the bankrupt to file a list, under oath, of all his creditors with their addresses, and shall cause notice to be sent to all creditors of the pendency of the application for dismissal and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard.<sup>55</sup> Creditors must have at least ten days' notice by mail of the proposed dismissal of bankruptcy proceedings,<sup>56</sup> and the duty of sending out such notices in an involuntary proceeding devolves upon the referee.<sup>57</sup>

Under the act of 1867 it was held that a petitioning creditor might at any time before adjudication, discontinue the proceedings and have his petition dismissed without notice to the creditors, who, if they desired to continue the proceedings, should apply on the day to which the proceedings were adjourned, for leave to be substituted or file a new petition.<sup>58</sup>

Notice of dismissal need not be given where it would be an idle ceremony, as where all the creditors except those who have joined in the petition have in writing objected to the debtor's being adjudged a bankrupt, and have agreed not to participate in any effort to that end.<sup>59</sup> It has also been held that in the case of a dismissal on the request of all of the known creditors or upon default of the petitioning creditors, the proceedings will be held valid although there are other creditors who were not known at the time and who did not receive notice.<sup>60</sup> Where a composition agreement provides that the proceedings may be discontinued without notice to creditors, the court is not bound to grant the application.<sup>61</sup>

While the notices referred to in section 59g relate to the withdrawal of cases without submission to the court,<sup>62</sup> and not to dismissals by order of the court after a hearing on the merits, it would seem that notice is essential where the proceedings are

55—Act of 1898, § 59g, as amended June 25, 1910.

56—Act of 1898, § 58a.

57—Act of 1898, § 58c. But see *In re Barrett Pub. Co.*, 2 N. B. N. R. 80.

58—*In re Rolling Mill Co.*, 2 N. B. R. 146, Fed. Cas. No. 2338.

59—*Cummins Grocery Co. v. Talley*, 187 Fed. 507, 26 A. B. R. 484.

60—*In re Jemison Mercantile Co.*, 112 Fed. 966, 7 A. B. R. 588; *In re Levi*, 142 Fed. 962, 15 A. B. R. 294, *certiorari* denied, 203 U. S. 596, 51 L. ed. 333.

61—*In re McNat, etc., Mfg. Co.*, 18 N. B. R. 388.

62—*Neustadter v. Dry Goods Co.*, 1 N. B. N. 552, 3 A. B. R. 96, 96 Fed. 830.



dismissed after such hearing,<sup>63</sup> especially where there has been an adjudication.<sup>64</sup>

The court may refuse to withhold its decision dismissing the petition for want of sufficient number of petitioning creditors until certain creditors not named in the bankrupt's answer are notified, where it appears that such creditors had notice of the proceedings but failed to appear or intervene, and there was nothing to indicate that they could be induced to join in the proceeding.<sup>65</sup>

### § 287. Notice of adjudication.

An adjudication which is necessarily an implied judgment that the court has jurisdiction, follows upon the filing of the petition. No notice is necessary that an adjudication will be made, but afterward by notice creditors become parties and if they do not they are precluded from thereafter objecting for the first time to the jurisdiction over the person.<sup>66</sup>

### § 288. Date of adjudication.

If there is no appeal from the decree adjudicating the defendant a bankrupt, it dates from rendition of same. If there is an appeal, and it is finally confirmed, the adjudication dates from the confirmation, but the mere taking of an appeal and the dismissal of the same either by the appellant or the appellate court is not a final confirmation so as to change the date of the adjudication from the time it is made to the dismissal of the appeal.<sup>67</sup>

### § 289. Effect of adjudication.

### § 290. — In general.

The adjudication is a judgment in rem, binding against all the world, so far as it determines that the defendant therein is a bankrupt and that his property is subject to administration in bankruptcy.<sup>68</sup> All persons interested in the res are regarded as

63—*Neustadter v. Chicago Dry Goods Co.*, 1 N. B. N. 552, 3 A. B. R. 96, 96 Fed. 830; *In re Plymouth Cordage Co.*, 135 Fed. 1000, 13 A. B. R. 665.

64—*In re Jamaica Slate Roofing & Supply Co.*, 197 Fed. 240, 28 A. B. R. 763.

65—*In re Tribelhorn*, 137 Fed. 3, 14 A. B. R. 491.

66—*In re Mason*, 2 N. B. N. R. 425, 99 Fed. 256, 3 A. B. R. 599.

67—*Moore Bros. v. Cowan*, 173 Ala. 536, 26 A. B. R. 902.

68—*Corbett v. Riddle*, 209 Fed. 811, 31 A. B. R. 330; *Silvey & Co. v. Tift*, 123 Ga. 804, 17 A. B. R. 9.

parties thereto, including the bankrupt and trustee as well as the creditors, secured and unsecured.<sup>69</sup>

Upon adjudication whether in voluntary or involuntary cases, the court acquires complete jurisdiction for all purposes.<sup>70</sup> An adjudication of bankruptcy is not a conclusive finding of a fact which tends to defeat the jurisdiction of the court over the alleged bankrupt;<sup>71</sup> but it is in the nature of a statutory execution, for all the creditors and the trustee, as their representative, may enforce against the debtor every right a judgment creditor could enforce.<sup>72</sup>

The adjudication is conclusive on the issue of insolvency for all purposes of bankruptcy administration.<sup>73</sup>

### § 291. — Parties bound.

An adjudication does not establish the facts upon which it is founded, no matter how necessary the connection, except as against parties entitled to be heard,<sup>74</sup> but creditors who have full knowledge of the pendency of the proceedings and have failed to intervene, thereby waive their right to attack the adjudication.<sup>75</sup>

### § 292. — As evidence of bankruptcy.

A certified copy of the adjudication is the best evidence of the fact of bankruptcy.<sup>76</sup>

### § 293. — Title to property.

The adjudication vests in the trustee, or temporary receiver, the title of the bankrupt's property<sup>77</sup> and stays all seizures made within four months,<sup>78</sup> and terminates the right of the bankrupt to dispose of his property.<sup>79</sup> The adjudication, however, will not estop third persons from denying that the bankrupt ever had title to the property,<sup>80</sup> or from denying the fraudulent character

69—Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594.

70—In re Archibrown, 11 N. B. R. 149, Fed. Cas. No. 504.

71—In re Goodfellow, 3 N. B. R. 114, 1 Lowell 510, Fed. Cas. No. 5536.

72—Barnwell v. Jones, 14 N. B. R. 278, Fed. Cas. No. 1027.

73—In re Witherbee, 202 Fed. 896, 30 A. B. R. 314.

74—Manson v. Williams, 213 U. S. 453,

22 A. B. R. 22, aff'g 153 Fed. 525, 18 A. B. R. 674.

75—In re Marian Contract & Construction Co., 166 Fed. 618, 22 A. B. R. 81.

76—Buck v. Winters, 15 N. B. R. 140.

77—See *post*, § 743.

78—See *post*, § 878.

79—In re Dillard, 9 N. B. R. 8, 2 Hughes, 190, Fed. Cas. No. 3912; Maxwell v. Faxton, 4 N. B. R. 60.

80—Silvey & Co. v. Tift, 123 Ga. 804, 17 A. B. R. 9.

of a transfer of property alleged as an act of bankruptcy, where although the petition alleges several acts of bankruptcy, the order of adjudication is general in its terms.<sup>81</sup>

### § 294. — Contracts and claims.

The adjudication does not dissolve or terminate contract relations<sup>82</sup> nor operate to discharge a defendant nor as a stay of the prosecution of a claim.<sup>83</sup>

The adjudication is conclusive as to validity of the creditors' claims passed upon as against the objection of the bankrupt and creditors not appearing.<sup>84</sup>

### § 295. — Partnerships and corporations.

An adjudication in bankruptcy does not dissolve a corporation, or work a forfeiture or loss of its franchise.<sup>85</sup>

A partnership, however, is dissolved immediately on the adjudication of bankruptcy of the firm, or any of its members;<sup>86</sup> but, the assets of the firm can be administered in bankruptcy only when the partnership is so adjudged,<sup>87</sup> or by consent of the partner or partners not adjudged bankrupt.<sup>88</sup> The rights of the firm creditors are not affected by a dissolution of the firm,<sup>89</sup> and where one partner only is bankrupt, the settlement of the joint affairs is intrusted to the solvent partner.<sup>90</sup>

### § 296. — Collateral attack.

The adjudication cannot be attacked in a collateral action or proceedings,<sup>91</sup> upon the ground that the proceedings were insti-

81—*In re Letson*, 157 Fed. 78, 19 A. B. R. 506.

82—*Watson v. Merrill*, 136 Fed. 359, 69 L. R. A. 719, 14 A. B. R. 453.

83—*Maas v. Kuhn*, 130 App. Div. (N. Y.) 68, 22 A. B. R. 91.

84—*In re Ulfelder Clothing Co.*, 98 Fed. 409, 3 A. B. R. 425; *Ayres v. Cone*, 138 Fed. 935, 14 A. B. R. 739.

Contra, *In re Continental Corporation*, 14 A. B. R. 538.

85—*National Surety Co. of New York v. Medlock*, 2 Ga. App. 665, 19 A. B. R. 654; *In re Imperial Brewing Co.*, 143 Fed. 579, 16 A. B. R. 110.

86—*New York Inst. for Deaf & Dumb v. Crockett*, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233.

87—*In re Lentz*, 2 N. B. N. R. 190, 97 Fed. 486; *In re Shepard*, 3 N. B. R. 172, 3 Ben. 347, Fed. Cas. No. 12754; *Amsinck v. Bean*, 22 Wall. 395, 22 L. ed. 801, 11 N. B. R. 495, 10 Blatch. 361, 8 N. B. R. 228; *Forsith v. Merritt*, 3 N. B. R. 48, 1 Lowell 336.

88—Sec. 5h of Act of 1898.

89—*Hudgins v. Lane*, 11 N. B. R. 462, 2 Hughes, 361, Fed. Cas. No. 6827; *In re McFarland*, 10 N. B. R. 381, Fed. Cas. No. 8788.

90—Sec. 5h, Act of 1898; *Wilkins v. Davis*, 15 N. B. R. 60, 2 Lowell 511, Fed. Cas. No. 17664; *Blackwell v. Claywell*, 15 N. B. R. 300.

91—*Corbett v. Riddle*, 209 Fed. 811, 31 A. B. R. 330; *Moore Bros. v. Cowan*,

tuted in the wrong district,<sup>92</sup> nor upon the ground that a subpoena to the bankrupt was not issued, he having voluntarily made an appearance,<sup>93</sup> nor upon the ground of defects in the petition which are not jurisdictional;<sup>94</sup> nor for contradiction or impeachment of the record.<sup>95</sup> The presumption that there was sufficient evidence to support the adjudication is conclusive in the absence of fraud.<sup>96</sup>

Where the answer filed by a corporation to an involuntary petition which waives process, admits the allegations of the petition, and declares its willingness to be adjudged bankrupt, is signed in the name of the corporation by its president, an objection that he was acting beyond his power is waived by the acquiescence of the bankrupt and its creditors in the adjudication, and, as against strangers, is concluded by the adjudication.<sup>97</sup>

An erroneous final adjudication, or even a correct adjudication, that the alleged bankrupt does not come within the statutory class, does not operate to nullify all intermediate

173 Ala. 536, 26 A. B. R. 902; *In re Dempster*, 172 Fed. 353, 22 A. B. R. 751; *Gilbertson v. United States*, 168 Fed. 672, 22 A. B. R. 32; *In re Hecox*, 164 Fed. 823, 21 A. B. R. 314; *In re Tully*, 156 Fed. 634, 19 A. B. R. 604; *Sloan v. Lewis*, 12 N. B. R. 173, 22 Wall. 150, 22 L. ed. 832; *Wilson v. Parr*, 8 A. B. R. 230.

Adjudication cannot be attacked upon the application for a discharge. *In re Ordway Bros.*, 19 N. B. R. 171, Fed. Cas. No. 10552.

Adjudication cannot be attacked collaterally in prosecution for false oath. *United States v. Brod*, 176 Fed. 165, 23 A. B. R. 740.

Adjudication cannot be attacked in a proceeding by the trustee to annul a preference. *Edwards v. Hutting Mfg. Co.*, 160 Fed. 619, 20 A. B. R. 349.

92—*In re Worsham*, 142 Fed. 121, 15 A. B. R. 672.

93—*In re Worsham*, 142 Fed. 121, 15 A. B. R. 672; *In re Western Inv. Co.*, 170 Fed. 677, 21 A. B. R. 367.

94—*In re First Nat. Bank of Belle Fourche*, 152 Fed. 64, 18 A. B. R. 265.

Failure of the petition to allege that the bankrupt was not a wage earner or a person chiefly engaged in farming or the tillage of the soil is not a jurisdictional effect rendering the adjudication subject to attack. *In re Worsham*, 142 Fed. 121, 15 A. B. R. 672.

If the petition is against a corporation which is not principally engaged in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, and that fact appears in the course of the proceedings, there will be such a jurisdictional defect on the face of the record as to make the adjudication and all proceedings under it void. *In re Hudson River Elec. Co.*, 167 Fed. 986, 21 A. B. R. 915.

95—*Gilbertson v. United States*, 168 Fed. 672, 22 A. B. R. 32.

An erroneous recital in the record of the absence of the district judge held not to render adjudication open to attack. *Id.*

96—*In re Billings*, 145 Fed. 395, 17 A. B. R. 80.

97—*In re Columbia Real Estate Co.*, 101 Fed. 965, 4 A. B. R. 411.

orders of the court, and does not determine that the court had no jurisdiction of the subject matter.<sup>98</sup>

### § 297. Setting aside adjudication.

### § 298. — Who may apply.

The bankrupt and his creditors who have provable claims against his estate are the only persons who can make an application to set aside an adjudication in involuntary proceedings.<sup>99</sup> A creditor who, by proving his claim, has acquiesced in the adjudication, cannot move for vacation of the adjudication.<sup>1</sup>

The petition of a creditor to set aside an adjudication on a voluntary petition, will not be entertained.<sup>2</sup>

### § 299. — Who may oppose application.

Any person affected by an adjudication and interested in sustaining it may oppose such application, as the receiver of a corporation adjudged bankrupt on a trustee's petition,<sup>3</sup> and it will be so set aside on grounds similar to those which authorize the review or vacation of a judgment; though if the ground is want of jurisdiction it is in the court's discretion to allow a stranger to be heard as *amicus curiae*.<sup>4</sup>

### § 300. — When set aside.

The fact that the creditor petitioning for the vacation of an adjudication states in his application that he appears specially and does not submit himself to the jurisdiction of the court will not prevent the setting aside of the adjudication.<sup>5</sup>

The order of adjudication may be vacated if entered within three months after the bankrupt took up his residence in the

98—*T. E. Hill Co. v. Contractor's Supply & Equip. Co.*, 156 Ill. App. 270, 24 A. B. R. 84.

A tort claimant has no standing to contest the adjudication. *In re New York Tunnel Co.*, 166 Fed. 284, 21 A. B. R. 531.

99—*In re New England Breeder's Club*, 169 Fed. 586, 22 A. B. R. 124, rev'g 165 Fed. 517, 21 A. B. R. 349; *In re Columbia Real Estate Co.*, 112 Fed. 643, 7 A. B. R. 441.

1—*In re New York Tunnel Co.*, 166

Fed. 284, 21 A. B. R. 531; *In re Hintze*, 134 Fed. 141, 13 A. B. R. 721.

2—*In re Ives*, 113 Fed. 911, 7 A. B. R. 692; *In re Carleton*, 115 Fed. 246, 8 A. B. R. 270.

3—*In re Atlantic Mutual Ins. Co.*, 16 N. B. R. 541, 9 Ben. 280, Fed. Cas. No. 628.

4—*In re Columbia Real Estate Co.*, 101 Fed. 965, 4 A. B. R. 411.

5—*In re Altonwood Park Co.*, 160 Fed. 448, 20 A. B. R. 31.

district, but where the three months have since elapsed and the bankrupt still retains his residence in the district, the proceedings will not be dismissed, but a second order of adjudication will be entered *nunc pro tunc* upon proper application.<sup>6</sup>

Where two of four members of a firm file a petition for the adjudication of the firm bankrupt and no notice is given the other partners and they do not appear, the adjudication should be set aside, notwithstanding a consent signed by such other partners' attorneys and filed after the adjudication;<sup>7</sup> or if made against an infant who did not appear by guardian ad litem;<sup>8</sup> or where a proceeding is reinstated without notice to or appearance of the debtor;<sup>9</sup> or where the debtor failed to comply with the requirements of an act passed the day the petition was filed.<sup>10</sup>

An adjudication in voluntary proceeding will be set aside where an involuntary petition had been previously filed to the knowledge of the debtor's attorney and had not been disposed of at the time of the adjudication upon the voluntary petition,<sup>11</sup> or where it subsequently develops that there are no dischargeable debts.<sup>12</sup>

### § 301. — When not set aside.

A motion to set aside an adjudication will not be entertained on the application of one guilty of laches.<sup>13</sup>

An adjudication will not be set aside because of a creditor's want of knowledge or notice of the proceeding,<sup>14</sup> nor on the ground that the petition and schedule were not filed for two months after verification;<sup>15</sup> nor on the ground that the proper proportion of creditors did not unite in the petition, unless there

6—In re Tully, 156 Fed. 634, 19 A. B. R. 604.

7—In re Altman, 1 N. B. N. 358, 1 A. B. R. 689.

8—In re Derby, 8 N. B. R. 106, Fed. Cas. No. 3815.

9—Gage v. Gage, 15 N. B. R. 145.

10—In re Carrier, 13 N. B. R. 208, Fed. Cas. No. 2443.

11—Gleason v. Smith, Perkins & Co., 145 Fed. 895, 16 A. B. R. 602.

12—In re Maples, 105 Fed. 919, 5 A. B. R. 426.

13—In re Urban & Suburban, 132 Fed. 140, 12 A. B. R. 687; In re Niagara Con-

tracting Co., 127 Fed. 782, 11 A. B. R. 643; In re Ives, 113 Fed. 911, 7 A. B. R. 692; In re Balt. Co. Dairy Ass'n, 11 N. B. R. 253, 2 Hughes 250, Fed. Cas. No. 8281; In re Griffith, 18 N. B. R. 510, Fed. Cas. No. 5820.

Four months delay in asking to have adjudication set aside not *laches*. In re Altonwood, 160 Fed. 448, 20 A. B. R. 31.

14—In re Billing, 145 Fed. 395, 17 A. B. R. 80.

15—In re Berner, 2 N. B. N. R. 330, 3 A. B. R. 325.

be fraud, bad faith or collusion in obtaining it;<sup>16</sup> nor because of the co-operation of the debtor in securing creditors, by lawful means, to unite in an involuntary petition;<sup>17</sup> nor for the reason that, on the filing of an involuntary petition, debtor defaulted, whether such default was voluntary or due to the solicitation of creditors,<sup>18</sup> nor because the petition fails to show upon its face that the corporation adjudged a bankrupt was not excepted from the provisions of the act,<sup>19</sup> nor because all the acts of bankruptcy alleged were not proved.<sup>20</sup>

An adjudication made where respondent waived process, entered appearance and admitted the alleged acts of bankruptcy will not be set aside for want of jurisdiction on the application of a stranger when neither the bankrupt nor any of his creditors object to the decree.<sup>21</sup>

An adjudication that a corporation is a bankrupt will not be set aside because the authority of the board of directors thereof to ask for an adjudication does not appear on the face of the petition.<sup>22</sup>

An adjudication against a partnership will not be set aside upon the ground that the caption of the petition made no reference to the partnership, where the body of the petition contains the necessary reference and all partners have been duly served,<sup>23</sup> but, upon the after discovery of a dormant partner, an adjudication against the nominal firm would permit the opening of the proceedings and bringing in the dormant partner without requiring a new petition to be filed.<sup>24</sup>

### § 302. — Proceedings for vacating.

The court has jurisdiction to consider an application to set aside an adjudication at any time until the estate is closed, although the actual term of the court has passed.<sup>25</sup> On a motion

16—In re Funkenstein, 14 N. B. R. 213, 3 Sawy. 605, Fed. Cas. No. 5158.

17—In re Duncan, 14 N. B. R. 18, 8 Ben. 365, Fed. Cas. No. 4131.

18—In re Billing, 145 Fed. 395, 17 A. B. R. 80; In re Gill, 195 Fed. 643, 28 A. B. R. 333; In re Hopkins, 18 N. B. R. 396, Fed. Cas. No. 6684.

19—In re Urban & Suburban, 132 Fed. 140, 12 A. B. R. 687.

20—In re Lyman, 127 Fed. 123, 11 A. B. R. 466.

21—In re Columbia Real Estate Co., 101 Fed. 965, 4 A. B. R. 411.

22—In re Kenwood Ice Co., 189 Fed. 525, 26 A. B. R. 499.

23—In re Gorman, 15 A. B. R. 587.

24—In re Scott, 1 N. B. N. 327.

25—In re Ives, 113 Fed. 911, 7 A. B. R. 692; reversing 111 Fed. 495, 6 A. B. R. 653.

to vacate an adjudication in a voluntary proceeding because of want of residence, while the moving creditor is required to introduce evidence, after that is in, the burden of proof is upon the bankrupt.<sup>26</sup>

26—In re Scott, 111 Fed. 144, 7 A. B. R. 39; Waxelbaum, 97 Fed. 562, 3 A. B. R. 392.



## CHAPTER IX

### LIABILITY FOR WRONGFUL INSTITUTION OF PROCEEDINGS OR SEIZURE OF PROPERTY

§ 303. Malicious prosecution.

§ 304. Libel.

§ 305. Liability of marshal.

§ 306. Recovery of costs independent of bond.

§ 307. Liability under bonds.

§ 308. — Practice.

#### § 303. Malicious prosecution.

There is no liability for filing a petition in bankruptcy which is subsequently dismissed except for the usual costs unless the petitioners acted without probable cause and maliciously, in which case the remedy is by an action for malicious prosecution,<sup>1</sup> nor will trespass on the case lie to recover damages resulting from the appointment of a receiver unless the appointment was procured maliciously and without probable cause.<sup>2</sup> In a proper case, however, an action for damages for the malicious institution of bankruptcy proceedings without probable cause will lie though there has been no seizure of property of the alleged bankrupt.<sup>3</sup>

A suit commenced by the trustee at the request of stockholders of the bankrupt to recover damages for throwing it into bankruptcy should not be compromised where the compromise offer if carried out will leave nothing for the stockholders, but upon furnishing the necessary security, the stockholders should be allowed to carry on the suit at their own cost.<sup>4</sup>

#### § 304. Libel.

Material allegations in the petition for adjudication are absolutely privileged and an action of libel cannot be based thereon.<sup>5</sup>

1—*In re Moehs & Rechnitzer*, 174 Fed. 165, 22 A. B. R. 286.

2—*Hill Co. v. Supply & Equip. Co.*, 156 Ill. App. 270, 24 A. B. R. 84.

3—*Wilkinson v. Goodfellow-Brooks Shoe Co.*, 141 Fed. 218, 15 A. B. R. 554.

4—*In re Woodbury Dermatological Institute*, 191 Fed. 819, 27 A. B. R. 497.

5—*Rosenberg v. Dworetzky*, 139 App. Div. (N. Y.) 517, 24 A. B. R. 583.

### § 305. Liability of marshal.

In executing a warrant for the seizure of property, the responsibility rests upon the United States marshal of determining the ownership of the property seized, and if he take that of a stranger, he renders himself liable to an action for trespass.<sup>6</sup> He has no authority to seize property provisionally, outside of his district,<sup>7</sup> and where property is unlawfully taken by him its actual value may be recovered.<sup>8</sup>

### § 306. Recovery of costs independent of bond.

Where the court of appeals sets aside an order of adjudication, the costs and expenses of the receivership are to be borne by the petitioning creditors where it appears that the receivership was not absolutely necessary to the preservation of the estate,<sup>9</sup> but the moving party cannot be held for the costs and expenses of a receivership over and above the assets of the same where the proceedings resulting in receivership have not been instituted improvidently and without reasonable cause.<sup>10</sup> Where the appointment of a receiver has had the effect of avoiding impending loss, and the restraints resulted in actual gain, the costs and expenses incident to the receivership should be charged against party applying for receiver.<sup>11</sup>

The alleged bankrupt cannot recover costs growing out of its failure to raise and litigate a jurisdictional question.<sup>12</sup>

### § 307. Liability under bonds.

During the pendency of bankruptcy proceedings and until adjudication in bankruptcy, the defendant retains control and title to the property,<sup>13</sup> unless the petitioning creditors file an application to take charge of and hold the property pending the adjudication, in which event they must accompany it with

6—*Marsh v. Armstrong*, 11 N. B. R. 125; *In re Muller*, 3 N. B. R. 86; *Deady*, 513, Fed. Cas. No. 9912; *In re Marks*, 2 N. B. R. 175, Fed. Cas. No. 9095; but see *Stevenson v. McLaren*, 14 N. B. R. 403; *In re Briggs*, 3 N. B. R. 157, Fed. Cas. No. 1869; *Vogel*, 3 N. B. R. 198, 7 Blatchf. 18, Fed. Cas. No. 16982.

7—*Carr v. Phillips*, 18 N. B. R. 527.

8—*Doll v. Harlow*, 11 N. B. R. 350.

9—*In re Joseph Lavoc*, 142 Fed. 960, 15 A. B. R. 290; *In re Wentworth Lunch Co.*, 191 Fed. 821, 27 A. B. R. 515.

10—*In re Metals Extraction & Refining Co.*, 195 Fed. 226, 27 A. B. R. 11.

11—*In re Ward*, 203 Fed. 769, 29 A. B. R. 547.

12—*In re Imperial Film Exchange*, 198 Fed. 80, 28 A. B. R. 815.

13—Sec. 70a Act of 1898.

a bond;<sup>14</sup> or, if upon satisfactory proof it is shown that the bankrupt against whom an involuntary petition has been filed and is pending, has committed an act of bankruptcy, or is neglecting, or permitting his property to deteriorate in value, the judge may issue a warrant under which the marshal may seize and hold such property subject to further orders. Before such warrant is issued, however, the petitioner applying therefor must enter into a bond conditioned upon indemnifying the bankrupt for any damages that may result from such seizure if wrongfully obtained.<sup>15</sup>

If the petition be dismissed or withdrawn, the debtor may recover such costs as are allowed to a party recovering in a suit in equity against the petitioning creditors, officers' fees<sup>16</sup> but not counsel fees,<sup>17</sup> or damages<sup>18</sup> unless the debtor's property has been seized and detained.<sup>19</sup> The costs, counsel fees and expenses for which the bondsmen are liable are those which are strictly incident to the seizure proceedings,<sup>20</sup> and they are not liable for counsel fees incurred by the alleged bankrupt in defending and successfully resisting bankruptcy.<sup>21</sup> Costs and attorney's fees

14—See. 3e Act of 1898.

15—See Secs. 50 and 69 Act of 1898, see *Beach v. Macon Grocery Co.*, 116 Fed. 143, 8 A. B. R. 751.

16—G. O. XXXIV.

See in re *Philadelphia & Lewes Trans. Co.*, 127 Fed. 896, 11 A. B. R. 444.

17—In re *Ghiglione*, 93 Fed. 186, 1 N. B. N. 351, 1 A. B. R. 580; *Dundon v. Coats*, 6 N. B. R. 304, Fed. Cas. No. 4142; In re *Sheeham*, 8 N. B. R. 353, Fed. Cas. No. 12738.

18—In re *Moebs & Rechnitzer*, 174 Fed. 165, 22 A. B. R. 286; In re *Morris*, 115 Fed. 591, 7 A. B. R. 709.

Damages caused to firm credit or business as a result of the institution of the bankruptcy proceeding are not recoverable under the bond. *Selkregg v. Hamilton Bros.*, 144 Fed. 557, 16 A. B. R. 474.

And see In re *Smith*, 16 A. B. R. 478.

19—See 3e Act of 1898; *Hoffschlaeger Company, Ltd. v. Young Nap*, alias *Young Lap*, 12 A. B. R. 526.

20—*Selkregg v. Hamilton Bros.*, 144

Fed. 557, 16 A. B. R. 474; In re *Smith*, 16 A. B. R. 478.

21—*Selkregg v. Hamilton Bros.*, 144 Fed. 557, 16 A. B. R. 474.

But see In re *Smith*, 16 A. B. R. 478.

"Under section 3e, only such costs, counsel fees, expenses and damages as are occasioned by the seizure and detention of the bankrupt's property can be recovered. The recovery of other costs and expenses depends upon their being brought within section 2, cl. 18, and G. O. 34, which are but declaratory of the general equity power in relation to such costs, etc." In re *Ward*, 203 Fed. 769, 29 A. B. R. 547.

Where the petition was successfully defended after protracted litigation on the ground of the insanity of the defendant costs held properly proportioned or divided between the parties. *Id.*

Guardian ad litem not entitled to compensation in case of dismissal on ground of insanity where general guardians come in and defend but he must look to the estate of the ward. *Id.*

incurred in procuring an injunction preventing the parties to an attachment suit from disposing of the property not allowable.<sup>22</sup>

Witness fees will be allowed though no subpoena was issued, it appearing that the attendance of the witnesses was procured in good faith,<sup>23</sup> but will not be allowed unless the affidavit attached to the memorandum of costs shows that they have been actually paid.<sup>24</sup>

Where the alleged bankrupt has been allowed the value of the property seized and sold by the receiver in bankruptcy, he cannot in addition thereto be allowed the expenses of the receivership.<sup>25</sup>

The relief provided by section 3e can only be had upon the bond contemplated by that section.<sup>26</sup> The fact that the second paragraph provides that all costs, etc., shall be allowed is based upon the assumption that a bond sufficient to cover all costs will be taken.<sup>27</sup> There is no liability under the bond to persons who become respondents after the execution of the bond. Such persons may if they desire move for a new bond.<sup>28</sup> Nor are petitioning and intervening creditors liable under the bond unless they cause the seizure.<sup>29</sup>

A bankrupt cannot recover under both sections 69a and 3e. A judgment under section 3e allowing him costs and disbursements is a bar to a proceeding to recover damages under section 69a.<sup>30</sup>

The right to recover damages upon dismissal of the petition, given by section 3e is not dependent upon the existence of either malice or want of probable cause. The right given by that section is not to sue for damages but to have the damages allowed in the bankruptcy proceedings by the bankruptcy court.<sup>31</sup>

### § 308. — Practice.

Where an involuntary petition is dismissed at the cost of the petitioners, they are entitled to a hearing upon the question of

22—In re Hines, 144 Fed. 147, 16 A. B. R. 538.

23—24—Hoffschlaeger Co., Ltd. v. Young Nap, alias Young Lap, 12 A. B. R. 526.

25—In re Smith, 16 A. B. R. 478.

26—In re Hines, 144 Fed. 147, 16 A. B. R. 538.

27—In re Spalding, 150 Fed. 120, 17 A. B. R. 667.

28—In re Spalding, 150 Fed. 120, 17 A. B. R. 667.

29—In re Ward, 203 Fed. 769, 29 A. B. R. 547.

30—Nixon v. Fidelity & Deposit Co., 150 Fed. 574, 18 A. B. R. 174.

31—Hill Co. v. Contractors Supply & Equip. Co., 156 Ill. App. 270, 24 A. B. R. 84.

amount, and costs will not be awarded until the bill of costs is filed with the clerk, and the petitioning creditors notified of the filing of the same and the amount thereof.<sup>32</sup>

An order requiring the petitioning creditors to pay the expenses of a receivership where, after the creation thereof, the petition is dismissed may be enforced by contempt proceedings.<sup>33</sup>

Upon dismissal of the petition and vacation of the receivership, the court may, in its discretion assess the expenses of the receivership against the petitioning creditors in the first instance, instead of out of the property in the hands of the receiver.<sup>34</sup>

32—In re Haeseler-Kohlhoff Carbon Co., 135 Fed. 867, 14 A. B. R. 381.

34—In re Charles W. Aschenbach Co., 183 Fed. 305, 25 A. B. R. 502.

33—In re Lavoc, 142 Fed. 960, 15 A. B. R. 290.

## CHAPTER X

### REFEREES IN BANKRUPTCY AND THEIR JURISDICTION

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### § 309. Creation and nature of office.

The office of referee is created by section 33 of the Bankruptcy Act. The referee occupies an office corresponding to that of register under the act of 1867. He exercises much of the judicial authority of the courts of bankruptcy;<sup>1</sup> and is essentially an assistant to the judge in the district for which appointed. He sits in a judicial capacity in all proceedings originally instituted before him in the course of the proceedings after reference,—such as a general examination, a proceeding to turn over assets, to allow or reject, or expunge a claim, etc. He sits in his capacity as a special commissioner or special master when in the course of the bankruptcy, a specific proceeding, instituted before another referee or before the district court is referred to him to take testimony and report. When acting in a judicial capacity

<sup>1</sup>—White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 2 N. B. N. R. 721, 4 A. B. R. 178; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

he is clothed with the same powers and duties in bankruptcy matters as the district court.<sup>2</sup>

### § 310. Number and districts of referees.

Section 34a of the act clearly contemplates that each county where the service of a referee is needed should constitute at least one district, and there should be at least one referee for each county, although, owing to the scarcity of business in some localities, many of the courts have appointed one referee for several counties. The number that may be appointed for each county is without limit, but there should be as many as are necessary to expeditiously transact the business.<sup>3</sup>

The district of each referee should be clearly defined, in order that there may be no conflict of jurisdiction. This requirement is emphasized by section 18 (f), (g), relative to the reference of cases "to the referee," as well as section 35, requiring a residence or office in the territorial district for which appointed, and the definition of the term "Referee,"<sup>4</sup> as meaning "the referee who has jurisdiction of the case," all of which would seem to indicate a purpose of limiting the appointments to a single referee for each district.

### § 311. Appointment of referees.

#### § 312. — Who may appoint.

The power to appoint referees is vested in the court of bankruptcy.<sup>5</sup> Where there are several judges in the same district, either has full power to appoint a referee without the concurrence of the other.<sup>6</sup> A judge who is a judge of two districts may make an appointment of a referee in one district though not

2—*In re Harrison Bros.*, 197 Fed. 320, 28 A. B. R. 293.

3—Act of 1898, § 37; *In re Steele*, 156 Fed. 853, 19 A. B. R. 671.

4—Act of 1898, § 1 (21).

5—Act of 1898, § 34. Analogous provision of Act of 1867. "Sec. 3. . . . That it shall be the duty of the judges of the district courts of the United States, within and for the several districts, to appoint in each congressional district in

said districts upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act.

6—*Birch v. Steele*, 165 Fed. 577, 21 A. B. R. 539; *In re Steele*, 156 Fed. 853, 19 A. B. R. 671.



present in the court thereof, if he is at the time in either district.<sup>7</sup>

**§ 313. — Appointment in case of vacancy.**

Whenever the office of referee is vacant, or its occupant is absent, or disqualified, the judge may act, or appoint another referee,<sup>8</sup> or another referee holding an appointment under the same court may be specifically designated.<sup>9</sup> This may be done before the answer of the bankrupt is filed and does not require the consent or approval of the respondent or his attorney.<sup>10</sup>

**§ 314. — Notice of appointment.**

No notice is required of the appointment of a special or general referee.<sup>11</sup>

**§ 315. Qualifications of referees.**

Section 35a of the act provides that: "Individuals shall not be eligible to appointment as referees unless they are respectively

(1) Competent to perform the duties of that office;

(2) Not holding any office of profit or emolument under the laws of the United States or of any state other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;

(3) Not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and

(4) Residents of, or have their offices in, the territorial districts for which they are to be appointed."<sup>12</sup>

7—Ex parte Steele, 162 Fed. 694, 20 A. B. R. 575.

8—Act of 1898, § 43a. Analogous provision of Act of 1867. "Sec. 5. . . . Such register shall be subject to removal by the judge of the district court, and all vacancies occurring by such removal, or by resignation, change of residence, death or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary."

Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102.

9—Act of 1898, § 43.

10—Bray v. Cobb, 1 N. B. N. 209, 91 Fed. 102, 1 A. B. R. 153.

11—Bray v. Cobb, 1 N. B. N. 209, 91 Fed. 102, 1 A. B. R. 153.

12—Analogous provision of act of 1867. "Sec. 3. . . . No person shall be eligible to such appointment unless he be a counselor of said court, or of some one of the courts of record of the state in which he resides."

Consanguinity is the relation existing between persons descending from a common ancestor; affinity is the connection existing in consequence of marriage between the husband or wife and the kindred of the other. The degrees in either case are computed alike, thus according to the canon law, which is adopted in the common law, the computation is made by beginning at the common ancestor and reckoning downward to the party related, and in whatever degree the most remote party is distant from the common ancestor that is the degree in which they are related, counting each person as one degree and excluding the common ancestor.

A referee would not be qualified to act in a case in which he is directly or indirectly interested,<sup>13</sup> although the fact that he owes a debt to the bankrupt would not operate as a disqualification. The interest here indicated must be either in the proceedings in bankruptcy or the estate of the bankrupt, but, on being apprised of the fact that the referee is indebted to the bankrupt a court in the exercise of its discretion would doubtless revoke the order of reference.<sup>14</sup>

The fact that the referee had been attorney or counsellor for any of the parties prior to the filing of the petition in matters not directly connected with the bankruptcy proceedings, would not necessarily disqualify him from acting as referee,<sup>15</sup> though if there is any doubt as to the existence of a bias or influence, the court should transfer the case to another referee.

### § 316. Tenure of office.

Referees are appointed for a term of two years, unless sooner removed.<sup>16</sup> While there is authority for the proposition that an officer's functions cease immediately at the expiration of his term of office<sup>17</sup> the rule supported by the weight of authority is, in the absence of any restrictive provision, that the officer is entitled to hold until his successor is duly chosen and qualified.<sup>18</sup> This rule conserves the public good by conserving the

13—Act of 1898, § 39b.

14—Bray v. Cobb, 1 N. B. N. 209, 91 Fed. 102, 1 A. B. R. 153.

15—Carr v. Fife, 156 U. S. 494, 39 L. ed. 508.

16—Act of 1898, § 34a.

17—Badger v. United States, 93 U. S.

599, 23 L. ed. 991; People v. Tillman, 3 Barb. 193; U. S. v. Green, 53 Fed. 771.

18—State v. Harrison, 113 Ind. 440; Tuley v. State, 1 Ind. 500; State v. Wells, 8 Nev. 105; Stratton v. Oulton, 28 Cal. 44, 382; State v. Fagan, 42 Conn. 32.

methods and instrumentalities by which alone public business can be transacted; while the opposite rule, when pushed to its consequences, might result in a suspension of business in every department of the public service. In the case of a United States attorney the law specifically provides that his commission shall cease and expire at the expiration of the term for which appointed,<sup>19</sup> but there is no such provision with reference to a referee. It is to be presumed, therefore, that Congress intended that the referee should hold his office until the appointment and qualification of his successor.

### § 317. Oath of office.

Referees shall take the same oath of office as that prescribed for judges of United States courts.<sup>20</sup>

The Revised Statutes of the United States provide as follows: The justices of the supreme court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States: So help me God."<sup>21</sup>

The form of the oath prescribed by the supreme court to be taken by a referee in bankruptcy would seem to indicate that it should be administered by the district judge only.<sup>22</sup>

### § 318. Referees' bonds.

Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by enter-

19—U. S. Rev. Stat., § 769.

20—Act of 1898, § 36a.

Analogous provision of Act of 1867.

"Sec. 3. . . . And he shall, in open court, take and subscribe the oath prescribed in the act entitled 'An act to prescribe an oath of office, and for other purposes,' approved July second, eighteen hundred and sixty-two, and also that he

will not, during his continuance in office be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district."

21—U. S. Rev. Stat. § 712; Official Form No. 16, § 1714, *post*.

22—Official Form No. 16, § 1714, *post*.

ing into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.<sup>23</sup>

Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.<sup>24</sup> There should be at least two sureties on each bond in case individuals seek to qualify,<sup>25</sup> though only one is required where a regularly organized bonding corporation is accepted.<sup>26</sup> The court shall require evidence as to the actual value of the property of sureties,<sup>27</sup> and such value over and above liabilities and exemptions, on each bond, shall equal at least the amount of such bond.<sup>28</sup>

The bond must be filed of record in the office of the clerk of the court and may be sued upon<sup>29</sup> at any time within two years after the alleged breach of the bond,<sup>30</sup> in the name of the United States for the use of any person injured by a breach of its conditions.<sup>31</sup>

The failure of a referee to give bond is equivalent to a refusal to accept the appointment and creates a vacancy in his office,<sup>32</sup> to be filled by the court of bankruptcy.<sup>33</sup>

### § 319. Removal of referee.

The referee may be removed from office by the court either because his services are not needed, or for other cause; in other words, the power of removal rests in the discretion of the court.<sup>34</sup> While the weight of authority sustains the proposition that the power to remove "for cause" can only be exercised after notice and a reasonable opportunity to make defense,<sup>35</sup> it is a corollary

23—Act of 1898, § 50a. Analogous provision of Act of 1867. "Sec. 3. . . . Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof."

24—Act of 1898, § 50g.

25—Act of 1898, § 50e.

26—In re Kalter, 2 A. B. R. 590.

27—Act of 1898, § 50d.

28—Act of 1898, § 50f.

29—Act of 1898, § 50h.

30—Act of 1898, § 50l.

31—Act of 1898, § 50h.

32—Act of 1898, § 50k.

33—Act of 1898, § 34a.

34—Act of 1898, § 34a; Act of 1867, § 5.

35—State v. St. Louis, 90 Mo. 19; Gaskins case, 8 Term Rep. 209; Field v. Com., 32 Pa. St. 478; State v. Brice, 8

of this rule that the appointing power having authority to remove, is the sole judge of the existence of the cause.<sup>36</sup>

Where there are two judges in the same district, either may, in the absence of the other, appoint a referee, and an appointment so made cannot be vacated by the other judge without the consent of the judge making the appointment.<sup>37</sup>

### § 320. Reference before adjudication.

If the judge is absent from the district or the division of the district in which an involuntary petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk must forthwith refer the case to the referee,<sup>38</sup> who must make the adjudication or dismiss the petition. The absence here referred to means from the judicial district or division of such district as established by law, and not the county or bankruptcy division of a district.

Upon the filing of a voluntary petition, if the judge is absent from the district or the division of the district in which the petition is filed, at the time of the filing, the clerk must forthwith refer the case to the referee,<sup>39</sup> who must make the adjudication or dismiss the petition.

A special reference before adjudication to inquire into matters pertaining to the business and conduct of the alleged bankrupt is premature<sup>40</sup> and is superseded by an adjudication and an order of general reference.<sup>41</sup>

A reference to the referee may be made by the clerk only when the judge is absent from the division of the district within which the petition is filed, and then only in case of default in involuntary cases. It cannot be made by him on the written admission

Ohio St. 82; Com. v. Slifer, 1 Casey, 23; Haight v. Love, 39 N. J. Law 14.

36—State v. Doherty, 25 La. Ann. 119; Patton v. Vaughan, 39 Ark. 211; Birch v. Steele, 165 Fed. 577, 21 A. B. R. 539.

37—In re Steele, 156 Fed. 853, 19 A. B. R. 671.

38—Act of 1898, § 18f.

39—Act of 1898, § 18g.

40—Skubinsky v. Bodek, 172 Fed. 332, 24 L. R. A. (N. S.) 985, 22 A. B. R. 689.

The appointment and qualification of the receiver and his exercise of official functions before the adjudication of the debtor as a bankrupt is not "process of administration" authorizing an order of reference to throw light on "the acts, conduct or property of the bankrupt" Id.

41—In re Ruos, 164 Fed. 749, 21 A. B. R. 257.

by the respondent of the acts of bankruptcy charged and a waiver of service and of the time of appearance.<sup>42</sup> The reference may be made by the deputy clerk.<sup>43</sup>

### § 321. Reference after adjudication.

Section 22a of the act provides that: "After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it

(1) Generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or

(2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district."

Under this section the trustee is required to proceed with the administration by collecting and reducing to money the property of the estate under the direction of the court, and close it up as expeditiously as compatible with the best interests of the parties in interest,<sup>44</sup> or the case may be referred to the referee for his action. The convenience of the parties in interest may be consulted and the case referred to any referee in the judicial district of the court, although there may be another referee in the bankruptcy district in which the petition was filed, and for cause, or at the instance of parties, the court may change the reference from one referee to another.<sup>45</sup> The court has no power, however, to refer a case to a referee appointed by and residing in another district.<sup>46</sup>

The bankruptcy proceedings may be referred to the referee by a general order, or to him as referee upon special issues, his power depending upon the order of reference. For the most part the duties of the referee are those of a special master, and a special master cannot be appointed to do the proper business of a referee.<sup>47</sup> Sometimes it is necessary for the court to refer

42—*Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102; *In re L. Humbert Co.*, 100 Fed. 439, 4 A. B. R. 76.

43—*Gilbertson v. United States*, 168 Fed. 672, 22 A. B. R. 32; *contra*: *Bray v. Cobb*, 91 Fed. 102, 1 A. B. R. 153.

44—Act of 1898, § 47.

45—Act of 1898, § 22b; *In re Western Inv. Co.*, 170 Fed. 677, 21 A. B. R. 367.

46—*In re Schenectady Engineering & Construction Co.*, 147 Fed. 868, 17 A. B. R. 279.

47—*In re Sweeney*, 168 Fed. 612, 21 A. B. R. 866.

the case to the referee to take and report testimony, as where answers are filed to a petition in involuntary bankruptcy, and it is no objection to such a course that questions of law are involved, as the action of the referee is in all respects subject to the control of the court.<sup>48</sup> Reclamation proceedings instituted to recover property in the possession of the trustee may be referred to a special master rather than to the referee,<sup>49</sup> as may the subject of a direction to the bankrupt to turn over assets.<sup>50</sup>

### § 322. Order of reference.

The order referring a case to a referee, a copy of which must be forthwith sent by mail, or delivered personally, to the referee, must name a day on which the bankrupt shall attend before the referee and from that day the bankrupt shall be subject to the order of the court in all matters relating to the bankruptcy proceedings, and thereafter all proceedings, except those required to be had before the judge, must be had before the referee; and the referee must perform his duties at such times and in such places as shall be fixed by special order of the judge or referee.<sup>51</sup>

### § 323. Transfer from one referee to another.

The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.<sup>52</sup> A case may be removed where it is shown that the referee has attempted to influence the choice of a trustee,<sup>53</sup> or otherwise conducted himself in a manner unbecoming a judicial officer, though the fact that a referee is indebted to the bankrupt is not such a disqualification as will be grounds for removing the case to another referee.<sup>54</sup>

A case cannot be transferred to a referee appointed by the court of another district.<sup>55</sup>

48—*Clark v. Am. Man'g. Co.*, 101 Fed. 962, 4 A. B. R. 351; *In re Lavoe*, 134 Fed. 237, 13 A. B. R. 400.

49—*In re Tracy*, 179 Fed. 366, 24 A. B. R. 539.

50—*In re Herskovitz*, 152 Fed. 316, 18 A. B. R. 247.

51—G. O. XII (1); Official Form No. 14, § 1712, *post*, gives the terms of reference.

52—Act of 1898, § 22b. *In re Western Inv. Co.*, 170 Fed. 102, 1 A. B. R. 153.

53—*In re Smith*, 1 N. B. R. 25, 2 Ben. 113, Fed. Cas. No. 12971.

54—*Bray v. Cobb*, 1 N. B. N. 209, 1 A. B. R. 153, 91 Fed. 102.

55—*In re Schenectady Engineering & Construction Co.*, 147 Fed. 868, 17 A. B. R. 279.

### § 324. Jurisdiction of referees.

#### § 325. — In general.

“Section 38 of the act provides that: Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) Consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.”<sup>56</sup>

This section limits the jurisdiction of the referee and nothing here stated can be construed to enlarge his power or to give

56—Analogous provision of act of 1867. “Sec. 4. . . . That nothing in this section contained shall empower a register to commit for contempt or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated

by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

“Sec. 5. . . . and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers and documents.”



any authority to hear and determine any question which the court of bankruptcy appointing him could not determine. He is a part of such court and performs all of its functions, except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt or applies for a discharge or composition,<sup>57</sup> and interlocutory motions, affecting such proceedings except when related to these specified exceptions, should be addressed to him.<sup>58</sup> The bankrupt is subject to the order of the court or referee from the day he is required to attend before the referee, and he may receive from the latter a protection against arrest. After the petition has been referred, all proceedings except such as are specifically required to be had before the judge, must be had before the referee.<sup>59</sup>

The referee is an officer of the court and takes judicial notice of its judgment and decrees,<sup>60</sup> and exercises much of the judicial authority of that court,<sup>61</sup> with the exercise of legal discretion, he has entire control over proceedings pending before him,<sup>62</sup> but he has no power to vacate, modify or set aside any order duly made by the court of bankruptcy, or to deny himself of the jurisdiction granted by such orders.<sup>63</sup> All his acts are presumed to be legal within the scope of his authority,<sup>64</sup> and the validity of any order made by him, except such as the judge alone has power to make, cannot be collaterally attacked in the absence of a showing that it was disproved by the court.<sup>65</sup>

The referee is required<sup>66</sup> to furnish interested parties with any desired information as to proceedings before him, but not copies of such proceedings, and his refusal to furnish a copy of a petition and order of reference will not affect his jurisdiction to proceed under such order.<sup>67</sup>

57—*In re Carter*, 1 N. B. N. 162, 1 A. B. R. 160; *In re Huddleston*, 1 N. B. N. 214, 1 A. B. R. 572; *In re Brenner*, 190 Fed. 209, 26 A. B. R. 646; *In re Overholzer*, 23 A. B. R. 10.

58—*In re Huddleston*, 1 N. B. N. 214, 1 A. B. R. 572. *Anon.* 1 N. B. N. 252.

59—G. O. XII (1).  
60—*In re Scott*, 15 N. B. R. 73, Fed. Cas. No. 12519.

61—*White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 4 A. B. R. 178; *Mueller v.*

*Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

62—*Hyman*, 2 N. B. R. 107, 3 Ben. 28, Fed. Cas. No. 6984.

63—*In re Franklin Syndicate*, 2 N. B. N. R. 522, 101 Fed. 402, 4 A. B. R. 511.

64—*Conti v. Sunseri*, 18 A. B. R. 891.

65—*Kilgore v. Barr*, 75 S. E. 762, 28 A. B. R. 860; *Geisreiter v. Sevier*, 33 Ark. 522.

66—Act of 1898, § 39a (3).

67—*In re Lewin*, 103 Fed. 850.

### § 326. — Consent will not confer jurisdiction.

If the subject matter of a controversy is not within the jurisdiction of the referee, consent will not confer it.<sup>68</sup>

### § 327. — Territorial limits.

The jurisdiction of a referee is confined to the limits of the district for which he is appointed, and does not extend to cases outside except where specially appointed to fill a vacancy caused by another absence or disability.<sup>69</sup>

In partnership cases, it would seem, where the place of business of the partnership and the residence of each of the partners are in different counties, the court has discretionary power to refer the proceedings to the referee of any one of the counties.<sup>70</sup>

### § 328. — Dismissal of petition.

The referee clearly has power to dismiss a petition in bankruptcy, though a petitioner cannot, either for want of prosecution or by consent of parties, until after notice to the creditors.<sup>71</sup> The referee has no power, however, to dismiss proceedings after the adjudication.<sup>72</sup>

### § 329. — Seizure and release of property.

This power of taking possession and releasing property of the bankrupt can only be exercised, in case of the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act.<sup>73</sup> The provision in section 38a (3) was obviously intended to cover cases of the taking possession of property where the bankrupt is permitting it to deteriorate in value, as provided in section 69,<sup>74</sup> or where application is made to take charge of and hold the property of a bankrupt prior to the adjudication under section 3e of the law.<sup>75</sup>

68—In re Walsh Bros., 163 Fed. 352, 21 A. B. R. 14.

69—In re Schenectady Engineering & Construction Co., 147 Fed. 868, 17 A. B. R. 279.

70—In re Alden, 205 Fed. 145, 30 A. B. R. 48.

71—Act of 1898, § 59g. In re Mussey, 2 N. B. N. R. 113; 99 Fed. 71, 3 A. B. R. 592; In re Scott, 7 A. B. R. 35; see 111 Fed. 144, 7 A. B. R. 39.

72—In re Elby, 157 Fed. 935, 19 A. B. R. 734.

73—Subd. 3, ante § 674.

74—In re Florecken, 107 Fed. 241, 5 A. B. R. 802; In re Carter, 1 A. B. R. 160, 1 N. B. N. 162.

75—Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

As distinct and independent of the power referred to above, courts of bankruptcy may appoint receivers to take charge of a bankrupt's property whenever the exigencies of the case demand, and after the petition has been referred to the referee, he has the like power.<sup>76</sup>

A referee has jurisdiction of an application by a trustee in bankruptcy for an order requiring the bankrupt to surrender money or property alleged to be in his possession or control, and withheld or concealed from the trustee, although belonging to the estate, or to appear before him and show cause why he should not be ordered to surrender such property;<sup>77</sup> and to make an order in accordance with his findings on such application, but the enforcement of the order devolves upon the reviewing court.<sup>78</sup> The court, upon review, will not set aside such order where it is not plain that the referee was mistaken in his judgment, or that the testimony was insufficient to support the order.<sup>79</sup>

### § 330. — Adverse claimants.

Until the amendment of 1903 neither the bankruptcy court nor the referee had jurisdiction to decide questions as to the status of property not within the possession of the court. The property itself not being in court, the trustee was relegated to suits in the same tribunals which were open to the bankrupt before adjudication, and could not resort to the United States courts unless on account of diversity of citizenship. By the amendment of 1903 it was provided that suits by the trustee to set aside such transfers might be brought either in any court of bankruptcy, or in the courts in which the bankrupt might have brought them, but the referee has been held not to constitute a court of bankruptcy within the meaning of the amendment.<sup>80</sup> Where, however, the property concerned, the res, is in the posses-

76—*In re Florecken*, 107 Fed. 241, 5 A. B. R. 802; see *In re Scott*, 7 A. B. R. 710.

77—*Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; *In re Oliver*, 1 N. B. N. 329, 96 Fed. 85, 2 A. B. R. 783; *In re Miller*, 105 Fed. 57; *In re Speyer*, 6 N. B. R. 255, Fed. Cas. No. 13239; but see *In re Green*, 108 Fed. 616, 6 A. B. R. 270.

78—*In Mayer*, 2 N. B. N. R. 257, 98 Fed. 839, 3 A. B. R. 533; *In re Rosser*, 1 N. B. N. 469, 96 Fed. 305, 2 A. B. R. 755, 3 A. B. R. 533.

79—*In re Tudor*, 2 N. B. N. R. 168, 96 Fed. 942, 2 A. B. R. 808.

80—*In re Overholzer*, 23 A. B. R. 10; contra, *In re O'Brien*, 21 A. B. R. 11.

sion of the court, the referee has full power to deal with its status, and can consider the validity of claims thereto,<sup>81</sup> and can set aside any transfers or incumbrances invalid under the act.<sup>82</sup>

Where a third party holds property at the time of the bankruptcy merely as agent or bailee of the bankrupt, he may be summarily required by the referee to turn the property over to the trustee; but where he acquires the possession prior to the bankruptcy, and claims the right to hold the property as against the bankrupt or the trustee, then the authority of the referee is limited to determining whether the claim is colorable merely, or is in fact adverse to the bankrupt, and according as he determines that question will he deny or retain jurisdiction of the controversy.<sup>83</sup>

The referee has authority to make an order permitting the trustee to intervene in a suit to set aside a fraudulent conveyance.<sup>84</sup>

### § 331. — Surrender of preference and collection of assets.

The referee has no authority whatever in respect to the collection of an estate administered before him, nor to handle the money thereof;<sup>85</sup> accordingly a creditor cannot surrender a preference to him in order to enable such creditor to prove his claim.<sup>86</sup>

### § 332. — Sale and appraisal of property.

Since the word "court," as used in the act, means the court of bankruptcy in which the proceedings are ending and may include the referee<sup>87</sup> a petition for an order of sale of the bankrupt's property may be presented to and granted by the latter,<sup>88</sup>

81—In re Drayton, 135 Fed. 883, 13 A. B. R. 602; In re Elletson Co., 174 Fed. 859, 23 A. B. R. 530, aff'd 183 Fed. 715, 24 A. B. R. 893.

82—In re Overholzer, 23 A. B. R. 10.

83—In re Famous Clothing Co., 179 Fed. 1015, 24 A. B. R. 780; In re Shults & Mark, 11 A. B. R. 690; In re Cohn, 18 A. B. R. 786; In re Carille, 199 Fed. 612, 29 A. B. R. 373; In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 A. B. R. 511; In re Walsh Bros., 163 Fed. 352, 21

A. B. R. 14; In re Knopf, 144 Fed. 245, 16 A. B. R. 432.

84—Conti v. Sunseri, 18 A. B. R. 891.

85—In re Pierce, 111 Fed. 516, 6 A. B. R. 747.

86—In re Thompson, 2 N. B. N. R. 1016; see In re Pierce, 111 Fed. 516, 6 A. B. R. 747.

87—Act of 1898, § 1 (7).

88—In re Fisher & Co., 135 Fed. 223, 14 A. B. R. 366.

and he has authority to appoint appraisers to value the estate of the bankrupt. But if the property is in the hands of a receiver before adjudication, appraisement or sale can be ordered only by the court of bankruptcy.<sup>89</sup> Although a sale should not be ordered before the adjudication unless it is necessary to preserve the value of the property, an order of sale made by a referee before the adjudication, while exercising the powers of the judge, will not be disturbed, where it was by consent and no prejudice is shown.<sup>90</sup>

A referee sitting as a court of bankruptcy, has power to order and to approve a sale of property free of liens or incumbrance,<sup>91</sup> in possession of the trustee, on notice to the incumbrancer, if in his judgment it is desirable, which would be the case where there was doubt as to the property covered by the mortgage.<sup>92</sup>

Where the bankrupt is the vendee in a contract for the sale of property, the referee may direct the trustee to execute a quit claim deed to same, the bankrupt having failed to perform his part of the contract.<sup>93</sup>

### § 333. — Injunctions.

By section 720 of the Revised Statutes of the United States, federal courts can only grant the writ of injunction to stay proceedings in a state court, when such an injunction is authorized by any law relating to proceedings in bankruptcy. This section remains still in force notwithstanding the act repealing the federal bankruptcy law of 1867 and its amendments. In view of which, together with the fact that courts of bankruptcy have such jurisdiction at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,<sup>94</sup> the power to grant injunctions under the present law is indisputable. As the word "court," when used in the law, is defined as meaning "the court of bankruptcy in which the proceedings are

89—In re Styer, 2 N. B. N. R. 205, 98 Fed. 290, 3 A. B. R. 424.

90—In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528.

91—In re Sanborn, 96 Fed. 551, 3 A. B. R. 54; In re Worland, 92 Fed. 893, 1 A. B. R. 450; In re Styer, 98 Fed. 290, 3 A. B. R. 424; In re Matthews, 109 Fed. 603, 6 A. B. R. 96; In re Kellogg, 113 Fed. 120, 122, 7 A. B. R. 623.

92—In re Sanborn, 96 Fed. 551, 3 A. B. R. 54; see also In re Christy, 3 How. 292, 11 L. ed. 603; Houston v. Bk., 6 How. 486, 12 L. ed. 526; Ray v. Norseworthy, 23 Wall. 128, 23 L. ed. 116.

93—Kenyon v. Mulert, 184 Fed. 825, 26 A. B. R. 184; In re Sonnabend, 18 A. B. R. 117.

94—Act of 1898, § 2.

pending and may include the referee,"<sup>95</sup> and, as by subdivision 4 of section 38, in addition to the specifically enumerated duties of the referee within the limits of their district, and subject to review, they are invested with jurisdiction "to perform such part of the duties except as to questions arising out of applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy," the conclusion is irresistible that a referee may also grant an injunction.<sup>96</sup> This has been held to be true, although the object of the injunction was to restrain foreclosure proceedings affecting property outside of the referee's district.<sup>97</sup>

After adjudication, the injunction is discretionary, provided the cause of action is one dischargeable in bankruptcy and may be granted: (1), if the bankrupt is threatened with an arrest, or will be needlessly harassed; (2), if the suit is not yet in judgment, and (3), even after judgment, if the rights of the general creditors, not parties to the suit, will be jeopardized by further proceedings in the state court, or the judgment is founded on a transaction which is an act of bankruptcy, or a fraud on the creditors or the law, and it has been held that, in the absence of either or both of the latter elements, it should never be granted after the judgment has ripened into an execution sale, provided the state court has or can be given jurisdiction of all parties interested in the distribution, including the general creditors represented by the trustee in bankruptcy.<sup>98</sup>

This power of the referee to grant an injunction is considered true notwithstanding the evident conflict between the act giving the referee concurrent jurisdiction with courts of bankruptcy, except as to questions affecting discharges and compositions, and General Orders XII-3, which provides that "application for

95—Act of 1898, § 1 (7).

96—In *re Northrop*, 1 A. B. R. 427; In *re Adams*, 1 N. B. N. 167, 1 A. B. R. 94; In *re Rogers*, 1 A. B. R. 541, 1 N. B. 211; In *re Killian*, 1 N. B. N. 267; In *re Kerski*, 2 A. B. R. 79; In *re Mussey*, 2 N. B. N. R. 213; In *re Matthews*, 109 Fed. 603, 6 A. B. R. 96; *Keegan v. King*, 96 Fed. 758, 3 A. B. R. 79; In *re Booth*, 96 Fed. 943, 2 A. B. R. 770; In *re Steuer*, 104 Fed. 976, 980, 5 A. B. R. 209; In *re Martin*, 105 Fed. 753, 5 A. B. R. 423; In

*re Wilkes*, 112 Fed. 975, 7 A. B. R. 574; *contra*, In *re Siebert*, 133 Fed. 781, 13 A. B. R. 348; In *re Adams*, 134 Fed. 142, 14 A. B. R. 23; In *re Berkowitz*, 143 Fed. 598, 16 A. B. R. 251; In *re Benjamin*, 140 Fed. 320, 15 A. B. R. 351.

See, also, § 1041.

97—In *re Sabine*, 1 N. B. N. 45, 1 A. B. R. 315.

98—In *re Globe Cycle Wks.*, 1 N. B. N. 421, 2 A. B. R. 447.

an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge, but he may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts."

### § 334. — Discharges and compositions.

Though questions arising out of applications for compositions or discharges are expressly excepted from a referee's jurisdiction<sup>99</sup> nevertheless the judge may refer such application, or any specified issue arising thereon, to the referee to ascertain and report the facts,<sup>1</sup> but such reference is made to him in the capacity of special master, not as referee in bankruptcy, and for duties independent of the latter office, and in no sense incompatible; in such a case his report is only advisory, the final hearing being before the judge.<sup>2</sup>

Whenever legal questions arise in considering a composition before a referee, the better practice is for him to appoint a day for bringing the composition before the court and issue the required notices to creditors, if requested to do so, suggesting in his report to the judge any questions arising or doubts as to the procedure adopted.<sup>3</sup> He may rule upon the sufficiency of specification of objections and should not take evidence on such as are clearly insufficient.<sup>4</sup>

The referee does not lose his powers in the administration of the estate because of the pendency of a composition offer. The pendency of a petition to set aside a composition does not operate to prohibit the referee from exercising his right independently of, or in conjunction with, such application to reopen the estate, and such reopening is not an interference with the administration of the estate. It is his duty to pass upon the truth or falsity of evidence on hearings in opposition to the discharge and, if a specification discloses valid objections to the

99—Act of 1898, § 38a.

Referee has no jurisdiction to confirm or reject a composition. *In re Sonnabend*, 18 A. B. R. 117.

1—G. O. XII.

2—*Fellows v. Freudenthal*, 102 Fed. 731, 4 A. B. R. 490; *In McDuff*, 101 Fed. 241, 4 A. B. R. 110.

3—*In re Hilborn*, 3 N. B. N. R. 62, 104 Fed. 866.

4—*In re Kaiser*, 2 N. B. N. R. 123, 3 A. B. R. 767, 99 Fed. 689; *contra*, *In re Leszynsky*, 2 N. B. N. R. 738.

discharge, *prima facie*, the case will be referred back to the referee for rehearing.<sup>5</sup>

### § 335. — Administration of oaths.

Referees are also authorized to administer such oaths as are required by the act, except upon "hearings in court." The power to administer oaths by referees is, therefore, restricted to proceedings in bankruptcy.<sup>6</sup> The adjudication made by a referee upon a petition duly referred to him is in no sense a "hearing in court," but is purely an *ex parte* proceeding.<sup>7</sup>

### § 336. — Costs and fees.

The statute is silent upon the right of a referee to tax costs in proceedings before him, but in explicit terms authorizes the court of bankruptcy "to tax costs whenever they are allowed by law, and render judgment therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."<sup>8</sup> In view of the fact that the referee exercises much of the judicial authority of that court<sup>9</sup> there is a clear implication that he exercises a like power to make a taxation of costs, or to order the taxation to be made by the clerk of the court of bankruptcy.<sup>10</sup>

The referee has the right, and it is his duty, to reduce the amount allowed by the trustee as fees for the attorney of the bankrupt, where excessive.<sup>11</sup>

### § 337. — Examinations and depositions.

The examination of the bankrupt and other witnesses before the referee is fully treated in Chapter XV.

### § 338. — Waiver of objections.

Unless objections are raised to the jurisdiction at an early stage of the proceedings, they will be considered as having been

5—In re Wolfstein, 1 N. B. N. 202.

6—In re Kindt, 2 N. B. N. R. 339.  
And see United States v. Liberman, 176 Fed. 161, 23 A. B. R. 734.

7—In re Kinot, 2 N. B. N. R. 339.

8—Act of 1898, § 2a (18).

9—Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; White v.

Schloerb, 178 U. S. 542, 44 L. ed. 1183, 4 A. B. R. 178.

10—In re Scott, 7 A. B. R. 710; In re Todd, 109 Fed. 265, 6 A. B. R. 88; see In re Ott, 95 Fed. 274, 2 A. B. R. 637.

11—In re Fureri, 188 Fed. 675, 26 A. B. R. 658.



waived and cannot be raised for the first time on the application to grant the discharge,<sup>12</sup> although it has been held that entire want of jurisdiction over the subject-matter may be taken advantage of at any time.<sup>13</sup> Where the referee takes jurisdiction of the subject matter, a party, submitting his person thereto and inviting action on his rights, cannot for the first time object to the jurisdiction and the way he was brought into court, on appeal and after an adverse decision.<sup>14</sup>

### § 339. Duties of referees.

#### § 340. — Presiding at first meeting of creditors.

At the first meeting of creditors, the judge or referee must preside.<sup>15</sup> If the referee presides he acts instead of the judge, and accordingly must pass upon judicial questions arising at the meeting, included within which is the power to determine the qualification and right to vote.<sup>16</sup> He should be punctually present at the time and place specified in the notice. Since his duties are judicial, he does not otherwise participate.<sup>17</sup>

#### § 341. — Declaration of Dividends.

The act specially makes it the duty of the referee to declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable.<sup>18</sup>

The referee must declare the first dividend within thirty days after the adjudication, if there is money sufficient to pay the debts entitled to priority and five per centum on claims which probably will be allowed. Subsequent dividends may be declared as often as the amount equals ten per cent or more and upon closing the estate.<sup>19</sup> He must in all cases ascertain the

12—In re Mason, 2 N. B. N. R. 425, 99 Fed. 256, 3 A. B. R. 599; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Clisdell, 2 N. B. N. R. 638, 101 Fed. 246, 4 A. B. R. 95; Allen v. Thompson, 10 Fed. 116; In re Thomas, 11 N. B. R. 330; See apparently contra, In re Little, 2 B. R. 298; In re Penn, 3 B. R. 582.

13—In re Mason, 99 Fed. 256, 2 N. B. N. R. 425, 3 A. B. R. 599.

14—In re Emrich, 2 N. B. N. R. 656, 4 A. B. R. 89, 101 Fed. 231; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405; 7 A.

B. R. 224; In re Matthews, 109 Fed. 603, 6 A. B. R. 96.

Objection to jurisdiction of referee in summary proceeding waived by failure to object. In re Hall & Sons, 208 Fed. 578, 31 A. B. R. 434.

15—Act of 1898, § 55b.

16—In re McGill, 106 Fed. 57, 5 A. B. R. 155.

17—Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 9 Fed. 696.

18—Act of 1898, § 39a.

19—Act of 1898, § 65b.

dividends to be paid to creditors entitled to priority, as well as to others, and place them all upon the dividend sheets,<sup>20</sup> which must be delivered to the trustee,<sup>21</sup> and which services involve a computation of the percentage to which creditors are entitled, as well as the amount to which each is entitled, according to such percentage.<sup>22</sup> He may be required to countersign all checks for dividends and other payments by the trustee,<sup>23</sup> which duty is judicial in its character and not ministerial.<sup>24</sup>

### § 342. — Notices.

All notices shall be given by the referee, unless otherwise ordered by the court.<sup>25</sup> Section 58a requires the referee to give creditors at least ten days' notice, by mail, of (1) all examinations of the bankrupt, (2) applications for compositions, (3) creditors' meetings, (4) proposed sales, (5) dividends, (6) filing of final accounts, (7) compromises, and (8) proposed dismissal of proceedings,<sup>26</sup> but the notices which the referee is required to give are not restricted to the particular cases enumerated in clause "a" of that section, but he is required to give all notices, unless the court should otherwise order.<sup>27</sup> Thirty days' notice is required in cases of applications for a discharge.<sup>27a</sup> This section is mandatory and requires that creditors shall have at least ten days' notice by mail of certain steps in the bankruptcy proceedings unless waived in writing,<sup>28</sup> and, if such notice has not been given, the fact that they were represented on the occasion, or even personally present, would doubtless, as was held under the act of 1867,<sup>29</sup> do away with the necessity for notice. These notices must be addressed to such places as are designated by the creditors, otherwise they should be addressed as specified in the proof of debt,<sup>30</sup> and where proof has not been

20—Official Form No. 40, § 1742, *post*.

21—In re Barber, 1 N. B. N. 559, 97 Fed. 547, 2 A. B. R. 307.

22—In re Fort Wayne Electric Corporation, 1 N. B. N. 356, 94 Fed. 109, 1 A. B. R. 706.

23—G. O. XXIX.

24—In re Clark, 9 N. B. R. 67, Fed. Cas. No. 2810.

25—Act of 1898, §§ 39a (4), 58c.

26—Act of 1898, § 58a.

27—In re Stoeve, 105 Fed. 355, 5 A. B. R. 250.

G. O. XVI requires the referee to notify trustees of their appointment.

27a—Act of 1898, § 58a, as amended June 25, 1910.

28—In re Gilbert, 2 N. B. N. R. 378.

29—In re Campbell, 17 N. B. R. 4, 3 Hughes 276, Fed. Cas. No. 2348.

30—G. O. XXI-2.

made, then as they appear in the list of creditors filed with the papers in the case.<sup>31</sup>

Notices and orders which are not by the act or by the General Orders required to be served on the party personally may be served upon his attorney. The creditor may request that all notices to which he is entitled be sent him at any designated place, and all notices shall be so addressed until otherwise directed;<sup>32</sup> but before incurring any expense in publishing or mailing notices, indemnity may be demanded therefor of the person for whom the service is rendered.<sup>33</sup> As official forms<sup>34</sup> are provided and the referee required to give the notices, the questions as to the sufficiency of the notices<sup>35</sup> or of their service<sup>36</sup> which arose under the act of 1867 are not likely to arise now, and the referee's official records will furnish evidence of service, of which the court takes judicial notice, and renders unnecessary the affidavit of service held sufficient ordinarily in case of service by mail under the act of 1867.<sup>37</sup>

### § 343. — Examination and amendments of schedules and lists.

The provision requiring the referee to examine schedules and lists of creditors and cause such as are incomplete or defective to be amended<sup>38</sup> is mandatory, and this seems to be true, although no interested party moves in the matter.<sup>39</sup> In particulars in which he finds them defective, it is within his discretion to order them to be amended and to refuse to call the first meeting of creditors until such amendments are made;<sup>40</sup> and he may allow the petition to be amended so as to allege additional acts of bankruptcy, originally omitted upon reasonably fair excuse; though it might be improper to abandon the original allegations and substitute entirely new ones.<sup>41</sup>

### § 344. — Preparation and filing of schedules.

It is the duty of the bankrupt, in the first instance, to prepare and file, within ten days after an adjudication, in case of invol-

31—Act of 1898, § 58a.

32—G. O. IV; XXI.

33—G. O. X.

34—Official Forms No. 18 and 41, §§ 1723, 1744, *post*.

35—In re Jones, 2 N. B. R. 20, Fed. Cas. No. 7447.

36—In re Schepeler, 3 N. B. R. 43, 3 Ben. 346, Fed. Cas. No. 12452.

37—In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13229.

38—Act of 1898, § 39a (2).

39—In re Mackey, 1 A. B. R. 593.

40—In re Brumelkamp, 1 N. B. N. 360, 95 Fed. 814, 2 A. B. R. 318.

41—In re Strait, 1 N. B. N. 354, 2 A. B. R. 308.

untary bankruptcy, and with the petition if voluntary, a correct schedule of his property,<sup>42</sup> and should an involuntary bankrupt fail to do so, the referee is required by the law to prepare and file the same, or cause it to be done,<sup>43</sup> though the supreme court, by its General Orders, places this duty upon the petitioning creditor, who is required to file the same within five days after the adjudication.<sup>44</sup> In order that this duty may be properly performed, the referee should be required to give creditors access to the records of the bankrupt, or furnish them with the necessary information to enable the preparation of the schedules and lists, as it is not to be presumed that this information is otherwise within their cognizance. The preparation of the schedules and lists by others than the debtor is not required until all necessary steps to compel the performance of this duty have proven futile, for which purpose an attachment may issue against the debtor, in case of his failure, after proper notice.<sup>45</sup>

#### § 345. — Furnishing information.

The referee is required to furnish interested parties any desired information as to proceedings before him, but not copies of the proceedings,<sup>46</sup> though there appears to be no reason why copies should not be furnished upon suitable reimbursement to cover the expense incident thereto.

#### § 346. — Accounts of receivers and trustees.

The referee must pass on the accounts of the receivers and trustees and be satisfied as to their correctness. He should in no case assume that an account is correct or that payments made are proper simply because no exceptions are filed thereto.<sup>47</sup>

#### § 347. Use of mails by referee.

The referee is an officer of the United States, and, as such, is entitled to transmit through the mails, free, in penalty envelopes, exclusively official mail matter, in accordance with the provisions of the postal laws and regulations.<sup>48</sup>

42—Act of 1898, § 7 (8).

43—Act of 1898, § 39 (6).

44—G. O. IX.

45—G. O. IX.

46—In re Lewin, 103 Fed. 850, 4 A. B. R. 632.

47—In re Fullick, 201 Fed. 463, 28 A. B. R. 634.

48—Act of July 5, 1884, p. 159, § 368.

### § 348. Orders of referees.

In all orders made by a referee, it must be recited, according as the fact may be, that notice was given, together with the manner thereof, or that the order was made by consent, or that no adverse opinion was represented at the hearing or that the order was made after hearing adverse opinion.<sup>49</sup> Where there is an appearance and a contest the referee should notify the parties of his decisions.<sup>50</sup>

The referee has power to annul or set aside an order founded on admitted mistake of facts.<sup>51</sup> The doctrine of laches is not applicable to a motion to set aside an order of a referee made without jurisdiction, especially where no rights have become vested thereunder.<sup>52</sup>

No orders of the referee can properly go on the bankruptcy record,<sup>53</sup> nor can an order of the referee be reviewed by a court in an action by the trustee.<sup>54</sup>

The order of a referee, if affirmed on review, is enforceable, not after the manner of courts of law, but by the process of commitment.<sup>55</sup> A party to an order made by the referee cannot ignore the order until the referee, under section 41, certifies his disobedience to the judge and then bring forward again, in his defense, matter contested before the referee prior to the making of the order, provided the order itself is not void.

### § 349. Records of referees.

#### § 350. — Preparation and preservation.

The records of all proceedings in a case before a referee should be kept as nearly as may be in the same manner as records are now kept in equity cases in the circuit courts of the United States. The records in each case should be kept in a separate book or books, and, when the case is concluded before the referee, it must be certified to by him, and, with such papers as are on file before him, be transmitted to the court of bankruptcy and there remain a part of the records of the court.<sup>56</sup>

49—G. O. XXIII.

50—In re Nichols, 166 Fed. 603, 22 A. B. R. 216.

51—In re Brenner, 190 Fed. 209, 26 A. B. R. 646.

52—In re Willis W. Russell Card Co., 174 Fed. 202, 23 A. B. R. 300.

53—In re Johnson, 158 Fed. 342, 19 A. B. R. 814.

54—Clendening v. Red-River Valley Nat. Bank of Fargo, 12 N. Dak. 51, 11 A. B. R. 245.

55—In re Gottardi, 114 Fed. 328, 341.

56—Act of 1898, § 42 provides,

The referee is required to indorse on each paper filed the day and hour of filing, and a brief statement of its character,<sup>57</sup> and should file it with the written authority from a creditor to an attorney, agent or proxy to represent and vote for him.<sup>58</sup>

The referee is required to make up a record embodying the evidence or the substance thereof as agreed upon by the parties in all contested matters arising before him, whenever requested by either of the parties, which must be transmitted to the judge, together with the findings made therein.<sup>59</sup> Upon application of any party in interest, he is required to preserve the evidence taken before him or the substance thereof as agreed upon by the parties when a stenographer is not in attendance;<sup>60</sup> or if in attendance a transcript of his notes;<sup>61</sup> and these, with any orders or notices, made by the referee, constitute the record of the proceedings, and should be neatly bound together as the record when the case is closed. On the closing of an estate the records should be sufficiently full and complete, to enable one to ascertain the full facts in regard to any given transaction without recourse to extrinsic explanation.<sup>62</sup>

Whenever papers on file before the referee are needed in any proceeding in court he should transmit them to the clerk and secure their return after they have been used, or transmit certified copies by mail when necessary.<sup>63</sup>

### § 351. — Records as evidence.

A certified copy of the proceedings before a referee, or of papers when issued by the clerk or referee, will be admitted as

“The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.”

Analogous provision of Act of 1867.

“Sec. 5. . . . Provided, always, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk’s office as a part of the proceedings. . . .

“Sec. 38. . . . the proceedings in all cases of bankruptcy shall be deemed

matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection.”

57—G. O. II.

58—In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696.

59—Act of 1898, § 39 (5).

60—Act of 1898, § 39 (9); G. O. 22.

61—Act of 1898, § 38 (5).

62—In re Carr, 116 Fed. 556, 8 A. B. R. 635.

63—Act of 1898, § 39 (8).

evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted.<sup>64</sup> A record cannot be impeached without previous notice by proper form of pleading.<sup>65</sup>

The referee's entries will as a rule prove what proceedings have taken place before him,<sup>66</sup> but as to the number of days that a witness was in attendance before him the clerk's certificate would be *prima facie* evidence.<sup>67</sup>

The referee's record must be taken as a true report of the proceedings and on an application to confirm a composition, notwithstanding that opposing creditors offer affidavits to show that he omitted to record objections and other proceedings and misstated what took place.<sup>68</sup>

### § 352. Semi-annual reports.

In order to enable the attorney general to report annually to congress as required by section 53 the referees are required to furnish him semi-annually statistics as to the business transacted by them.<sup>69</sup>

### § 353. Conclusiveness of findings.

There is no arbitrary rule for determining the weight to be given findings of a referee as special master, the weight to be given them depending upon their character.<sup>70</sup> However, the findings of a referee or master concurred in by the district court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, but they are not conclusive.<sup>71</sup> So, upon an application to review an order made by

64—Act of 1898, § 21d.

65—*Sloan v. Lewis*, 12 N. B. R. 173, 22 Wall. 150, 22 L. ed. 832.

66—*In re Crane*, 15 N. B. R. 120, Fed. Cas. No. 3352.

67—*In re Crane*, 15 N. B. R. 120, Fed. Cas. No. 3352.

68—*In re Spencer*, 18 N. B. R. 199, Fed. Cas. No. 13229.

69—Act of 1898, § 54.

70—*Baumhauer v. Dustin*, 186 Fed. 260, 26 A. B. R. 385. *In re McCrary Bros.*, 169 Fed. 485, 22 A. B. R. 161.

71—*In re Lawrence*, 134 Fed. 843, 13 A. B. R. 798; *In re Noyes Bros.*, 127 Fed. 286, 11 A. B. R. 506; *In re Dorr*, 196 Fed. 292, 28 A. B. R. 505; *Houck v. Christy*, 152 Fed. 612, 18 A. B. R. 330; *Buckingham v. Estes*, 128 Fed. 584, 12 A. B. R. 182; *Southern Pine Co. of Georgia v. Savannah Trust Co.*, 141 Fed. 802, 15 A. B. R. 618; *Salsburg v. Blackford*, 204 Fed. 438, 29 A. B. R. 320; *Lumpkin v. Foley*, 204 Fed. 372, 29 A. B. R. 673.

a referee or special master, the court will neither vacate nor modify it, where it rests upon a matter within the referee's or master's discretion,<sup>72</sup> unless abused, nor will it interfere with his decision upon questions of fact, unless convinced that it is manifestly against the weight of evidence, or there is clear error, though the court might have reached a different conclusion.<sup>73</sup> However, the referee's findings of fact are not conclusive, as is the verdict of a jury, or the findings made by the judge in an action at law when a jury has been waived.<sup>74</sup> And where the evidence is not in serious conflict, and the referee's conclusions are based principally upon inferences to

72—In re Brumelkamp, 1 N. B. N. 360, 95 Fed. 814, 2 A. B. R. 318.

73—In re Malschick v. Levin, 206 Fed. 71, 30 A. B. R. 237; In re Hodge, 205 Fed. 824, 30 A. B. R. 522; In re Schwarz, 200 Fed. 309, 29 A. B. R. 700; In re Doyle, 199 Fed. 247, 29 A. B. R. 102; In re Geiver, 193 Fed. 128, 28 A. B. R. 413; In re Brenner, 190 Fed. 209, 26 A. B. R. 646; In re Boner, 189 Fed. 93, 26 A. B. R. 321; In re Atcherley, 25 A. B. R. 827; In re Hutchins Co. 179 Fed. 864, 24 A. B. R. 647; Neumann v. Blake, 178 Fed. 916, 24 A. B. R. 575; In re McDonald & Sons, 178 Fed. 487, 24 A. B. R. 446; In re Landsberger, 177 Fed. 443, 24 A. B. R. 107; Canner v. Webster Tapper Co., 168 Fed. 519, 21 A. B. R. 872; In re Hoffman, 173 Fed. 234, 23 A. B. R. 19; Fouché v. Shearer, 172 Fed. 592, 22 A. B. R. 828; Westall v. Avery, 171 Fed. 626, 22 A. B. R. 673; In re Braselton, 169 Fed. 960, 22 A. B. R. 419; In re Sweeney, 168 Fed. 612, 21 A. B. R. 866; First Nat. Bank of Philadelphia v. Abbott, 165 Fed. 852, 21 A. B. R. 436; In re Hatem, 161 Fed. 895, 20 A. B. R. 470; In re Littman, 159 Fed. 233, 20 A. B. R. 300; In re Kenyon, 156 Fed. 863, 19 A. B. R. 194; In re Simon v. Sternberg, 151 Fed. 507, 18 A. B. R. 204; In re Billing, 145 Fed. 395, 17 A. B. R. 80; In re Harr, 143 Fed. 421, 16 A. B. R. 213; Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 518, 15 A. B. R. 804; In re Nas-

sau, 140 Fed. 912, 14 A. B. R. 828; In re Romine, 138 Fed. 837, 14 A. B. R. 785; In re Shults, 135 Fed. 623, 14 A. B. R. 378; In re Royce Dry Goods Co., 133 Fed. 100, 13 A. B. R. 257; Coutts v. Townsend, 126 Fed. 249, 11 A. B. R. 126; In re West, 116 Fed. 767, 8 A. B. R. 564; In re Stephens, 114 N. R. 192, 8 A. B. R. 153; In re Boorstin, 114 Fed. 696, 8 A. B. R. 89; In re Stout, 109 Fed. 794, 6 A. B. R. 505; In re Covington, 110 Fed. 143, 6 A. B. R. 373; In re Waxelbaum, 101 Fed. 228, 4 A. B. R. 120; In re Ryder, 96 Fed. 811, 3 A. B. R. 193; In re Richard, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506; In re Miner, 117 Fed. 953, 9 A. B. R. 100; see In re Swift, 118 Fed. 348.

Presumption in favor of referee's finding of fact. In re Cox, 199 Fed. 952, 29 A. B. R. 456; In re Starkweather & Albert, 206 Fed. 797, 30 A. B. R. 743.

Finding of special master presumptively correct. Peterson v. Mettler, 198 Fed. 938, 29 A. B. R. 158.

Doubts resolved in favor of referee's determination of questions of fact. In re Charles Town L. & P. Co., 199 Fed. 846, 29 A. B. R. 721.

It will be presumed that referee performed his duty and that his report is based upon competent testimony only. In re Kramer & Muchnick, 209 Fed. 627, 31 A. B. R. 377.

74—In re Hawks, 204 Fed. 309, 30 A. B. R. 365.



be drawn therefrom, the referee's decision is entitled to no presumption in its favor.<sup>75</sup>

Where the assignee of the bankrupt consents to a judicial examination of the items of his account by the referee and the court, he is bound by their determination.<sup>76</sup>

#### § 354. Review of orders and findings.

##### § 355. — Right of review.

Only final orders of the referee can be reviewed by petition.<sup>77</sup> The district court cannot review mere opinions of the referee upon questions of law where no order or judgment has been entered.<sup>78</sup> All rulings pertaining to questions arising in the course of administration<sup>79</sup> may, however, be reviewed, including an order of the referee approving the appointment of a trustee<sup>80</sup> or allowing fees to himself.<sup>81</sup>

General Order XXVII does not give a creditor an unlimited right of petition for review of an allowed claim, the mention of creditors not being intended to cover cases where the order complained of is one affecting creditors generally and which calls for action by the trustee.<sup>82</sup> One who has filed his claim is entitled to petition for a review although the claim has been neither allowed or disallowed by the referee.<sup>83</sup> The refusal of the referee to accept a claim because not filed within the year is not a judicial act, requiring an order and a petition of review.<sup>84</sup>

A bill of review can be filed for errors of law apparent on the face of the record, or because of the discovery of new evidence since the hearing, which could not have been discovered prior to the hearing by the use of due diligence. The evidence must

75—*In re Big Cahaba Coal Co.*, 26 A. B. R. 910; *Id.*, 183 Fed. 662, 25 A. B. R. 761.

And see, *In re People's Dept. Store Co.*, 159 Fed. 256, 20 A. B. R. 244.

76—*In re Banzai Mfg. Co.*, 183 Fed. 298, 25 A. B. R. 497.

77—*In re Schimmel*, 203 Fed. 181, 29 A. B. R. 361.

Action of referee in overruling bankrupt's petition to dismiss a petition to show cause for want of proof held not final. *Id.*

78—*In re Schneider*, 203 Fed. 589, 29 A. B. R. 469.

79—*In re Carlile*, 199 Fed. 612, 29 A. B. R. 373.

80—*In re Hanson*, 156 Fed. 717, 19 A. B. R. 235.

81—*In re Albert*, 173 Fed. 691, 23 A. B. R. 101.

82—*In re Mexico Hardware Co.*, 197 Fed. 650, 28 A. B. R. 736.

83—See *Allgair v. Fisher & Co.*, 143 Fed. 962, 16 A. B. R. 278.

84—*In re Baker Notion Co.*, 180 Fed. 922, 24 A. B. R. 808.

be relevant, material, and such as would have produced a different result if introduced at the hearing. It must have been unknown to the party at the time of the hearing, and such as by due diligence could not have been known. In case newly discovered evidence is set up, such a bill can only be filed by express leave of court, and great caution is to be used in granting such leave.<sup>85</sup>

Rulings of the referee excluding evidence not taken and returned to the appellate court are not reviewable there. The remedy for the refusal of a referee to take and preserve such evidence is an application to the district court, and failing there to the circuit court of appeals, for an order that it be taken and preserved.<sup>86</sup>

### § 356. — Practice.

General Order XXVII prescribes the only method of review of orders and findings of the referee.<sup>87</sup> It provides that when a bankrupt, creditor, trustee, or other person desires a review by the judge of any order made by the referee, he must file with the referee his petition therefor setting out the error complained of.<sup>88</sup> Merely filing exceptions to a referee's rulings in the court of bankruptcy does not properly bring before the court for review such rulings, but the requirements of the law must be complied with,<sup>89</sup> and in default of a petition, the application for review will be dismissed.<sup>90</sup>

Upon the filing of a petition for review, the referee must forthwith certify to the judge the question presented, a summary of the evidence relating thereto and his finding and order thereon,<sup>91</sup>

85—*In re McIntire*, 142 Fed. 593, 16 A. B. R. 80.

86—*First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436.

87—*In re Clark Coal & Coke Co.*, 173 Fed. 658, 23 A. B. R. 273, rev'g in part 22 A. B. R. 843; *In re T. M. Leshner & Son*, 176 Fed. 650, 25 A. B. R. 218; *In re Carlile*, 199 Fed. 612, 29 A. B. R. 373; *In re Home Discount Co.*, 147 Fed. 538, 17 A. B. R. 168.

88—Error relied on must be clearly pointed out. *In re Harnden*, 200 Fed. 175, 29 A. B. R. 507.

89—*In re Hawley*, 116 Fed. 429, 8 A.

B. R. 631; *Dressel v. North State Lumber Co.*, 119 Fed. 531.

90—*In re Schiller*, 96 Fed. 400, 2 A. B. R. 704; *In re Russell*, 105 Fed. 501, 5 A. B. R. 566.

91—Act of 1898, § 39 (5); G. O. XXVII. *In re Samuel Kurtz*, 125 Fed. 992, 11 A. B. R. 129; *In re Marengo Co. Mercantile Co.*, 199 Fed. 474, 29 A. B. R. 46; *Crim v. Woodford*, 136 Fed. 34, 14 A. B. R. 302.

Sending up stenographer's transcript in extenso disapproved. *In re Harnden*, 200 Fed. 172, 29 A. B. R. 504.

whose duty it is to consider, confirm, modify, overrule or return with instruction for further proceedings such records and findings.<sup>92</sup> Where the referee fails to send a summary of the evidence, the judge may direct him to prepare and submit it, and either party may move for an order to that effect.<sup>93</sup>

The certificate should state clearly and distinctly the precise question for review,<sup>94</sup> and the referee should not confine himself to a summary of the testimony and a statement of his belief therein, but should make definite findings of fact.<sup>95</sup> A certificate of the referee which contains neither a ruling nor an order made by him cannot be considered as a petition to review his findings.<sup>96</sup> A certificate concerning an order to sell property discharged of liens should affirmatively show that notice has been given creditors and lienholders. A general statement that such notice has been given will not suffice.<sup>97</sup>

Specific questions arising in a proceeding, may be presented for review of the court, on certificate setting forth the question involved, which should be signed by the referee, or in case of orders entered, on petition for review, and not in the form of assignment of errors.<sup>98</sup> Exceptions to a determination by the referee may be taken by any party in interest. Exceptions to the decisions and rulings of the referee need not, however, be filed in the absence of a rule or order of the court requiring such filing,<sup>99</sup> and where the specific question of the correctness of a referee's findings is certified to the court for decision on petition of a party, no formal exceptions to such findings are required to render them reviewable.<sup>1</sup>

### § 357. — Time for applying for review.

After the time within which an act is required to be done by parties to proceedings in bankruptcy has expired, rights are thereby conferred by law, and the courts will not ordinarily

92—Act of 1898, § 2 (10).

93—*Crim v. Woodford*, 136 Fed. 34, 14 A. B. R. 302.

94—*In re Milgran & Ost.*, 133 Fed. 802, 13 A. B. R. 337.

95—*In re Turetz*, 29 A. B. R. 752.

96—*Craddock-Terry Co. v. Kaufman*, 175 Fed. 303, 23 A. B. R. 724.

97—*In re Saxton Furnace Co.*, 136 Fed. 697, 14 A. B. R. 483.

98—See *In re Kelly Dry Goods Co.*, 102 Fed. 747, 4 A. B. R. 523; *In re Reliance Storage and Warehouse Co.*, 100 Fed. 619, 4 A. B. R. 49.

99—*In re People's Dept. Store Co.*, 159 Fed. 286, 20 A. B. R. 244.

1—*In re Miner*, 117 Fed. 953; but see *In re Carver*, 113 Fed. 138, 7 A. B. R. 539; *In re Lane Lumber Co.*, 206 Fed. 780, 30 A. B. R. 749.

deprive of such rights the party who may be entitled thereto by reason of the neglect or omission on the part of his adversary.<sup>2</sup> While the power of the court in this respect is quite broad,<sup>3</sup> it is held that delay in filing exceptions to a referee's rulings until after the expiration of ten days, unless the time is enlarged by the court, will prevent their consideration.<sup>4</sup>

While neither the statute nor general orders contain any provision fixing the time within which an application for a review of the referee's decisions must be made, if exceptions are not promptly taken, but there is an apparent acquiescence in a decision, some good reason should appear for permitting objections to be made that are out of season. The circumstances in each case must therefore determine whether the right to review is deemed to have been waived.<sup>5</sup>

In the absence of a rule fixing the time within which an application to review an order of the referee shall be made, the same should be made within a reasonable time.<sup>6</sup> The application for review, in such case, is addressed to the sound discretion of that court, and the exercise of that discretion will not be disturbed except in case of abuse thereof.<sup>7</sup> The time fixed for an appeal from the same class of orders will be regarded as a reasonable time.<sup>8</sup>

A rehearing on the merits will not be allowed for the sole purpose of reviving a right to review.<sup>9</sup>

2—In re Scott, 99 Fed. 404, 2 N. B. N. R. 440, 3 A. B. R. 625.

3—G. O. XXXVII.

4—In re Greek Mfg. Co., 164 Fed. 211, 21 A. B. R. 111; In re Marks, 171 Fed. 281, 22 A. B. R. 568.

5—In re Nippon Trading Co., 182 Fed. 959, 25 A. B. R. 695; In re Scherr, doing business as Scherr Bros., 138 Fed. 695, 14 A. B. R. 794; In re Koenig & Van Hoogenhuyze, 127 Fed. 891, 11 A. B. R. 617; In re Milgraum & Ost, 133 Fed. 802, 13 A. B. R. 337; In re Chambers, Calder & Co., 6 A. B. R. 709; In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528; In re Reliance Storage & Warehouse Co., 100 Fed. 619, 4 A. B. R. 49.

6—In re Foss, 147 Fed. 790, 17 A. B. R. 439; In re Verdon Cigar Company, 193 Fed. 813, 27 A. B. R. 56; In re Nichols, 166 Fed. 603, 22 A. B. R. 216.

Delay of four months held unreasonable. In re Grant, 143 Fed. 661, 16 A. B. R. 256.

Delay of five months held unreasonable. In re Verdon Cigar Co., 193 Fed. 813, 27 A. B. R. 56.

Delay of 25 days not unreasonable. Crim v. Woodford, 136 Fed. 34, 14 A. B. R. 302.

Delay of 30 days held reasonable. In re Foss, 147 Fed. 790, 17 A. B. R. 439.

Twenty days allowed in District of Columbia. In re Maloney, 37 Wash. L. Rep. 147, 21 A. B. R. 502.

7—Bacon v. Roberts, 146 Fed. 729, 17 A. B. R. 421.

8—In re Nichols, 166 Fed. 603, 22 A. B. R. 216.

9—In re Girard Glazed Kid Co., 129 Fed. 841, 12 A. B. R. 295.

**§ 358. — Scope of review.**

A general review of the proceedings before the referee, or rulings not directly affecting an order made, is not intended<sup>10</sup> and ordinarily only questions involved in issues before the referee are to be reviewed.<sup>11</sup>

The provision as to the petition is mandatory, and, consequently, on a review of the referee's decision, the court will not consider exceptions not duly filed with the referee.<sup>12</sup> It has been held, however, that a court will notice manifest errors in a record that is certified to it, although not raised by counsel;<sup>13</sup> or considered by the referee; but it will not look through voluminous depositions and records for errors which are not plainly pointed out.<sup>14</sup> Irrelevant issues raised by a party not in court should be returned without decision.<sup>15</sup>

The power of review being unlimited,<sup>16</sup> questions of fact as well as of law may be considered;<sup>17</sup> in the court's discretion the inquiry may be restricted to the report of the referee and the evidence to which he refers therein, and to such evidence as the petitioner for review has set forth in his exceptions to the finding.<sup>18</sup>

**§ 359. — Action on petition.**

The record and findings of the referee may be modified, overruled or returned by the court with instructions for further proceedings by the referee.<sup>19</sup> Upon reversal of an order of the referee disallowing a claim upon motion of the referee, the district court should remand the case with directions to allow the

10—In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528; In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168.

11—In re Sam Z. Lorch & Co., 199 Fed. 944, 28 A. B. R. 784.

12—In re Scott et al., 99 Fed. 404, 2 N. B. N. R. 440, 3 A. B. R. 625; In re Gottardi, 114 Fed. 328, 333; In re Carver, 113 Fed. 138, 7 A. B. R. 539.

Objections to evidence received by the referee cannot be made for the first time upon review of his order. In re McCann Bros. Ice Co., 171 Fed. 265, 22 A. B. R. 555.

13—In re Wilde's Sons, 144 Fed. 972, 16 A. B. R. 386, aff'g 137 Fed. 517, 13 A. B. R. 217; In re Clay, 192 Fed. 830, 27 A. B. R. 715; In re Woodard, 95 Fed. 955, 1 N. B. N. 430, 2 A. B. R. 692.

14—In re Richard, 1 N. B. N. 487, 94 Fed. 643, 2 A. B. R. 506; In re Carver, 113 Fed. 138, 7 A. B. R. 539.

15—Haskell v. Jones, 4 N. B. R. 481, Fed. Cas. No. 6191.

16—Sec. 38a.

17—In re Gottardi, 114 Fed. 328, 333.

18—In re Stokes, 185 Fed. 994, 26 A. B. R. 255.

19—Act of 1898, § 2 (10).

trustee to put in his proofs,<sup>20</sup> so, where the referee, ignoring the rule that the sworn proof of claim is *prima facie* evidence of its allegations disallows a claim, on the ground that no evidence has been introduced in support thereof, the district court in reversing the ruling of the referee should remand the proceedings to the referee for a new hearing.<sup>21</sup>

### § 360. — Review by referee.

An order of a referee once entered is not subject to be reviewed or altered by the referee himself.<sup>22</sup>

### § 361. — Effect of appeal.

The proceedings will not be stayed merely because an appeal has been taken from a referee's decision, but the estate will be protected and the administration proceeded with.<sup>23</sup>

In the absence of statutory provisions or rules of court, a petition to review an order of the referee does not in and of itself act as a supersedeas of the order, and whether or not it shall have that effect rests in the discretion of the court.<sup>24</sup>

### § 362. Certification of hypothetical questions.

A question, in order to be certified to the judge, must arise in the course of the proceedings before the referee and between parties having a right to raise it,<sup>25</sup> as an opinion will not be given on an abstract question.<sup>26</sup> The judge cannot be compelled to answer questions before the referee himself takes action.<sup>27</sup>

### § 363. Fees for filing petition and claims.

The referee is entitled to a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except

20—A decree reversing the referee's order and allowing the claim is improper. *In re Livingston Co.*, 144 Fed. 971, 16 A. B. R. 385.

21—*Moore v. Crandall*, 205 Fed. 689, 30 A. B. R. 517.

22—*In re Marks*, 171 Fed. 281, 22 A. B. R. 568; *In re Greek Mfg. Co.*, 164 Fed. 211, 21 A. B. R. 111.

23—*In re Brown*, 2 N. B. N. R. 590.

24—*In re Home Discount Co.*, 147 Fed. 538, 17 A. B. R. 168.

25—*In re Wright*, 1 N. B. R. 191, Fed. Cas. No. 18069; *In re Bray*, 2 N. B. R. 53, Fed. Cas. No. 1818; *In re Freedenburg*, 1 N. B. R. 34, 2 Ben. 133, Fed. Cas. No. 5075.

26—*In re Renkauff, Sons & Co., Inc.* 135 Fed. 251, 14 A. B. R. 344; *In re Sturgeon*, 1 N. B. R. 131, Fed. Cas. No. 13564.

27—*Craddock-Terry Co. v. Kaufman*, 175 Fed. 303, 23 A. B. R. 724.

when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration.<sup>28</sup>

The clerk is required to collect the referee's fee of \$15 in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt accompanied by a pauper affidavit,<sup>29</sup> such fee to be in full for all services performed by the referee under the act, or general orders.<sup>30</sup> In any case in which such fee is not required to be paid, before filing the petition, the judge may at any subsequent time order it paid out of the estate, or, after notice and proof of bankrupt's ability, require him to pay it.<sup>31</sup>

Prior to the amendatory act of February 5, 1903, the practice with reference to the fee charged by referees for this service varied, in some states no fee was allowable, while in others it was permitted by rule of court. Referees are now entitled to charge for every proof of claim filed for allowance twenty-five cents, though there appears to be no warrant for exacting an additional fee on filing an amended or substituted proof of claim. This fee is not to be paid by the creditor on filing the proof, but the referee is entitled to charge it against the estate, if any there be, as with other expenses incurred, as part of the cost of administration.<sup>32</sup>

### § 364. Expenses of referee.

#### § 365. — In general.

The compensation of the referee does not include expenses of publishing, or mailing, notices, traveling, or perpetuating testimony, or other expenses necessarily incurred and allowed by the judge;<sup>33</sup> and actual expenses so incurred may be allowed him over and above his percentage. Money advanced for this purpose will be repaid out of the estate as a part of the cost of administering the same.<sup>34</sup> Before incurring any of these

28—Act of 1898, § 40a.

29—Act of 1898, § 51a (2).

30—In re Barker, 111 Fed. 501, 7 A. B. R. 132.

31—G. O. XXXV.

32—See In re Stewart, 193 Fed. 791, 27 A. B. R. 529.

33—G. O. XXXV; In re Dixon, 114 Fed. 675, 8 A. B. R. 145; In re Pierce, 111 Fed. 516, 6 A. B. R. 747; In re Daniels, 130 Fed. 597, 12 A. B. R. 446.

34—G. O. IV.

expenses, the referee may require indemnity from the person for whom the service is to be rendered.<sup>35</sup>

### § 366. — Stenographic and clerical help.

A referee has authority, upon the application of the trustee, during the examination of the bankrupt, or other proceedings, to authorize the employment of a stenographer at the expense of the estate at ten cents a folio,<sup>36</sup> but it has been held that he is not required to take notes of testimony personally or incur the expense of clerical or stenographic aid, but should supervise the taking of testimony at the expense of the parties, or permit them to take it.<sup>37</sup> In the absence of any other provision with reference to the employment of a stenographer than as thus provided,<sup>38</sup> no further charge for such fees can be imposed even though it be for a copy of the deposition for use of the court, except it be in pursuance of some stipulation by the parties to the cause.<sup>39</sup> The provision as to the employment of a stenographer has been held inapplicable where the hearing was not a statutory hearing before a referee<sup>40</sup> as where at the request of the creditors or of the receiver a special hearing was had before a special commissioner,<sup>41</sup> or where the expenses were incurred at the instance of counsel, for the purpose of taking testimony necessary because of his negligence, which invited inquiry concerning the accuracy of his accounts;<sup>42</sup> or where an examination is undertaken, at the suggestion of trustee's attorney, to discover concealed assets, against the objection of labor claimants, whose claims would absorb the admitted assets, and which resulted in no benefit to the estate.<sup>43</sup>

A referee may employ a clerk for the performance of these services and the expense so incurred is properly allowable.<sup>44</sup>

35—G. O. X.

36—In re Todd, 109 Fed. 265, 6 A. B. R. 88; see also In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 A. B. R. 651.

37—In re Warszawiak, 1 N. B. N. 135.

38—Sec. 38a (5).

39—In re Todd, 109 Fed. 265, 6 A. B. R. 88. But see In re Ellett Elec. Co., 196 Fed. 400, 28 A. B. R. 453, in which the court approved an allowance of forty cents per page, three copies having been made,

40—In re Stark, 155 Fed. 694, 18 A. B. R. 467.

41—In re Stark, 155 Fed. 694, 18 A. B. R. 467.

42—In re Gerson, 2 N. B. N. R. 493, 1 A. B. R. 251.

43—In re Rozinsky, 2 N. B. N. R. 787, 101 Fed. 229, 3 A. B. R. 830.

44—In re Warszawiak, 1 N. B. N. 135; In re Price, 91 Fed. 635, 1 A. B. R. 419; In re Tebo, 101 Fed. 419, 4 A. B. R. 235; contra, In re Carolina Cooperage



**§ 367. — Account of expenses and manner of payment.**

The referee must keep an accurate account of his traveling and incidental expenses and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him and must make return of the same, under oath, to the judge with proper vouchers, when they can be procured, on the first Tuesday in each month,<sup>45</sup> and, if approved, they will be paid or allowed out of the estates in which they were incurred.<sup>46</sup>

**§ 368. — Exceptions to charges.**

Exceptions to the referee's charges against an estate in bankruptcy for his expenses therein will not be heard by the court, when his account therefor has been duly kept and returned to the court, under oath, with vouchers,<sup>47</sup> and approved; especially when distribution has been made before such exceptions were presented.<sup>48</sup>

**§ 369. Compensation in pauper cases.**

No provision is made for the payment of compensation or necessary expenses in cases where the bankrupt files his petition in forma pauperis,<sup>49</sup> but if, at any time during the pendency of the proceedings, assets should be developed, the court may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he has or can obtain the money, order him to pay such fees, and, on default, dismiss the petition.<sup>50</sup>

**§ 370. Commissions on disbursements.**

The referee is entitled to one per centum on all moneys disbursed to creditors by the trustee in the bankruptcy proceedings, and to one-half of one per centum on the amount paid under a composition.<sup>51</sup> He is only entitled to commissions upon such moneys as have been under his authority disbursed to cred-

Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 Fed. 950.

45—G. O. XXVI; In re Daniels, 130 Fed. 597, 12 A. B. R. 446.

46—Act of 1898, § 62; In re Stewart, 193 Fed. 791, 27 A. B. R. 529.

47—G. O. XXVI.

48—In re Tebo, 101 Fed. 419, 4 A. B. R. 235, but see In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 A. B. R. 651.

49—Act of 1898, § 51.

50—G. O. XXXV-4; see also Act of 1898, § 51.

51—Act of 1898, § 40a.

itors and cannot credit himself with a percentage upon the entire amount of claims and liabilities scheduled.<sup>52</sup>

The present act establishes a new rule for the determination of the compensation due to officers charged with the administration of bankrupt estates, differing from the preceding acts, and, consequently, there is an absence of precedent touching the right of commissions upon secured claims. It was held prior to the amendatory act that the use of the term "dividend" in this section limited the commission to unsecured claims and those not entitled to priority of payment,<sup>53</sup> and that priority claims with reference to commissions, stood on a different footing from secured claims, and that the term "dividends," as used in section 65a, could have no application to the former for the reason that the statute directed them to be paid out of the estate in full, seriatim, before the matter of declaring and paying dividends arose, and the referee was denied a commission thereon.<sup>54</sup> The amendment, however, removes all doubt, and the referee is now clearly entitled to "commissions on all moneys lawfully disbursed" by the trustee, and held by him as such, whether to creditors, secured or unsecured or having priority, or to other persons. If to creditors it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends or in satisfaction of liens upon the fund.<sup>55</sup>

There seems now to be no question in view of the change of phraseology that the provision comprehends the case of a secured creditor who submits his securities to the federal jurisdiction, the avails of the property being disbursed by the trustee in bankruptcy, in which event a commission should be allowed thereon.<sup>56</sup>

Commissions are to be allowed upon all sums which would

<sup>52</sup>—*Fiedling v. Philips*, 210 Fed. 889, 31 A. B. R. 542.

<sup>53</sup>—*In re Fort Wayne Electric Corporation*, 1 N. B. N. 356, 94 Fed. 109, 1 A. B. R. 706; *In re Fielding*, 2 N. B. N. R. 735, 96 Fed. 800, 3 A. B. R. 135; *In re Utt*, 105 Fed. 754, 5 A. B. R. 383; *In re Mammoth Pine Lumber Co.*, 116 Fed. 731, 8 A. B. R. 651; see *In re Smith*, 108 Fed. 39, 5 A. B. R. 559; *In re Barker*, 111 Fed. 501, 7 A. B. R. 132.

<sup>54</sup>—*In re Fielding*, 2 N. B. N. R. 735, 96 Fed. 800, 3 A. B. R. 135; *In re Sabine*, 1 N. B. N. 312, 1 A. B. R. 322; *contra*, *In*

*re Gerson*, 1 N. B. N. 384, 2 A. B. R. 352; *In re Muhlhauser Co.*, 9 A. B. R. 80.

<sup>55</sup>—*Varney v. Harlow*, 210 Fed. 824, 31 A. B. R. 339; *In re Meadows*, 199 Fed. 304, 29 A. B. R. 165; *In re Cramond*, 145 Fed. 966, 17 A. B. R. 22; *In re Iowa Falls Mfg. Co.*, 140 Fed. 527, 15 A. B. R. 384.

<sup>56</sup>—See *In re Barber et al.*, 1 N. B. N. 559, 97 Fed. 547, 3 A. B. R. 307; *In re Sabine*, 1 N. B. N. 312, 1 A. B. R. 322; *In re Coffin*, 1 N. B. N. 507, 2 A. B. R. 344; see *In re Muhlhauser Co.*, 9 A. B. R. 80.

have been paid through the trustee but for an outside agreement between the parties, and when property subject to liens is sold by consent of the parties holding such liens, the referee is entitled to commissions on the purchase price in full.<sup>57</sup>

Where mortgaged property is sold by the trustee and the latter is credited with the amount of his mortgage, such credit is a constructive payment upon which the referee is entitled to a commission.<sup>58</sup> When, however, a secured creditor has recourse to a state court to foreclose his lien, or when personal property coming into the custody of the bankruptcy court, is sold by the pledgee thereof under a specific contract of sale, and the pledgee does not participate in the bankruptcy proceedings, no commissions are computed on the amount realized.<sup>59</sup> So, the setting apart to the bankrupt of a homestead exemption from proceeds of property sold by the trustee is not the making of a dividend nor such a disbursement as would entitle the referee to a commission upon the same.<sup>60</sup>

A referee cannot be allowed his statutory percentages out of property which comes into the possession of the trustee through the fraud of the bankrupt and is adjudged to be returned to the real owner.<sup>61</sup> Where he authorizes the continuation of the business of the bankrupt, without express authority from the court, he is not entitled to commissions on all funds paid out by the trustees in the conduct of such business, but a decree awarding the referee compensation on that basis will not be disturbed as to payments already made thereunder where the referee and the court acted in good faith and the circumstances were fully known by all parties in interest.<sup>62</sup>

The judge may order the commissions paid immediately after they are earned.<sup>63</sup>

### § 371. Extra compensation.

The commission with the filing fee is to be in full compensa-

57—*In re Sanford Furniture Mfg. Co.*, 126 Fed. 888, 11 A. B. R. 414.

58—*Varney v. Harlow*, 210 Fed. 824, 31 A. B. R. 339.

59—*In re Meadows*, 199 Fed. 304, 29 A. B. R. 165.

60—*In re Gardner*, 2 N. B. N. R. 796, 103 Fed. 932, 4 A. B. R. 420.

61—*Gillespie v. Piles & Co.*, 178 Fed. 886, 44 L. R. A. (N. S.) 1, 24 A. B. R. 502.

62—*Bray v. Johnson*, 166 Fed. 57, 21 A. B. R. 383.

63—G. O. XXXV (4) as amended December 11, 1905.

tion for all services rendered. Section 72 of the act expressly provides that "the referee shall not in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in the act." This provision is a clear and explicit limitation upon the charges of the referee and trustee for services, and the charges allowed are in full for the services rendered. The use of the expression "for their services" is an evident indication that congress meant services rendered by the referee or trustee as such. Accordingly services rendered by a referee when sitting as a special master in the hearing of objections to a discharge and the like, would not be comprehended by this provision and compensation may be allowed therefor, since the service is not rendered in the capacity of referee.<sup>64</sup>

A special allowance to a referee for services performed, in addition to the fees fixed by law, cannot be made, even with the consent of the attorneys for the parties in interest.<sup>65</sup>

### § 372. Compensation when case transferred.

Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.<sup>66</sup>

### § 373. Compensation when reference revoked.

In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.<sup>67</sup>

### § 374. Review of allowance of fees.

The allowance of fees by a referee to himself is reviewable.<sup>68</sup>

64—In re Hart & Co., 18 A. B. R. 137; *Fellows v. Freudenthal*, 102 Fed. 731, 4 A. B. R. 490; In re Grossman, 111 Fed. 507, 6 A. B. R. 510; In re Steed, 107 Fed. 682, 6 A. B. R. 73; In re Troth, 4 A. B. R. 780, 104 Fed. 291; *Bragassa v. St. Louis Cycle Co.*, 107 Fed. 77, 5 A. B. R. 700. Contra: In re Wilcox, 156 Fed. 685, 19 A. B. R. 241; In re Talton, 137

Fed. 178, 14 A. B. R. 617; In re Sweeney, 168 Fed. 612, 21 A. B. R. 866.

65—*Dressel v. North State Lumber Co.*, 119 Fed. 531.

66—Act of 1898, § 40b.

67—Act of 1898, § 40c.

68—In re Allert, 173 Fed. 691, 23 A. B. R. 101.

**§ 375. Compensation of special master.**

A special master appointed to hear the application for a discharge is entitled to a reasonable compensation to be fixed by the court in accordance with the circumstances of the particular case.<sup>69</sup>

The referee may be allowed extra compensation for services performed as special master.<sup>70</sup>

**§ 376. Offenses by referees.**

See *post*, Chapter XXVII.

<sup>69</sup>—In re Gillardon, 187 Fed. 289, 26 A. B. R. 103.

<sup>70</sup>—See *ante*, § 371.

## CHAPTER XI

### DEATH OR INSANITY OF THE BANKRUPT

- § 377. Death of bankrupt.
- § 378. — In general.
- § 379. — Disposition of estate among creditors.
- § 380. — Proceeds of insurance.
- § 381. — Statutory allowance to widow and children.
- § 382. — Rights of next of kin.
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- § 391. Death or insanity of partner.
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#### § 377. Death of bankrupt.

#### § 378. — In general.

Unless a petition has been filed against the insolvent during his lifetime, the court of bankruptcy has no jurisdiction to administer or settle his estate upon a petition filed against his representatives for an act of bankruptcy committed by the deceased, nor has it jurisdiction to entertain a petition filed in his behalf by his representative after his decease for the purpose of having the estate adjudged bankrupt.<sup>1</sup>

In comparing the section under the present act,<sup>2</sup> with that under the former,<sup>3</sup> it will be observed that the first covers death

1—See *In re Funk*, 4 A. B. R. 96.

2—Act of 1898, § 8a: “— The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and

children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt’s residence.”

3—Act of 1867. Sec. 12. . . . If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

at any stage of the proceedings, as immediately after the filing of the petition, while the second fixes the time as after the issuing of the warrant. Hence the decisions that the death of the bankrupt prior to the adjudication,<sup>4</sup> or between the entry of the order of adjudication and the physical issuing of the warrant,<sup>5</sup> or of one partner prior to the adjudication,<sup>6</sup> would not abate the proceedings, become immaterial. Since the present act has no similar provision to that found in section 29 of the act of 1867, with reference to bankrupt's oath before discharge, the decisions that a discharge could not be granted where the bankrupt had died before doing what he was personally required to do, do not now apply.<sup>7</sup>

As illustrative of the effect of the difference between the former and the present section, the English decisions under their act of 1869 (section 80) that death between the filing of the petition and the adjudication would abate<sup>8</sup> and under the act of 1883 (section 108) which is similar to section 8 of the law in force in this country that it would not,<sup>9</sup> are valuable.

The death of the bankrupt after the filing of the petition, although prior to the adjudication,<sup>10</sup> will have no effect upon the proceedings, but they will be conducted and concluded so far as possible as though he had not died. Hence, a court of bankruptcy, or the referee to whom an application for discharge is referred, has the right to proceed with the hearing upon objections thereto and to conduct and conclude the same, although by reason of bankrupt's death it is impossible to comply with the provision requiring his presence at the hearing upon such application.<sup>11</sup> Where the death occurs before the adjudication the

4—*Frazier v. McDonald*, 8 N. B. R. 237, Fed. Cas. No. 5073.

5—*In re Litchfield*, 9 N. B. R. 506, 7 Ben. 259, Fed. Cas. No. 8385; *Adams v. Terrell*, 4 Fed. 796.

6—*Hunt v. Pooke*, 5 N. B. R. 161, Fed. Cas. No. 6896.

7—*In re Miller*, 133 Fed. 1017, 13 A. B. R. 345; *In re O'Farrell*, 2 N. B. R. 484, Fed. Cas. No. 10,446, 3 Ben. 191; *In re Gunike*, 4 N. B. R. 92, 2 Biss. 354, Fed. Cas. No. 5868; *contra*, *Young v.*

*Ridenbaugh*, 11 A. B. R. 563, 3 Dill. 239, Fed. Cas. No. 18, 173.

8—*Ex p. Obbard*, 24 L. T. n. s. 145.

9—*In re Walker*, 54 L. T. n. s. 682.

10—*In re Larkin*, 168 Fed. 100, 21 A. B. R. 711; *In re Spalding*, 139 Fed. 244, 14 A. B. R. 129, *rev'g* 134 Fed. 507, 13 A. B. R. 223; *In re Hicks*, 107 Fed. 910, 6 A. B. R. 182; *Shute v. Patterson*, 147 Fed. 509, 17 A. B. R. 99.

11—*In re Parker*, 1 N. B. N. 261, 1 A. B. R. 615.

heirs and representatives of the alleged bankrupt should be brought in before the adjudication.<sup>12</sup>

Where the debtor appears and confesses the acts of bankruptcy charged in a creditor's petition and a trustee is appointed, a creditor who has proved his debt can not have the adjudication set aside after the death of the bankrupt and after the right of third parties have intervened.<sup>13</sup>

### § 379. — Disposition of estate among creditors.

Where the bankrupt dies during the pendency of the proceedings, the disposition of his estate among creditors is controlled by the bankruptcy act, and not by the laws of the state of his last domicile.<sup>14</sup>

### § 380. — Proceeds of insurance.

Where the bankrupt dies before the adjudication, his executor may become entitled to the proceeds of the insurance on the bankrupt's life by tendering to the trustee the cash surrender value of the policies at the date of the filing of the petition.<sup>15</sup>

Where the bankrupt dies after the adjudication, the proceeds of a policy having no surrender value or actual value at the date of the filing of the petition do not pass to the trustee.<sup>16</sup> Where the permanent disability resulting in death of the bankrupt after his adjudication existed prior to the filing of the petition, it has been held that the proceeds of an insurance policy insuring him against permanent disability passed to the trustee.<sup>17</sup>

### § 381. — Statutory allowance to widow and children.

The bankruptcy court has exclusive jurisdiction to determine a widow's right to dower in the property of her bankrupt husband deceased during the pendency of the bankruptcy proceedings.<sup>18</sup> The proviso in section 8 preserves the rights of the

12—*Shute v. Patterson*, 147 Fed. 509, 17 A. B. R. 99.

13—*In re Thomas*, 11 N. B. R. 330, Fed. Cas. No. 13, 891.

14—*In re Devlin*, 180 Fed. 170, 24 A. B. R. 863.

15—*In re Judson*, 192 Fed. 834, 27 A. B. R. 704, 188 Fed. 702, 26 A. B. R. 775, aff'd 228 U. S. 474, 46 L. R. A. (N. S.) 154, 57 L. ed. 927, 30 A. B. R. 1;

contra, *Partridge v. Andrews*, 191 Fed. 325, 41 L. R. A. (N. S.) 123, 27 A. B. R. 388.

16—*Gould v. New York Life Ins. Co.*, 132 Fed. 927, 13 A. B. R. 233.

17—*In re Matschke*, 193 Fed. 284, 27 A. B. R. 770.

18—*Hurley v. Devlin*, 151 Fed. 919, 18 A. B. R. 627.



wife and children in case of bankrupt's death but leaves the dower and allowances to be determined by the laws of the state of bankrupt's residence.<sup>19</sup> It does not establish a new rule but is declaratory of the existing law. The trustee takes the bankrupt's property subject to the same burdens it bore in the bankrupt's hands, one of which is the wife's right to dower, and such right will not, ordinarily, be divested by a sale under order of the court of bankruptcy,<sup>20</sup> and, where the wife joins in a deed to release dower and the deed is avoided as made to hinder, delay and defraud creditors, her right thereto is not lost.<sup>21</sup>

It has been held that the widow is not entitled to dower in real estate held as partnership assets,<sup>22</sup> though clearly the true rule is that the question whether the statutory allowances claimed by the widow and children of one of the partners dying during the pendency of the proceedings may be set aside to them from the assets of the partnership, depends upon the law of the state of such partner's last domicile. In such case the law of the state furnishes the guide to the bankruptcy court, and if such allowance be authorized thereby, it should be set apart to the widow and children in the bankruptcy proceeding.<sup>23</sup>

A statute providing that a widow shall be entitled to one-third of the personal estate whereof her husband died seized or possessed does not entitle her to a dower interest in unexempt personal property or its proceeds in the possession of the trustee in bankruptcy.<sup>24</sup> Under a statute providing that a wife divorced from her husband shall be entitled to one-third of his personal property absolutely, her interest after the commencement of a

19—*In re McKenzie*, 142 Fed. 383, 15 A. B. R. 679; *aff'g* 132 Fed. 986, 13 A. B. R. 227; *Hurley v. Devlin*, 151 Fed. 919, 18 A. B. R. 627. But see *Thomas v. Woods*, 173 Fed. 585, 23 A. B. R. 132.

Widow held entitled to year's support provided for by Georgia Code, such support being an allowance within the meaning of the bankruptcy act. *In re Dicks*, 198 Fed. 293, 28 A. B. R. 845.

20—*In re McKenzie*, 142 Fed. 383, 15 A. B. R. 679, *aff'g* 132 Fed. 986, 13 A. B. R. 227; *Porter v. Lazear*, 109 U. S. 84, 27 L. ed. 865; *In re Schaeffer*, 5 A. B. R. 248; *In re Slack*, 111 Fed. 523, 7 A. B. R. 121; *In re Forbes*, 7 A. B. R. 42; see

*In re Seabolt*, 113 Fed. 766, 8 A. B. R. 57; *contra*, *In re Freedman*, 29 A. B. R. 135, *aff'd* 31 A. B. R. 53. See also, *In re Codori*, 207 Fed. 784, 30 A. B. R. 453, decided under amendment of 1910.

21—*Cox v. Wilder*, 7 N. B. R. 241, 2 Dill. 45, Fed. Cas. No. 3308, *rev'g* 5 N. B. R. 443, Fed. Cas. No. 3309.

22—*Hiscock v. Jaycox & Green*, 12 N. B. R. 507, Fed. Cas. No. 6531.

23—*In re F. Robert & Son*, 165 Fed. 749, 21 A. B. R. 634.

24—*In re McKenzie*, 142 Fed. 383, 15 A. B. R. 679, *aff'g* 132 Fed. 986, 13 A. B. R. 227.

divorce suit but before decree is not such as is provable against the husband's estate nor as will authorize the enjoining of the distribution of one-third of the proceeds of such property.<sup>25</sup>

### § 382. — Rights of next of kin.

A brother is not a party in interest and is not entitled to file a petition for leave to dispose of the bankrupt's property in case of his death.<sup>26</sup>

### § 383. Insanity of bankrupt.

#### § 384. — Insanity prior to filing of petition.

The court of bankruptcy has no jurisdiction to entertain the petition of a lunatic, or of his committee,<sup>27</sup> nor of a petition filed against either,<sup>28</sup> and it has been held that a person so unsound of mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy,<sup>29</sup> regardless of the fact that there has been no adjudication of lunacy at the time of the filing of the petition.<sup>30</sup>

#### § 385. — Insanity after commission of act of bankruptcy.

Insanity of the bankrupt after the commission of the act of bankruptcy<sup>31</sup> or after the filing of the petition,<sup>32</sup> will have no effect upon the proceedings, but they will be conducted and concluded as far as possible as though he had not become insane, and he may nevertheless be granted his discharge.<sup>33</sup>

#### § 386. — Guardian ad litem.

An idiot or lunatic must in equity, as well as at law, be made a defendant to a suit against him. He must defend by his committee who is also a necessary party to the suit, and it is the

25—Hawk v. Hawk, 102 Fed. 679, 2 N. B. N. R. 940, 4 A. B. R. 463.

26—Karr v. Whittaker, 5 N. B. R. 123, Fed. Cas. No. 7613.

27—In re Eisenberg, 117 Fed. 786, 8 A. B. R. 551; compare In re Burka, 107 Fed. 674, 5 A. B. R. 843.

28—In re Funk, 4 A. B. R. 96.

29—In re Ward, 194 Fed. 174, 28 A. B. R. 29; In re Marvin, 1 Dill. 178, Fed. Cas. No. 9178.

30—In re Ward, 161 Fed. 755, 20 A. B. R. 482.

31—In re Kehler, 159 Fed. 55, 19 A. B. R. 513.

32—In re Miller, 133 Fed. 1017, 13 A. B. R. 345.

33—In re Miller, 133 Fed. 1017, 13 A. B. R. 345.

duty of the committee to apply for appointment as guardian ad litem for the purpose of making the defense. If there be no committee, or if the committee be antagonistic, a guardian ad litem should be appointed on the application of either the plaintiff or defendant.<sup>34</sup> Accordingly a guardian ad litem should be appointed to defend an involuntary petition against a lunatic when he has no regular guardian or committee appointed for him or for his estate by competent authority of the state having control of his affairs. If he have such committee or guardian he must be brought in by process as well as the lunatic to defend the petition in behalf of the lunatic.<sup>35</sup>

A court of bankruptcy has the same power and duty that courts of equity have always had toward incompetents who are interested in proceedings pending before it and such duty is to be exercised by the appointment of a guardian ad litem.<sup>36</sup>

The authority of a guardian ad litem to defend on behalf of an insane debtor ceases upon the intervention of the debtor's general guardian and the filing of an answer by him.<sup>37</sup>

### § 387. — Examination as to sanity.

The bankrupt cannot be compelled to submit to an examination before trial as to his sanity, against the objections of his guardians, but the issue of insanity at the time of the commission of the act of bankruptcy may be submitted to a jury at the hearing.<sup>38</sup>

### § 388. — Burden of proof.

While the presumption is in favor of sanity, yet where an inquisition in lunacy held after the filing of the petition finds that the bankrupt was insane with lucid intervals at the time of the commission of the alleged act of bankruptcy the burden is upon the petitioning creditors to show his sanity at the time of the alleged act.<sup>39</sup>

34—1 Daniell Ch. Pr. 219, 600; 2 Daniell Ch. Pr. 287, 302, 403; In re Miller, 133 Fed. 1017, 13 A. B. R. 345.

35—In re Burka, 107 Fed. 674, 5 A. B. R. 843; Equity Rule, 87.

36—In re O'Brian, 2 N. B. N. R. 312; In re Burke, 107 Fed. 674, 5 A. B. R. 843; 1 Daniell Ch. Pr. 8.

37—In re Ward, 203 Fed. 769, 29 A. B. R. 547.

38—In re Ward, 161 Fed. 755, 20 A. B. R. 482.

39—In re Kehler, 159 Fed. 55, 19 A. B. R. 513.

### § 389. — Rights of wife.

An application by the wife of an alleged bankrupt who has been held to have been insane at the time of the commission of the alleged act of bankruptcy, for a division of the assets in the hands of the receiver for the support of the alleged bankrupt pending an appeal from the decision of the district court will not be entertained where she continues to hold property transferred to her adversely to the receiver.<sup>40</sup>

### § 390. — Effect upon receivership.

A receiver will not be discharged pending an appeal from a decision of the district court that the alleged bankrupt was insane at the time of the commission of the alleged act of bankruptcy.<sup>41</sup>

### § 391. Death or insanity of partner.

After the filing of a petition, the death or insanity of a partner will not abate the proceedings, but they are continued in the same manner, so far as possible, as though he had not died or become insane.<sup>42</sup> A surviving partner who commits an act of bankruptcy with respect to the joint property can be adjudged bankrupt individually,<sup>43</sup> and it has been held that where the firm is dissolved by the death of one partner, the firm cannot be adjudicated,<sup>44</sup> though the survivor may be individually and as surviving member of the firm,<sup>45</sup> and the individual estate of the deceased would still be liable for the partnership debts.<sup>46</sup>

It has been held that the guardian of a partner who becomes insane before adjudication, may consent to the administration of the estate in bankruptcy,<sup>47</sup> though this position does not seem tenable, if the party became insane before the petition was filed.

In a case where a partner not adjudged bankrupt becomes

40—In re Ward, 194 Fed. 179, 28 A. B. R. 36.

41—In re Ward, 194 Fed. 179, 28 A. B. R. 36.

42—Act of 1898, § 8. Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6896; In re L. Stein & Co., 127 Fed. 547, 11 A. B. R. 536; In re Coe, 157 Fed. 308, 19 A. B. R. 618.

43—In re Meyer, 98 Fed. 976; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 Fed.

896; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393.

44—In re Temple, 17 N. B. R. 345, 4 Sawy. 92, Fed. Cas. No. 13825; contra, In re Coe, 157 Fed. 308, 19 A. B. R. 618.

45—In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393.

46—Vaccaro Bank, 2 N. B. N. R. 1037, 103 Fed. 436.

47—In re O'Brian, 2 N. B. N. R. 312.

insane and thereafter cannot himself speak or act in the proceedings, he can do so through a guardian appointed for him, and it has been held that by such guardian he may give consent to the administration of the partnership property in bankruptcy.<sup>48</sup>

Upon the death of a partner, the surviving member takes the property of the firm for the purpose of closing the estate,<sup>49</sup> and the assets are to be marshalled as if all the partners were living;<sup>50</sup> the joint assets going to partnership creditors and the separate assets to separate creditors,<sup>51</sup> though in some states the debts are severed upon the death of the partner.<sup>52</sup>

### § 392. Dissolution of corporation.

The dissolution of a corporation by a state court does not end its existence so as to prevent the jurisdiction of the bankruptcy courts from attaching,<sup>53</sup> nor will it deprive the bankruptcy court of jurisdiction, or abate the proceedings.<sup>54</sup>

48—In re O'Brian, 2 N. B. N. R. 312.

49—In re Stevens, 5 N. B. R. 112, 1 Sawyer 397, Fed. Cas. No. 13393.

50—Ex parte Leaf, 4 Dea. 287; ex p. Morley, L. R. 8 Ch. 1026; ex p. Dea. 1 Ch. D. 514; ex p. Manchester Bk., 12 Ch. D. 917; In re Clap. 2 Lowell, 168 Fed. Cas. No. 2783; Farley v. Moog, 79 Ala. 148; Tellinghast v. Champlin, 4 R. I. 173.

51—Craft v. Pyke, 3 P. Williams, 180; Addis v. Knight, 2 Mer. 117; Lodge v. Prichard, 1 D. G. J. & S. 610; Gray v. Chiswell, 9 Ves. 118; Hills v. McRae, 9 Hare 297; In re Gray, 111 N. Y. 404.

52—Pearce v. Cooke, B. R. I. 184; Sparhawk v. Russell, 10 Met. 305; changed by Statute in Mass.; Jewett v. Phillips, 5 Allen 150.

53—White Mountain Paper Co. v. Morse, 127 Fed. 643, 11 A. B. R. 633, aff'g 127 Fed. 180, 11 A. B. R. 491; In re Independent Ins. Co., 6 N. B. R. 260, Fed. Cas. No. 7017; Id., 6 N. B. R. 169, 2 Lowell 97, Fed. Cas. No. 7018.

54—Platt v. Archer, 6 N. B. R. 465, 9 Blatch. 559, Fed. Cas. No. 11213.

## CHAPTER XII

### RIGHTS AND DUTIES OF BANKRUPT

- § 393. Attendance at meetings.
- § 394. Compliance with orders.
- § 395. Disclosure of assets.
- § 396. Examination of claims.
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- § 410. — Relation of schedule to composition proceedings.
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- § 415. Production of books and papers.
- § 416. Duty to disclose combination to safe.
- § 417. Duty to assist receiver.
- § 418. Waiver of protest on notes.
- § 419. Right to reclaim property.

#### § 393. Attendance at meetings.

At the first meeting of the creditors, the judge or referee shall preside and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor, but the place of such meeting should be one most convenient for the parties in interest; and it must be held not less than ten nor more than thirty days after the adjudication.<sup>1</sup> The bankrupt is required to be and should be actually present at the first meeting,<sup>2</sup> and, if

1—Act of 1898, § 55a.

& Crisp, 2 N. B. N. R. 62, 99 Fed. 695, 3

2—Act of 1898, § 7a (1); In re Eagles A. B. R. 733.

called upon, to testify fully, fairly and truthfully.<sup>3</sup> His inability to attend the meeting due to sickness,<sup>4</sup> or confinement in an insane asylum,<sup>5</sup> may be a sufficient excuse, though the creditors are to determine as to the sufficiency of the excuse and the court will not disturb their decision without good cause shown.<sup>6</sup>

The bankrupt must appear in person or by representative at the creditors' meeting in composition,<sup>7</sup> if required so to do, and may be required to attend the hearings upon his application for a discharge.<sup>8</sup>

If in involuntary proceedings against the bankrupt he neither enters appearance nor denies by answer the allegations of the petition, he may be ordered to state in writing the number of his creditors and the amount due them,<sup>9</sup> and a failure to comply with such order renders him liable to proceedings in contempt.

#### § 394. Compliance with orders.

The bankrupt is enjoined by express provision of the act,<sup>10</sup> to comply with all lawful orders of the court. Obedience may be enforced by fine or imprisonment, or both;<sup>11</sup> or by proceedings for contempt. If the contempt is committed before the referee, he certifies the facts to the judge,<sup>12</sup> and, after a hearing, the latter is authorized to impose punishment.<sup>13</sup>

#### § 395. Disclosure of assets.

Should the bankrupt, while such, or after his discharge, conceal from his trustee any property belonging to his estate in bankruptcy, he is liable to imprisonment.<sup>14</sup>

#### § 396. Examination of claims.

The bankrupt is bound to examine the correctness of all proofs of claim filed against his estate.<sup>15</sup>

3—In re Tudor, 100 Fed. 796, 2 N. B. N. R. 168, 4 A. B. R. 78.

4—In re Carpenter, 1 N. B. R. 51, Fed. Cas. No. 2427.

5—In re Thaw, 166 Fed. 71, 21 A. B. R. 561.

6—In re Wronkow, 18 N. B. R. 81, Fed. Cas. No. 18105.

7—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

8—Act of 1898, § 7 (1). In re Shanker, 138 Fed. 862, 15 A. B. R. 109.

9—Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2899; see also Meetings of Creditors, *post*, § 439.

10—Act 1898, § 7 (2).

11—Act of 1898, § 2 (13).

12—Act of 1898, § 41b.

13—Act of 1898, § 2 (16).

In this connection reference should be had to chapter XXXVI which deals fully with contempts.

14—Act of 1898, § 29b.

15—Act of 1898, § 7 (3).

Any person presenting under oath, a false claim for proof against the estate of a bankrupt, or using any such claim in composition, personally or by agent, is liable to imprisonment,<sup>16</sup> and if knowledge thereof comes to the bankrupt it is his duty to disclose the fact immediately to his trustee, and if no trustee has been appointed, it becomes not only the right but the duty of the bankrupt to move to set aside and expunge the proof and to object to the allowance of such claim.<sup>17</sup> If a claim omits one of the essential facts required by good pleading, but complies apparently with the forms, orders and statute, a referee can only allow it as requested since he is required merely to see that the formal requisites are complied with, but it is the bankrupt's duty or the trustee's, if one is appointed, in such case to file objection to the claim, or petition for a re-examination.<sup>18</sup>

### § 397. Schedules.

### § 398. — Filing.

In voluntary cases a schedule of the bankrupt's property and list of creditors must be filed with the petition. In involuntary cases such schedule must be filed within ten days after the adjudication, unless further time is granted. The schedules must be in triplicate, one for the clerk, one for the referee and one for the trustee.<sup>19</sup>

If the bankrupt fails to file the schedule of property and list of creditors required, the referee must do so;<sup>20</sup> but, if the debtor is notified to furnish the schedule and fails, the creditor may apply for an attachment against him.<sup>21</sup> An order directed to the bankrupt to show cause why he should not be compelled to file his schedules may be granted without notice to him.<sup>22</sup>

While the bankrupt cannot be compelled to file schedules containing incriminating evidence, he must make a bona fide effort to comply with the provisions of the act and file a schedule that obeys the act up to the point where the court can see that further obedience would violate the constitutional privilege.<sup>23</sup>

16—Act of 1898, § 29b.

17—In re Ankeny, 2 N. B. N. R. 349,  
100 Fed. 614, 4 A. B. R. 72.

18—In re Ankeny, 1 N. B. N. 511.

19—Act of 1898, § 7a (8).

20—Act of 1898, § 39 (6).

21—G. O. IX.

22—In re Brady, 169 Fed. 152, 21  
A. B. R. 364.

In re Brockton Ideal Shoe Co., 200 Fed.  
745, 29 A. B. R. 76.

23—In re Podolin, 202 Fed. 1014, 20  
A. B. R. 406.



The court of a district other than that in which proceedings are pending has jurisdiction to order the treasurer of the bankrupt corporation, who is within its jurisdiction, to file schedules.<sup>24</sup>

### § 399. — Partnership cases.

When all the members of a firm file a petition, they are jointly and severally bound to make the required statements of their debts, whether copartnership or individual, or due them jointly with other persons not parties to the petition;<sup>25</sup> but the fact that one member does not file a schedule of debts or inventory of effects, nor deliver his property into the hands of the trustee, does not affect the right of the other members to receive a discharge.<sup>26</sup> In proceedings by a partnership and certain members thereof, the objecting partner may be compelled to file schedules of his individual property and liabilities in manner and form as required of one who has been adjudicated.<sup>27</sup> In involuntary proceedings against a partnership the solvent partner may be required to file schedules.<sup>28</sup>

A judgment recovered on a partnership obligation is properly scheduled as a debt against an individual bankrupt partner.<sup>29</sup>

### § 400. — Form and contents in general.

The schedule must be printed or typewritten, or written plainly, without abbreviation, or interlineation, except it be for the purpose of reference.<sup>30</sup> Schedules conforming in all respects with the act are sufficient, though not containing all the allegations and statements required by the forms.<sup>31</sup> It has been held, however, that a petition, or other pleading, neither type-

24—In re Brockton Ideal Shoe Co., 200 Fed. 745, 29 A. B. R. 76.

25—In re Leland, 5 N. B. R. 222, 5 Ben. 168, Fed. Cas. No. 8228.

26—In re Schofield, 3 N. B. R. 137, Fed. Cas. No. 12509.

27—G. O. VIII.

In re Funck & Balthazard, 169 Fed. 481, 22 A. B. R. 298; In re Ceballos & Co., 161 Fed. 445, 20 A. B. R. 467. Contra: In a partnership bankruptcy, a partner who is not himself adjudged bankrupt

need not file schedules of his individual assets and liabilities. In re City Con. & Bldg. Co., 30 A. B. R. 133.

28—In re Solomon & Carvel, 163 Fed. 140, 20 A. B. R. 488.

29—New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233.

30—G. O. V.

Sutherland v. Lasher, 41 Misc. (N. Y.) 249, 11 A. B. R. 780.

31—In re Soper, 1 A. B. R. 198.

written <sup>32</sup> nor on the prescribed printed <sup>33</sup> form, should be dismissed by the court on its own motion.

The schedules should contain detailed information. A bare statement of assets and liabilities is not enough; the bankrupt should go through every item of the official form of schedules and show the facts relating thereto.<sup>34</sup>

### § 401. — Verification.

The schedules attached to a voluntary petition need not be separately verified. It is sufficient that the petition is properly verified.<sup>35</sup>

### § 402. — Assets to be listed.

The schedule should include all property which, prior to the filing of the petition, the bankrupt could have transferred, or which might have been levied upon and sold on judicial process; but not property acquired after such filing.<sup>36</sup> The amount and kind of property, the location thereof, and its money value in detail should be given.<sup>37</sup>

Failure to list a cause of action as an asset will not operate as an estoppel in a subsequent suit thereon commenced after the bankrupt's discharge.<sup>38</sup>

### § 403. — Creditors and claims listed.

The schedules should include a list of his creditors and the amount of their respective claims,<sup>39</sup> including his wife if a creditor;<sup>40</sup> and all the papers upon which he may be liable, with proper explanations in regard thereto should be set down.<sup>41</sup> The existence of a difference between the list of creditors filed by the debtor and the list filed by the petitioning creditors constitutes an issue to be tried and determined as a result of evidence.<sup>42</sup>

32—*Mahoney v. Ward*, 2 N. B. N. R. 538, 100 Fed. 278, 3 A. B. R. 770.

33—*Anon.* 1 N. B. N. 239.

34—*In re City Con. & Bldg. Co.*, 30 A. B. R. 133.

35—*In re McConnell*, 11 A. B. R. 418.

36—Act of 1898, § 70a; *In re Harris*, 1 N. B. N. 384, 2 A. B. R. 359.

37—Act of 1898, § 7a (8).

38—*Irion v. Knapp*, 132 La., 60, 31 A. B. R. 891.

39—Act of 1898, § 7a (8). *Sav. Bk. v. Palmer*, 10 N. B. R. 239, Fed. Cas. No. 17207.

40—*In re Rosenfield*, 2 N. B. R. 49, Fed. Cas. No. 12057.

41—*In re Henry*, 17 N. B. R. 463, 9 Ben. 449, Fed. Cas. No. 6370.

42—*In re Hymes*, 10 N. B. R. 433, 7 Ben. 427, Fed. Cas. No. 6986.

Where the creditor is a partnership and the same is dissolved by the death of one of the partners, the surviving partner may be described in the schedules as the creditor.<sup>43</sup>

The legal names of creditors, that is, the Christian name as well as the surname, should appear in the schedule; and in giving the addresses of creditors, while the ordinary and common abbreviations for the names of states may be used, the abbreviations of the names of cities and villages, not being in common use, should not, nor is the use of ditto marks to be encouraged; and wherever possible the street number should be given in large cities.<sup>44</sup> The residence address of the creditors, if ascertainable, rather than the office address, should be given.<sup>45</sup>

#### § 404. — Claim for exemptions.

See Exemptions, post, Chapter XXIV, § 985.

#### § 405. — Errors and omissions in schedules.

The correctness of the schedule of creditors, or whether a creditor received notice of the proceedings, does not determine the jurisdiction of the proceedings or of a discharge,<sup>46</sup> nor will a clerical mistake in the name of a creditor which prevented his receiving a notice invalidate the proceeding.<sup>47</sup> The omission to place a claim on the list of creditors is merely a circumstance of suspicion.<sup>48</sup> But any debt which was not duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt will not be affected by a discharge unless such creditor had actual notice or knowledge of the proceedings.<sup>49</sup>

It is the province of the court to pass on all questions of concealment of assets and failure to name creditors.<sup>50</sup> The omission of a debt contracted with a creditor in his individual capacity,

43—*Kaufman v. Schreier*, 108 App. Div. (N. Y.) 298, 17 A. B. R. 314.

44—*In re Mackey*, 1 A. B. R. 593; *In re Brumelkamp*, 1 N. B. R. 360, 2 A. B. R. 318, 95 Fed. 814. *Haack v. Thiese*, 51 Misc. (N. Y.) 3, 16 A. B. R. 699; *Sutherland v. Lasher*, 41 Misc. (N. Y.) 249, 11 A. B. R. 780.

45—*Weidenfeld v. Tillinghast*, 54 Misc. (N. Y.) 90, 18 A. B. R. 531.

46—*In re Archenbrow*, 11 N. B. R. 149, Fed. Cas. No. 504.

47—*Thornton v. Hogan*, 17 N. B. R. 277.

48—*In re Mendelsohn*, 12 N. B. R. 533, 3 Sawy. 342, Fed. Cas. No. 9420.

49—Act of 1898, § 17a; *Barnes v. Moore*, 2 N. B. R. 174; *Lamb v. Brown*, 12 N. B. R. 522, Fed. Cas. No. 8011.

50—*In re Scott*, 15 N. B. R. 73, Fed. Cas. No. 12519.

and subsequent to the date of the partnership, under which partnership name he claimed notice as a creditor, has been held not to be a fraudulent or wilful omission.<sup>51</sup>

Where an involuntary bankrupt omits a certain claim from his schedule, his trustee cannot be said to have elected to abandon it, in the absence of any evidence of his knowledge or sufficient means of knowledge of its existence.<sup>52</sup>

The bankrupt has a standing to oppose the allowance of claims even though he has omitted them from his schedules.<sup>53</sup> A deposition of a creditor setting forth a claim against the bankrupt for unliquidated damages for breach of a contract, omitted from the schedule, is not proof thereof, unless the amount is liquidated in the manner prescribed, application for which must have been made by the creditor.<sup>54</sup>

For a further discussion of the effect of omissions from the schedules upon the discharge, see Chapter XXXV, §§ 1501, 1569.

Omissions from schedules as constituting an offense, see Chapter XXXVII, §§ 1611, 1612.

#### § 406. — Amendment.

In case the schedule and list are defective, it is the duty of the referee to see that they are amended;<sup>55</sup> but this only refers to defects in complying with the formal requisites of the forms, orders and statute, as the referee's duty to examine the schedule and list extends only to such matters.<sup>56</sup> Schedules filed prior to the promulgation of the general orders by the supreme court should be allowed to be amended and supplemented to conform to the requirements of such rules, and such amended schedules should be filed as of the date of the filing of the original schedules.<sup>57</sup> In case of ignorance or mistake, either of fact or law, the court has power in its discretion and, in a proper case, to allow amendments and will in general exercise that power in the absence of fraud and when all the parties can be placed in the

51—In re Pierson, 10 N. B. R. 107, Fed. Cas. No. 11153.

52—Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791.

53—In re French, 181 Fed. 583, 25 A. B. R. 77.

54—In re Clough, 2 N. B. R. 59, 2 Ben. 508, Fed. Cas. No. 2905.

55—Act of 1898, § 39 (2); In re Mackey, 1 A. B. R. 593; In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 Fed. 814.

56—In re Ankeny, 1 N. B. N. 511.

57—In re Harris, 1 N. B. N. 384, 2 A. B. R. 359.

same situation they would have occupied if the error had not occurred and where justice seems to demand such amendment,<sup>58</sup> which may be done on application of the petitioner. The failure to file a complete schedule originally is not fatal provided it is afterwards corrected by an amended schedule, and, if the bankrupt has filed such amended schedule and it is accepted both by the court and by the objecting creditors, neither having objected to it at the time it was filed or to the manner of its filing, it is sufficient.<sup>59</sup>

The amendments should be written or printed, signed and verified, like the originals, and, if made to separate schedules, must be made separately, with proper references; and the application must state the cause of the error in the paper originally filed.<sup>60</sup>

Where the case has been referred to the referee, he may pass upon the application to amend, his action being subject to review by the judge.<sup>61</sup> In either case the power exists but its exercise rests in the sound judicial discretion of the court.

The application to amend may be made *ex parte*, and unless good reasons are shown, the bankrupt may be allowed to amend his schedule to include additional property;<sup>62</sup> and to correct material mistakes, as the entire omission of a debt, or the name of a creditor,<sup>63</sup> in which event it has been held that the amendment would relate back to the time of the filing of the petition.<sup>64</sup>

Amendments should not be allowed, except upon such conditions as to prevent injustice, and hence, if new creditors are introduced, or application to amend is made after adverse parties have appeared in the case, notice should be given to all interested parties and, in proper cases, conditions should be imposed on the allowance of the amendment.<sup>65</sup> When the bank-

58—In re Bean, 100 Fed. 262, 4 A. B. M. 53; In re Meyers, 3 A. B. R. 760; In re Wilder, 2 N. B. N. R. 629, 101 Fed. 104, 3 A. B. R. 761.

59—In re Mudd, 2 N. B. N. R. 710.

60—G. O. XI.

61—G. O. XXVII.

62—In re Watts, 2 N. B. R. 145, 3 Ben. 166, Fed. Cas. No. 17293.

63—Beebe v. Pyle, 18 N. B. R. 162; In re Heller, 5 N. B. R. 46, Fed. Cas. No. 6339.

Motion to open a discharge made within one year after the granting thereof for the purpose of including in the schedules a claim against the bankrupt omitted by mistake granted. In re McKee, 165 Fed. 269, 21 A. B. R. 306.

64—In re Beerman, 112 Fed. 662, 7 A. B. R. 434.

65—In re Perry, 1 N. B. R. 2, Fed. Cas. No. 10998; In re Ratcliff, 1 N. B. R. 98, Fed. Cas. No. 11578; In re Morganthal, 1 N. B. R. 98, Fed. Cas. No. 9813.

rupt amends his schedules after a trustee has been chosen, so as to include an additional creditor, notice to creditors already named in his schedules or a call for a new meeting has been held unnecessary.<sup>66</sup>

A bankrupt may, even after consideration of specifications in opposition to discharge, amend his schedule, by order of the court,<sup>67</sup> or before the distribution of the estate where the purpose is to claim further exemptions.<sup>68</sup>

An application to amend the schedules so as to bring in an omitted creditor may be denied where it is made within a few days of the end of the year after his adjudication, since at the expiration of such time claims cannot be filed for allowance.<sup>69</sup>

### § 407. — Effect of including claim.

Including a claim in his schedule is not equivalent to a new promise by the bankrupt or sufficient to revive a debt already barred by the statute of limitations;<sup>70</sup> but wherever any doubt exists as to whether a claim is barred in any jurisdiction other than the one in which proceeding is pending, it should be included in order that it may be discharged. The classification in the schedule as partnership assets of real estate held by the partners as tenants in common will not convert the separate property of the individual partners into firm property in derogation of the rights of the separate creditors.<sup>71</sup>

### § 408. — False oath to schedule.

The making of a false oath to a schedule constitutes an offense under the law which would operate as a bar to a discharge.<sup>72</sup>

### § 409. — Schedules as evidence.

The schedules of the bankrupt are not testimony within the meaning of section 7 (9), and are admissible against him in

66—In re Preston, 3 N. B. R. 27, Fed. Cas. No. 11392.

67—In re Carson, 5 N. B. R. 290, 5 Ben. 277, Fed. Cas. No. 2460.

68—In re Fisher, 142 Fed. 205, 15 A. B. R. 652; In re Berman, 15 Ohio Fed. Dec. 110, 15 A. B. R. 463; In re Kaufman, 142 Fed. 898, 16 A. B. R. 118; In re White, 128 Fed. 513, 11 A. B. R. 556; In re Moran, 105 Fed. 901, 5 A. B. R. 472.

69—In re Kittler, 176 Fed. 655, 23 A. B. R. 585.

70—In re Lipman, 1 N. B. N. 310, 94 Fed. 353, 2 A. B. R. 46; In re Resler, 1 N. B. N. 280, 95 Fed. 804, 2 A. B. R. 166, 602.

71—In re Zug, 16 N. B. R. 280, Fed. Cas. No. 18222.

72—See Offenses, Chap. XXXVII, *post*, § 1612.

criminal proceedings instituted in the state courts.<sup>73</sup> However, such schedules are inadmissible against the bankrupt in criminal proceedings for concealment of assets under the bankruptcy act, by virtue of R. S. § 860 (U. S. Comp. St. 1901. p. 661).<sup>74</sup> It has been held that use of the schedules of the bankrupt by the grand jury in determining whether to indict or not is a violation of section 7a (9) and is ground for the dismissal of the indictment, but this seems doubtful under the recent decision of the supreme court.<sup>75</sup>

### § 410. — Relation of schedule to composition proceedings.

In cases of composition the statement should conform to the schedule;<sup>76</sup> but a mistake without fraud, made by the debtor in his statement of the amount due to the creditor, will not vitiate the composition.<sup>77</sup> Where the facts relating thereto are brought out and considered by the creditors in coming to a conclusion as to the composition, it is not a good objection that property standing in the bankrupt's wife's name was omitted from the schedule; nor that the schedules stated the debtor's real estate as of unknown or uncertain value.<sup>78</sup>

### § 411. Examination of bankrupt.

The examination of the bankrupt is fully treated in Chapter XV.

### § 412. Payment of money to creditors by bankrupt.

The bankrupt will not be permitted to pay money which he has collected and which belongs to his estate after the petition was filed, as for interest on mortgages, unless such payment is beneficial to the estate.<sup>79</sup>

73—Commonwealth v. Ensign, 40 Pa. Super Ct. 157, 22 A. B. R. 797; Ensign v. Commonwealth of Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 30 A. B. R. 408.

But see Cohen v. United States, 170 Fed. 715, 22 A. B. R. 333.

74—Ensign v. Commonwealth of Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 30 A. B. R. 408; Johnson v. United States, 163 Fed. 30, 18 L. R. A. (N. S.) 1194, 20 A. B. R. 724; Cohen v. United States, 170 Fed. 715, 22 A. B. R. 333.

75—United States v. Chalmers, 135

Fed. 1023, 13 A. B. R. 708; Ensign v. Commonwealth of Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 30 A. B. R. 408.

76—In re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6192.

77—In re Trafton, 14 N. B. R. 507, 2 Lowell 505, Fed. Cas. No. 14133; Beebe v. Pyle, 18 N. B. R. 162.

78—In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17377.

79—In re Ellinger, 18 N. B. R. 222, Fed. Cas. No. 4543.

### § 413. Surrender of property to trustee.

On being adjudged bankrupt, it is the duty of the bankrupt to deliver into the possession of the trustee all such property as he may have, other than such as is exempt by law,<sup>80</sup> notwithstanding there may be a prospect of settlement with his creditors.<sup>81</sup> The bankrupt is not excused from the duty to produce property in his possession at the institution of the proceedings,<sup>82</sup> because of having disposed of it while the proceedings were pending. He will not, however, be ordered to turn over his property to the trustee in the absence of a hearing upon a petition making definite averments and offering a definite issue.<sup>83</sup> Furthermore, an order to turn over certain assets should not be made except with caution and upon convincing evidence lest a commitment for disobedience on contempt proceedings to follow should in effect be nothing more than imprisonment for debt, which would not be justified.<sup>84</sup> Where the bankrupt admits having had possession of property a short time before his bankruptcy, which is not shown in his schedules, the burden is upon him to satisfactorily account for the same.<sup>85</sup>

### § 414. Duty to join in application for license.

The bankrupt may be compelled to join in an application for the renewal of a liquor license sold by the court.<sup>86</sup>

### § 415. Production of books and papers.

This subject is fully discussed in another chapter.<sup>87</sup>

### § 416. Duty to disclose combination of safe.

The bankrupt may be required to disclose to the trustee the combination of his safe.<sup>88</sup>

80—In re Peacock, 178 Fed. 851, 24 A. B. R. 159.

81—In re Shaffer, 2 N. B. R. 178, Fed. Cas. No. 12694.

82—In re Lesaius, 163 Fed. 614, 21 A. B. R. 23.

83—In re Ruos, 164 Fed. 749, 21 A. B. R. 257.

84—In re Lesaius, 163 Fed. 614, 21 A. B. R. 23.

85—In re Richards, 183 Fed. 501, 25 A. B. R. 176; In re DeGottardi, 114 Fed. 328, 7 A. B. R. 723.

See, in this connection, Chapter XXVII, dealing fully with proceedings to compel the bankrupt to turn over property to the trustee.

86—In re Doyle & Son, 209 Fed. 1, 31 A. B. R. 571, rev'g 205 Fed. 543, 30 A. B. R. 58.

And see, In re Wiesel & Knaup, 173 Fed. 718, 23 A. B. R. 59.

87—See *post*, Chapter XV.

88—In re Hooks Smelting Co., 138 Fed. 954, 15 A. B. R. 83.



**§ 417. Duty to assist receiver.**

Up to the time of his discharge, the bankrupt can be compelled, by summary order of court, to give the receiver any information he may possess or render him any assistance he can in the transfer of possession of property belonging to the bankrupt estate. Accordingly it has been held that the bankrupt may be compelled to join in a petition with the receiver in an application for a transfer of the bankrupt's liquor license to the purchaser thereof at the receiver's sale.<sup>89</sup> The mere assertion of the bankrupt that his books will tend to incriminate him will not justify his refusal to turn the same over to the receiver for use in continuing the business.<sup>90</sup>

**§ 418. Waiver of protest on notes.**

Where bankrupt is endorser on a note which falls due after adjudication and before the trustee is appointed, it has been held that he may waive demand and notice.<sup>91</sup>

**§ 419. Right to reclaim property.**

The bankrupt cannot reclaim property which constitutes part of his estate, simply because he has been deprived thereof by unlawful search and seizure.<sup>92</sup>

89—In re Wiesel & Knaup, 173 Fed. 718, 23 A. B. R. 59.

90—In re Rosenblatt, 143 Fed. 663, 16 A. B. R. 306.

91—In re Battey, 16 N. B. R. 397, 2 Lowell 409, Fed. Cas. No. 14, 169.

92—In re Musica & Son, 205 Fed. 413, 30 A. B. R. 555, aff'd 211 Fed. 326, 31 A. B. R. 687.

## CHAPTER XIII

### ARREST, DETENTION AND EXTRADITION OF BANKRUPT

- § 421. Bankrupt's exemption from arrest.
- § 422. — When exempt.
- § 423. — Exemption applies to bankrupt only.
- § 424. — When not exempt.
- § 425. — Period during which exemption continues.
- § 426. — Scope of inquiry into state court proceedings.
- § 427. — Manner of procuring release.
- § 428. Detention of bankrupt for examination—Writ of *ne exeat*.
- § 429. — Release upon bond.
- § 430. Extradition of bankrupt.
- § 431. — Power to extradite.
- § 432. — Manner of extraditing.

#### § 421. Bankrupt's exemption from arrest.

#### § 422. — When exempt.

The bankruptcy act provides that: "A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act."<sup>1</sup>

This exemption is given to protect a bankrupt from arrest on claims from which his discharge will be a release and to prevent interference with the bankruptcy proceedings and render them effectual. A bankrupt is entitled to exemption from arrest on

<sup>1</sup>—Act of 1898, Sec. 9a. Act of 1867, Sec. 26. . . . No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

civil process for a claim from which his discharge in bankruptcy would release him;<sup>2</sup> as in contempt proceedings for failure to obey a state court's order to pay costs.<sup>3</sup>

The bankrupt is also expressly exempted from arrest on civil process issued by a state court even in actions on claims from which his discharge would not be a release when in attendance on the bankruptcy court or in the performance of a duty imposed by the act,<sup>4</sup> to continue until the final adjudication on the application for a discharge.<sup>5</sup> All courts insist upon this right as to parties and witnesses before them, since it is necessary to the orderly conduct of business.<sup>6</sup>

The bankrupt is exempt from arrest on civil process issued by a federal court other than the court of bankruptcy.<sup>7</sup>

### § 423. — Exemption applies to bankrupt only.

The exemption is given only to "a bankrupt," which includes any person against whom an involuntary petition or an application to set aside or revoke a discharge has been filed or who has filed a voluntary petition.<sup>8</sup>

### § 424. — When not exempt.

A bankrupt is liable to arrest where the proceeding is based on a claim which would not be released by his discharge, except when in attendance on the bankruptcy court or in the performance of a duty imposed by the act which is construed to be from the day his attendance before the referee is required until the final adjudication on his application for discharge;<sup>9</sup> as in

2—*Kavanaugh v. McIntyre*, 74 Misc. (N. Y.) 222, 27 A. B. R. 278; In re Baker, 1 N. B. N. 547, 3 A. B. R. 101, 96 Fed. 954; In re Fife, 109 Fed. 880, 6 A. B. R. 258; *Knott v. Putnam*, 107 Fed. 907, 6 A. B. R. 80; see also debts dischargeable, Chapter XXXV.

3—In re Summers, 1 N. B. N. 60; In re Borst, 2 N. B. N. 62, Fed. Cas. No. 1665.

4—See *United States v. Flynn*, 179 Fed. 316, 23 A. B. R. 294

5—G. O. XII (1). See § 425.

6—See *Matthews v. Tufts*, 87 N. Y. 568; s. c. 62 How. Pr. 508; and cases cited.

7—In re Wenman, 153 Fed. 910, 16 A. B. R. 690.

8—Act of 1898, § 1 (4).

9—G. O. XII (1); In re Lewensohn, 2 N. B. N. R. 381, 99 Fed. 73; In re Valk, 3 N. B. R. 73, 3 Ben. 431, Fed. Cas. No. 16814; In re Alsberg, 16 N. B. R. 116, Fed. Cas. No. 261; In re Walker, 1 N. B. R. 60, 1 Lowell, 222, Fed. Cas. No. 17060; In re Robinson, 2 N. B. R. 108, 6 Blatch. 256, Fed. Cas. No. 11939; In re Patterson, 1 N. B. R. 58, 2 Ben. 155, Fed. Cas. No. 10817; In re Whitehouse, 4 N. B. R. 15, 1 Lowell, 429, Fed. Cas. No. 17564.

the case of a judgment for the support of a bastard child;<sup>10</sup> or in the case of costs adjudged against him after adjudication;<sup>11</sup> or in proceedings in certain states on a judgment for a labor claim;<sup>12</sup> or under a state statute for failure to pay the balance due on goods sold on commission, the balance of sales being payable monthly;<sup>13</sup> or in an action for conversion of funds coming into his hands as ticket agent of a railroad company;<sup>14</sup> or on a judgment in trespass.<sup>15</sup> So, the exemption does not apply in an action to set aside a fraudulent conveyance of property prior to the bankruptcy act;<sup>16</sup> or on attachment in proceedings in a state court to discover assets to satisfy a lien established prior to bankruptcy;<sup>17</sup> and the nature of the process does not affect the question whether mesne or final.<sup>18</sup> Nor is the bankrupt exempt where the bankruptcy proceedings were instituted between the service of summons and time of appearance and he failed to appear,<sup>19</sup> or where after being sent to jail bankrupt applied for the poor debtor's oath and on the last day of the examination filed a petition in bankruptcy,<sup>20</sup> or in an action for fraud,<sup>21</sup> or if surrendered in discharge of bail, it being then as if he had never been bailed;<sup>22</sup> or if recaptured after an escape;<sup>23</sup> but a civil action for fraud will be stayed until the determination of the bankruptcy proceedings,<sup>24</sup> though the mere filing charges of fraud in a pending civil suit does not act as such stay.<sup>25</sup>

10—In re Baker, 1 N. B. N. 547, 3 A. B. R. 101, 96 Fed. 954.

11—In re Marcus, 104 Fed. 331, 5 A. B. R. 19; Id., 105 Fed. 907, 5 A. B. R. 365.

12—In re Grist, 1 A. B. R. 89.

13—Grover v. Clinton, 8 N. B. R. 312, Fed. Cas. No. 5845. Contra, In re Kimball, 2 N. B. R. 114, 6 Blatch. 292, Fed. Cas. No. 7769; aff'g 2 N. B. R. 74, 2 Ben. 554, Fed. Cas. No. 7768.

14—In re Wenman, 153 Fed. 910, 16 A. B. R. 690.

15—In re Simpson, 2 N. B. R. 17, Fed. Cas. No. 12879.

16—Goodwin v. Sharkey, 3 N. B. R. 138.

17—Ex p. Taylor, 16 N. B. R. 40, 1 Hughes, 617, Fed. Cas. No. 13773.

18—In re Wiggers, 2 Biss. 71; In re Miffin, 1 Penn. L. J. 146.

19—In re Graham, 1 N. B. N. 59.

20—In re Casey, 1 N. B. N. 166.

21—In re Devoe, 2 N. B. R. 11, 1 Lowell, 251, Fed. Cas. No. 3843.

22—In re Hazelton, 2 N. B. R. 12, 1 Lowell, 270, Fed. Cas. No. 6287; In re Cheney, 5 Law, Rep. 19, Fed. Cas. No. 2636; In re Rank, Crabbe, 493, Fed. Cas. No. 11566; Foxall v. Levi, 1 Cranch C. C. 139, Fed. Cas. No. 5015; Lingan v. Bayley, 1 Cranch C. C. 112, Fed. Cas. No. 8370.

23—Anderson v. Hampton, 1 B. & A. 308.

24—In re Migel, 2 N. B. R. 153, Fed. Cas. No. 9538; In re Lewensohn, 2 N. B. R. 381, 99 Fed. 73.

25—Minon v. Van Nostrand, 4 N. B. R. 28, 1 Lowell, 458, Fed. Cas. No. 9642.

Considerable question arose prior to the amendment of 1903, whether a bankrupt would be exempt from arrest upon a claim for alimony, and while it was held that if under the state law the judgment awarding the alimony, created a debt, as to the accrued instalments the discharge would be a release,<sup>26</sup> in view of the law which now specifically exempts alimony, the bankrupt would be liable to arrest. If the court of bankruptcy has for any reason stayed proceedings in such suit the bankrupt will be released from arrest without regard to whether the claim would be released.<sup>27</sup>

Imprisonment for debt being generally abolished in this country, neither the bankruptcy nor state courts can order one confined therefor, but there are many circumstances arising in the prosecution of cases in which imprisonment is authorized, generally in the nature of contempts for failure to comply with the court's orders, or for fraud.<sup>28</sup> A bankrupt may commit a contempt against a state court with which the court of bankruptcy would have no power to interfere, as a positive indignity offered to that court in its presence, and in other ways.<sup>29</sup>

#### § 425. — Period during which exemption continues.

The exemption begins with the filing of the petition and may exist where there is no adjudication of bankruptcy, and where there may never be, the filing of the petition fixing the time,<sup>30</sup> and applies to arrest after the institution of bankruptcy proceedings only, but does not render the institution of such proceedings a cause for release from prior arrest.<sup>31</sup>

26—Act of 1898, § 63, *post*, Appendix; In re Houston, 1 N. B. N. 305, 2 A. B. R. 107, 94 Fed. 119; In re Van Orden, 1 N. B. N. 475, 2 A. B. R. 801, 96 Fed. 86; In re Shufeldt, 2 N. B. N. R. 517; In re Nowell, 99 Fed. 931, 3 A. B. R. 837; In re Smith, 1 N. B. N. 471, 3 A. B. R. 67; In re Shepard, 97 Fed. 187; Barclay v. Barclay, 2 N. B. N. R. 552; but see In re Challoner, 2 N. B. N. R. 105, 98 Fed. 82, 3 A. B. R. 442.

27—Wagner v. U. S., 2 N. B. N. R. 1116, 104 Fed. 133, 4 A. B. R. 596.

28—Bankrupt may be committed as punishment for contempt where the contempt proceedings prosecuted solely as punishment for contempt of the state

court's authority as such and not merely for the collection of a debt. In re Fritz, 152 Fed. 562, 18 A. B. R. 244.

29—In re Houston, 94 Fed. 119, 1 N. B. N. 305, 2 A. B. R. 107.

30—State v. Rollins, 13 Mo. 179.

31—In re Walker, 1 N. B. R. 60, 1 Lowell, 222, Fed. Cas. No. 17060; In re Hazelton, 2 N. B. R. 12, 1 Lowell, 270, Fed. Cas. No. 6287; In re Claiborne, 109 Fed. 74, 5 A. B. R. 812, 3 N. B. N. R. 622; but see Brandon Nat. Bk. v. Hatch, 16 N. B. R. 468.

Contra, People ex rel. Taranto v. Erlanger, 132 Fed. 883, 13 A. B. R. 197; Turgeon v. Emery, 182 Fed. 1016, 25 A. B. R. 694.

The term "when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act," is not to be restricted to the particular occasions when the bankrupt is physically present in attendance in court, or actually engaged in performing a required duty, but is extended<sup>32</sup> to the whole period of time during which his performance of the duties imposed by the act may be ordered, that is, until the final adjudication on his application for discharge, or until the time limited for such application has expired,<sup>33</sup> and continues during the pendency of an appeal from an order refusing to revoke a discharge.<sup>34</sup>

#### § 426. — Scope of inquiry into state court proceedings.

The exemption is conferred because the party becomes amenable to the court of bankruptcy the moment the petition is filed against him, and the enforcing of the exemption by affirmative action is an act "to be done under and in virtue of the bankruptcy." The court of bankruptcy will not go behind the face of the papers in the case in the state court but will release the bankrupt if on their face it appears that the order was made on a claim that is dischargeable; or remand him if the contrary appears,<sup>35</sup> although the right to go behind the face of the papers is maintained in certain cases.<sup>36</sup>

#### § 427. — Manner of procuring release.

If at the time of filing his petition, a debtor is imprisoned, the court, on application, will order him to be produced on *habeas corpus* for the purpose of examination but will not order his

32—G. O. XII.

33—In re Lewensohn, 99 Fed. 73, 2 N. B. N. 381. See cases cited under § 424, note 9.

34—In re Chandler, 135 Fed. 893, 13 A. B. R. 614.

35—In re Robinson, 2 N. B. R. 108, 6 Blatch. 253, Fed. Cas. No. 11939; In re Devoe, 2 B. R. 27, 1 Lowell, 251, Fed. Cas. No. 3843; In re Migel, 2 N. B. R. 153, Fed. Cas. No. 9538; In re Valk, 3 N. B. R. 73, 3 Ben. 431, Fed. Cas. No. 16814; In re Kimball, 2 N. B. R. 114, 6 Blatch. 292, Fed. Cas. No. 7769; s. c. 2 N. B. R. 204, 2 Ben. 554, Fed. Cas. No.

7768, disapproving In re Glaser, 1 N. B. R. 73, 2 Ben. 180, Fed. Cas. No. 5474, and In re Kimball, 1 N. B. R. 193, 2 Ben. 38, Fed. Cas. No. 7767.

36—Electoral College Case, 1 Hughes, 571, Fed. Cas. No. 4336; In re Alsberg, 16 N. B. R. 116, Fed. Cas. No. 261; In re Williams, 11 N. B. R. 145, 6 Biss. 233, Fed. Cas. No. 17700; In re Glaser, 1 N. B. R. 73, 2 Ben. 180, Fed. Cas. No. 5474; In re Kimball, 1 N. B. R. 193, 2 Ben. 38, Fed. Cas. No. 7767; In re Smith, 18 N. B. R. 24, Fed. Cas. No. 12976.

release.<sup>37</sup> If during the pendency of the proceedings the petitioner is arrested or imprisoned on process in any civil action, a *habeas corpus* will issue on his application to ascertain if the basis of the arrest is a provable debt and, if it is, he will be discharged, otherwise he will be remanded.<sup>38</sup> The use of the term "provable" claim in the general orders is in evident conflict with the act which says "dischargeable" debt and must accordingly yield thereto. If the cause of action is dischargeable, an injunction after adjudication is discretionary and should be granted (1) if the bankrupt is threatened with arrest; (2) if the suit is not yet in judgment, and, even after judgment, if the rights of the general creditors, not parties to the suit, will be jeopardized by further proceedings; or (3) if the judgment is founded on a transaction which is an act of bankruptcy, or a fraud on creditors or the law; but it should never be granted after the judgment has ripened into an execution sale, provided the state court has or can be given jurisdiction of all interested parties.<sup>39</sup>

Application is usually made to the bankruptcy court for a writ of *habeas corpus* and if on the hearing bankrupt appears entitled an order for his release will be made. The motion may be addressed to the state court issuing the process whose duty it is to order the bankrupt's release in a proper case, but a failure or refusal to perform such duty does not deprive the bankruptcy court of its power to release him;<sup>40</sup> but the consideration of such application may properly be postponed until the state court has had an opportunity to pass on the federal question.<sup>41</sup> When a court of bankruptcy has no power to discharge a judgment,

37—In re Claiborne, 109 Fed. 74, 5 A. B. R. 812.

38—G. O. XXX; In re Fife, 109, Fed. 880, 6 A. B. R. 258; Barrett v. Prince, 143 Fed. 302, 16 A. B. R. 64.

39—S. L. & T. Co. v. Benbow, 1 N. B. N. 499, 3 A. B. R. 9, 96 Fed. 514.

40—In re Williams, 11 N. B. R. 145, 6 Biss. 233, Fed. Cas. No. 17700; In re Glaser, 1 N. B. R. 73, 2 Ben. 180, Fed. Cas. No. 5474; In re Simpson, 2 N. B. R. 17, Fed. Cas. No. 12879; In re Taylor, 16 N. B. R. 40, 1 Hughes, 617, Fed. Cas.

No. 13773; In re Migel, 2 N. B. R. 153, Fed. Cas. No. 9538; In re Wiggers, 2 Biss. 71, Fed. Cas. No. 17623; In re O'Mara, 4 Biss. 506, Fed. Cas. No. 10509.

41—Scott v. McAleese, 1 N. B. N. 265, 1 A. B. R. 605; Ex p. Royall, 117 U. S. 254, 29 L. ed. 872; Whitten v. Tomlinson, 160 U. S. 241, 40 L. ed. 412; Ex p. Fonda, 117 U. S. 516, 29 L. ed. 994; In re Duncan, 139 U. S. 449, 35 L. ed. 219; N. Y. v. Eno, 155 U. S. 89, 39 L. ed. 80.

it cannot interfere to prevent its enforcement by imprisonment, unless necessary to the exercise of its jurisdiction.<sup>42</sup>

The bankruptcy court of one district has the power to order the release of a bankrupt from arrest in another district, if the jailor is within its jurisdiction,<sup>43</sup> and such order fully protects the officer holding him and he will not thereafter be liable to punishment by the state court nor to an action for an escape.<sup>44</sup>

As the court may suspend or vacate the protection from arrest, it may grant it on terms, and hence may require the bankrupt to furnish a bond with sureties conditioned that during its continuance he will obey all orders of the court, and not meanwhile depart from its jurisdiction.<sup>45</sup>

A composition satisfies the debt, though based on a sale procured through false representations, and avoids an arrest on civil process.<sup>46</sup>

#### § 428. Detention of bankrupt for examination—Writ of ne exeat.

Section 9b of the bankruptcy act provides that: "The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released, or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as

42—In re Pettis, 2 N. B. R. 17, Fed. Cas. No. 11076.

43—In re Seymour, 1 N. B. R. 29, 1 Ben. 348, Fed. Cas. No. 12694; Hazelton v. Valentine, 2 N. B. R. 12, 1 Lowell, 270, Fed. Cas. No. 6287; Lathrop v. Drake, 13 N. B. R. 472, Fed. Cas. No.

8109, 91 U. S. (1 Otto) 516, 23 L. ed. 414.

44—In re Kimball, 1 N. B. R. 193, 2 Ben. 38, Fed. Cas. No. 7767.

45—In re Lewensohn, 2 N. B. R. 381, 99 Fed. 73; Act of 1898, § 2 (15).

46—Bamberg v. Stern, 18 N. B. R. 74.



required by the court, and for his obedience to all lawful orders made in reference thereto."<sup>47</sup>

The present law gives the court greater power than that under the act of 1867, but the time within which the debtor may be detained is limited to ten days. The marshal should be directed simply to bring the debtor before the court as the power to hold him ten days depends on the necessary facts being established by evidence at the hearing. Under its broad law and equity powers,<sup>48</sup> the bankruptcy court may issue an order in the nature of a *ne exeat* as broad as that provided by sections 717 and 5024 of the Revised Statutes of the United States, whenever necessary for the enforcement of the provisions of the law, and may thereunder arrest the bankrupt whenever the facts warrant the belief that he is about to abscond with or without his property to the embarrassment of the bankruptcy proceedings, and the fact that such order is not in the form provided in this subdivision, requiring the bankrupt to be brought before the court for examination, but in the form usually employed under section 717 of the Revised Statutes does not make the writ void, especially where the arrested parties are immediately brought before the judge and do not ask for an examination or object that none was given, but offer bail which is accepted.<sup>49</sup> The right of arrest given by this provision of the law confers no authority upon the court of bankruptcy to issue a warrant for the arrest of a bankrupt who is not within the district at the time, but who removed therefrom prior to the commencement of the bankruptcy proceedings.<sup>50</sup>

47—Analogous provision of Act of 1867, Sec. 40. . . . If it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged (bankrupt) and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take pos-

session provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

48—Act of 1898, § 2 (15); In re Schenkein et al., 113 Fed. 421, 7 A. B. R. 162; In re Cohen, 136 Fed. 999, 14 A. B. R. 355.

49—In re Lipke, 2 N. B. N. R. 347, 98 Fed. 970, 3 A. B. R. 569; Comp. Usher v. Pease, 12 N. B. R. 305, 116 Mass. 440; In re McKibben, 12 N. B. R. 97, Fed. Cas. No. 8859; In re Hale, 18 N. B. R. 335, Fed. Cas. No. 5911.

50—In re Ketchum, 108 Fed. 35, 5 A. B. R. 532.

The application for a writ of *ne exeat* should be supported by an affidavit made by the complainant or some person conversant with the facts which contain positive allegations that there is an equitable debt due and that the defendant intends to go abroad or has declared his intention to go, and that the debt will be in danger by the defendant's going abroad.<sup>51</sup>

An irregularity in the omission of a formal order authorizing the issue of a writ of *ne exeat* may be cured by signing such order *nunc pro tunc*.<sup>52</sup>

The writ of *ne exeat* will not be vacated until the examination is fully completed.<sup>53</sup>

### § 429. — Release upon bond.

A defendant arrested upon a writ of *ne exeat* may obtain a discharge of the writ upon giving bond with surety to answer and be amenable to the process of the court.<sup>54</sup> The court of bankruptcy has power to chancery a bond so given.<sup>55</sup> A temporary absence from the district is a breach of such bond.<sup>56</sup>

### § 430. Extradition of bankrupt.

### § 431. — Power to extradite.

Under section 2, clause 14 and section 10 of the act, after a warrant, or order, of arrest has been issued for a bankrupt for the commission of an offense under the bankrupt law,<sup>57</sup> or on a charge of contempt,<sup>58</sup> he may be extradited if found within the jurisdiction of a court other than the one issuing the warrant, or order. These provisions do not deal with or concern the jurisdiction or power of the court in which the bankruptcy case is pending to issue a warrant for the apprehension of the bankrupt for the purpose of examination, but only confer power on a court other than the one issuing the warrant to extradite the bankrupt.<sup>59</sup>

51—Hoffschlaeger Co., Ltd., v. Young Nap, *alias* Young Lap, 12 A. B. R. 510.

52—In re Berkowitz, 173 Fed. 1012, 22 A. B. R. 231.

53—In re Berkowitz, 173 Fed. 1013, 22 A. B. R. 227, 233.

54—Griswold v. Hazard, 141 U. S. 260; 35 L. ed. 678; In re Appel, 163 Fed. 1002, 20 L. R. A. (N. S.) 76, 20 A. B. R. 890.

55—In re Appel, 163 Fed. 1002, 20 L. R. A. (N. S.) 76, 20 A. B. R. 890.

56—In re Appel, 163 Fed. 1002, 20 L. R. A. (N. S.) 76, 20 A. B. R. 890.

57—Sec. 29b, act of 1898.

58—Sec. 2 (14), and 41a, act of 1898.

59—In re Ketchum, 108 Fed. 35, 5 A. B. R. 532.

**§ 432. — Manner of extraditing.**

The bankrupt is to be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.<sup>60</sup> The Revised Statutes<sup>61</sup> provide that for any offense against the United States, the offender may be arrested and imprisoned, or bailed, as the case may be, for trial before the court having cognizance of the offense; by any United States judge, United States commissioner, chancellor, judge of the supreme, superior or common pleas court, mayor of a city, justice of the peace or other magistrate, of any state where he may be found, and agreeably to the usual mode of process in such state, and at the expense of the United States; and, where any offender is committed in any district other than the one where the offense is triable, the judge of the district where the offender is imprisoned shall seasonably issue, and the marshal execute, a warrant for his removal to the trial district. Though there may be slight differences in the mode of procedure in different states, the usual course is to present a sworn complaint to a United States commissioner, or other committing magistrate, who thereupon issues a warrant to the marshal to arrest and bring the bankrupt before him. When brought before such officer, the bankrupt makes his plea, and, if it be guilty, he is bailed to appear for trial in the proper court, or committed to await the order of removal as the case may be. Otherwise he waives examination or demands a hearing. In the former case, the same disposition is made of him as on a plea of guilty. At the examination evidence is introduced for and against, counsel heard and the identity of the offender and his probable guilt must be established. If this is done he is bailed or committed as before stated. Thereupon the district attorney, accompanied by the marshal and the prisoner, go before the judge and apply for an order of removal, and the judge after satisfying himself of the prisoner's identity, his probable guilt, and that he is charged with an offense within the jurisdiction of the trial court, should issue an order directing the marshal to remove the prisoner to the trial district, or may admit him to bail; or, if it appears the removal should not be made, discharge him.<sup>62</sup>

60—Act of 1898, § 10.

61—Rev. Stat. U. S., § 1014.

62—In re Dana, 68 Fed. 886; Horner v. U. S. 143 U. S. 207, 36 L. ed. 126.

When a bankrupt has once been extradited, he may be detained <sup>63</sup> and obedience to all lawful orders enforced by fine or imprisonment, or both.<sup>64</sup>

63—Sec. 9, act of 1898.

64—Sec. 2 (13), act of 1898.

## CHAPTER XIV

### MEETINGS OF CREDITORS

- § 433. First meeting.
- § 434. — Nature and purpose.
- § 435. — Time and place of meeting.
- § 436. — Notice.
- § 437. — Adjournments.
- § 438. — Judge or referee to preside.
- § 439. — Bankrupt's attendance.
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#### § 433. First meeting.

#### § 434. — Nature and purpose.

The term "first meeting" does not necessarily mean the first assembling of the creditors, but refers to the meeting called to choose a trustee; for there may be adjournments if required as may readily happen where the creditors are numerous and the interests involved large, but all adjournments are the same meeting in contemplation of law; and an objection to the appointment of a particular trustee made at that stage is considered as continuing unless it appears to have been withdrawn. The

meeting is for business and must be held in strict accordance with the notice, at the time and place specified, not at some other time, sooner or later, or another place, though near by; and, if no creditors appear, the meeting is as effectual as if they were present or represented, the judge or referee not being authorized or required to wait for or "count a quorum;" and, in such case, if the schedules disclose no assets, the court may order that no trustee be appointed.<sup>1</sup>

### § 435. — Time and place of meeting.

The first meeting of the creditors of the bankrupt should be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, a place for the meeting should be fixed which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.<sup>2</sup>

### § 436. — Notice.

Creditors are entitled to at least ten days' notice by mail, from the referee to their respective addresses, of all meetings of creditors, in addition to which notice of the first meeting must be published at least once, and as many times additional as the court may direct, the last publication to be at least one week prior to the date fixed for the meeting.<sup>3</sup>

Courts of bankruptcy are required to designate a newspaper published within their respective districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices shall be inserted and for the convenience of parties in interest, additional newspapers may be designated.<sup>4</sup> Failure to give such notice as required, would

1—G. O. XV; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696; In re Phelps, 1 N. B. R. 139, Fed. Cas. No. 11071; In re Norton, 6 N. B. R. 297, Fed. Cas. No. 10348.

2—Act of 1898, § 55a.

3—Act of 1898, § 58.

4—Act of 1898, § 28.

render all subsequent proceedings void.<sup>5</sup> The form of notice is prescribed and the meeting must be held in strict accordance with the notice given.<sup>6</sup> Where notice of the first meeting of creditors does not reach creditors, and the court is satisfied that their votes would have changed the result, and that they did not attend through failure to receive notice, on their application the meeting should be reopened and each vote received, but, if one waits until a later meeting, he cannot have the first reassembled without good cause for the delay.<sup>7</sup> The objection of the bankrupt to the first meeting of creditors because the notice was mailed from a list prepared by the referee, the bankrupt failing to file a list within the time required and with the necessary data, as a result of which many creditors appearing on bankrupt's list failed to receive notice, will be overruled.<sup>8</sup>

One claiming to be a creditor to the knowledge of the referee is entitled to notice of the first meeting though he is not scheduled by the bankrupt as a creditor.<sup>9</sup>

### § 437. — Adjournments.

With the exercise of proper legal discretion a referee has entire control over proceedings pending before him, including the power to grant or refuse adjournments and postponements;<sup>10</sup> but it has been held that he could not adjourn a meeting fixed for a certain day, on which he was prevented from attending, by orders of adjournment sent his assistant, while he remained absent.<sup>11</sup> An adjournment will not be granted on the ground of surprise where the surprise relied upon is not as to a fact, but arises from an oversight of a provision of law.<sup>12</sup>

The meeting may be postponed to enable a creditor to restate or perfect his proof of debt.<sup>13</sup> Where the majority of creditors

5—In re Hall, 2 N. B. R. 68, Fed. Cas. No. 5922.

6—Form 18; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696.

7—In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13229.

8—In re Schiller, 2 A. B. R. 704, 96 Fed. 400.

9—In re Evening Standard Pub. Co., 164 Fed. 517, 21 A. B. R. 156.

10—In re Hyman, 2 N. B. R. 107, 3 Ben. 28, Fed. Cas. No. 6984; In re

Chemy, 19 N. B. R. 16, Fed. Cas. No. 2637; In re Kaufman, 179 Fed. 552, 24 A. B. R. 117.

11—In re Dickinson, 18 N. B. R. 514, Fed. Cas. No. 3895.

12—In re Finlay, 104 Fed. 675, 3 A. B. R. 738, 3 N. B. N. R. 78; see In re Blankfein, 2 N. B. N. R. 49, 97 Fed. 91, 3 A. B. R. 165.

13—In re Morris, 154 Fed. 211, 18 A. B. R. 828; In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13229.

are represented by an attorney who was formerly attorney for the bankrupt, the proper practice is to postpone the election for a few days in order to get at the exact fact,<sup>14</sup> but it has been held that the refusal of a referee to postpone the first meeting, after holding certain proxies invalid, is not an abuse of his discretion.<sup>15</sup>

### § 438. — Judge or referee to preside.

Either the judge or referee presides and should be punctually present at the time and place specified in the notice. The referee's duties being judicial, he does not otherwise participate in the meetings, but should conduct himself with dignity and impartiality as most familiar with the matters in question.<sup>16</sup>

### § 439. — Bankrupt's attendance and examination.

A bankrupt should attend the first meeting, if required by the court to do so, and when present at such meeting and at such other time as the court shall order, he must submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters affecting the administration and settlement of his estate.<sup>17</sup> The examination should be under oath.<sup>18</sup> A writ of *habeas corpus ad testificandum* to produce the bankrupt for examination, while allowable in the discretion of the court, need not be allowed regardless of circumstances or condition. Thus where the alleged bankrupt was confined in the hospital for criminal insane of another state, it was held that an order quashing the writ was properly quashed.<sup>19</sup>

The scope and conduct of examinations, generally, is treated elsewhere.<sup>20</sup>

14—In re Kaufman, 179 Fed. 552, 24 A. B. R. 117.

15—In re McGill, 106 Fed. 57, 5 A. B. R. 155.

16—Act of 1898, § 55b.

Analogous provision of act of 1867.

"Sec. 4. . . . Every register in bankruptcy shall . . . hold and preside at meetings of creditors."

17—Act of 1898, § 7a.

18—Edelstein v. United States, 149 Fed. 636, 9 L. R. A. (N. S.) 236, 17 A. B. R. 649.

19—In re Thaw, 166 Fed. 71, 21 A. B. R. 561.

20—See *post*, Chapter XV.



§ 440. — Allowance or disallowance of claims.

Before proceeding with other business the presiding officer may allow or disallow claims of creditors presented.<sup>21</sup> The court should be able without difficulty or delay to pass on all or most of the claims with the assistance of the schedules, the bankrupt, creditors and others interested. Claims of secured creditors and of those who have priority, may be allowed to enable such creditors to participate in the proceedings at the meetings held prior to the determination of the value of their securities of priorities.<sup>22</sup> If a particular claim is objected to, the question should be heard as soon as feasible, and, if the judge or referee is not satisfied with the weight of evidence, the hearing may be postponed and heard at some subsequent time and, if the creditor objects to such postponement, he should have the objection entered and the question certified to the judge in case the postponement was by the referee;<sup>23</sup> or if claims are presented which do not appear on the bankrupt's schedules in an involuntary proceeding action on them may be postponed until after the election of the trustee.<sup>24</sup>

§ 441. — Appointment of trustee.

At the first meeting of the creditors after the adjudication or after a vacancy has occurred in the office of trustee, or after the estate has been reopened, a composition set aside or discharge revoked, they should appoint one or three trustees of such estate,<sup>25</sup> and fix the amount of their bond, which may at any time be increased.<sup>26</sup>

§ 442. Subsequent meetings.

§ 443. — When called.

Section 55d of the act provides that: "A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance

21—Act of 1898, § 55b.

22—Act of 1898, § 57e.

23—In re Jackson, 14 N. B. R. 449, 7 Biss. 280, Fed. Cas. No. 7123; see In re Stevens, 4 N. B. R. 122, Fed. Cas. No. 13391.

24—In re Milwain, 12 N. B. R. 358, Fed. Cas. No. 9623.

See also *proof* and Allowance of Claims, *post*, § 660.

25—Act of 1898, § 44.

26—Act of 1898, § 50c.

See also *post*, Chap. XIX.

of their claims sign a written consent to hold a meeting at such time and place.”<sup>27</sup>

Section 55e provides that: “The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.”

In the event that no trustee is appointed by reason of the fact that the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may order that no meetings other than the first meeting shall be called.<sup>28</sup>

Whenever by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting, the court may call such meeting.<sup>29</sup>

27—Analogous provision of act of 1867. “Sec. 27. . . . At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt’s creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. At such meeting the majority in value

of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine. . . .

“Sec. 28. . . . If by accident, mistake, or other cause, without default of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to validity of the proceedings as if the meeting had been duly held.”

28—G. O. XV.

29—G. O. XXV.

### § 444. — Notice.

Notice must be given of all meetings.<sup>30</sup> Notices of special meetings called upon the petition of creditors for the purpose of re-examining certain claims, should be sent out by the referee unless otherwise ordered by the judge.<sup>31</sup>

### § 445. — Dividend and final meetings.

Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.<sup>32</sup>

The trustee must lay before the final meeting a detailed statement of the administration of the estate; and make final reports and file final accounts with the court fifteen days before the day fixed for such meeting,<sup>33</sup> of which ten days' notice must be given all creditors.<sup>34</sup>

The meeting for the declaration of a dividend may properly and conveniently be combined ordinarily with the meeting for the payment of such dividend; and, where there is but one dividend, there can be no objection to a further consolidation in the interest of economy, both of time and expense, proper notice being given.<sup>35</sup>

### § 446. Duties of creditors at meetings.

The creditors should at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of the act.<sup>36</sup>

30—*In re Stein*, 1 N. B. N. 339, 1 A. B. R. 662, 94 Fed. 124.

31—G. O. XXI (6); *In re Stoevers*, 3 N. B. N. R. 314, 105 Fed. 355.

32—Act of 1898, § 55f.

Analogous provision of act of 1867. "Sec. 28. . . . That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of the creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee

shall, as soon as may be, convert such state or effects into money, and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court."

33—Act of 1898, § 47a.

34—Act of 1898, § 58a.

35—*In re Smith*, 1 N. B. N. 404, 2 A. B. R. 648.

36—Act of 1898, § 55c.

### § 447. Voting at creditors' meetings.

#### § 448. — In general.

To entitle creditors to participate in and vote at meetings of creditors, they must own claims, provable in bankruptcy, which are neither secured, entitled to priority of payment, nor preferred, and must not only have proved such claims but have had them allowed,<sup>37</sup> and be in actual attendance.<sup>38</sup> Such creditors as are prohibited from proving their debts will not be allowed to vote.<sup>39</sup>

Claims proved after the election of a trustee will not entitle claimant to vote thereon to change the result though an appeal has been taken from the election.<sup>40</sup>

The creditors' powers are limited to voting for the trustee.<sup>41</sup> The vote for trustee should be taken at the earliest practicable moment, but creditors who have proved their claims may, if they choose, postpone action until others have proved, though they are not compelled to do so.<sup>42</sup>

#### § 449. — Individual and partnership creditors.

Creditors who have proved a debt against a partner of a firm in bankruptcy have no right to vote for a trustee for the firm, only partnership creditors being so entitled;<sup>43</sup> though, in case of the separate bankruptcy of one member of a firm, both individual and joint creditors are entitled to prove their claims and vote for the trustee, but the joint creditors do not compete in the separate assets.<sup>44</sup>

37—In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696; In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 Fed. 550; In re Richards, 2 N. B. N. R. 1027, 103 Fed. 849; In re Brown, 2 N. B. N. R. 590; In re Briscoe, 2 N. B. R. 78, Fed. Cas. No. 1886; In re Hill, Fed. Cas. No. 6481; In re Altenheim, Fed. Cas. No. 268.

38—In re Kaufman, 179 Fed. 552, 24 A. B. R. 117; In re Richards, 2 N. B. N. R. 1027, 103 Fed. 849, 4 A. B. R. 631.

39—In re Stevens, 4 N. B. R. 122, Fed. Cas. No. 13391.

40—In re Lake Superior, etc., 7 N. B. R. 376, Fed. Cas. No. 7997.

41—In re Campbell, 17 N. B. R. 4, 3 Hughes, 276, Fed. Cas. No. 2348.

42—In re Lake Superior, etc., 7 N. B. R. 376, Fed. Cas. No. 7997.

43—In re Scheiffer, 2 N. B. R. 179, Fed. Cas. No. 12445; see In re Beck, 110 Fed. 140, 6 A. B. R. 554; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696; In re Phelps, 1 N. B. R. 139, Fed. Cas. No. 11071; Sec. 5b, act of 1898.

44—In re Falkner, 16 N. B. R. 503, Fed. Cas. No. 4624; In re Webb, 16 N. B. R. 258, 4 Sawy. 326, Fed. Cas. No. 17317; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, Fed. Cas. No. 17664; see Partnership, *ante*, § 97, *et seq.*

### § 450. — Assigned claims.

The owner of a mere beneficial interest in a claim is not entitled to vote. Hence when the claims of a number of creditors have been assigned to a trustee, the creditors lose their right to vote separately,<sup>45</sup> but the fact that bankrupt's friends have endeavored to buy up the debts against him and stop the bankruptcy proceedings constitutes no reason for not voting upon the debts.<sup>46</sup> Claims secured through the bankrupt's disclosure of the contents of his schedules prior to the filing of the same should not be allowed any part in the selection of the trustee.<sup>47</sup>

The mere fact that an attorney was formerly in the employ of the bankrupt and filed his petition in bankruptcy, will not prevent him from accepting claims in good faith for the purpose of voting on them for trustee, it appearing that the relation between the attorney and bankrupt has ceased.<sup>48</sup>

Claims proved before the election and sold and assigned after proof must be voted upon by the owner and not by the original creditor, the owner being entitled to one vote.<sup>49</sup>

### § 451. — Secured, priority and preferred creditors.

A creditor whose claim is secured or has priority cannot vote unless such claim exceeds the security, and then only for the excess<sup>50</sup> or for so much of his debt as is unsecured, when the security applies only to a specific portion of the debt;<sup>51</sup> and a preferred creditor can only vote by surrendering such preference.<sup>52</sup> A "secured creditor" includes a creditor who has a security for his debt upon the property of the bankrupt of a

45—*In re Columbia Iron Works*, 142 Fed. 234, 14 A. B. R. 526; *In re Kenney & Co.*, 136 Fed. 451, 14 A. B. R. 611.

46—*In re Frank*, 5 N. B. R. 194, 5 Ben. 164, Fed. Cas. No. 5050.

47—*In re Lloyd*, 148 Fed. 92, 17 A. B. R. 96.

48—*In re Cooper*, 135 Fed. 196, 14 A. B. R. 320.

49—*In re Frank*, 5 N. B. R. 194, 5 Ben. 164, Fed. Cas. No. 5050.

50—Act of 1898, §§ 56b, 57e.

51—Analogous provision of act of 1867.

52—Sec. 18. . . . No person who has received any preference contrary to the

provisions of this act shall vote for or be eligible as assignee." *In re Milne, Turnbull & Co.*, 159 Fed. 280, 20 A. B. R. 248; *In re Campbell*, 17 N. B. R. 4, 3 Hughes, 276, Fed. Cas. No. 2348.

51—*In re Parker*, 10 N. B. R. 82, Fed. Cas. No. 10754.

52—Secs. 56, 57, act of 1898; *In re Eagles & Crisp*, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696; *In re Richards*, 2 N. B. N. R. 1027, 103 Fed. 849, 4 A. B. R. 631; *In re Malino*, 118 Fed. 368, 8 A. B. R. 205; *Brown v. City National Bank*, 72 Misc. (N. Y.) 201, 26 A. B. R. 638.

nature to be assignable under the act, or who owns such a debt for which some indorser, surety or other person, secondarily liable for the bankrupt, has such security upon bankrupt's assets;<sup>53</sup> and so far as concerns voting, does not include creditors holding securities on the property of third persons, or on exempt property.<sup>54</sup> A secured creditor who has sold his security, bid it in himself and proved his claim for the difference between the face of the claim and the amount bid at the sale cannot vote.<sup>55</sup>

Firm creditors are entitled to vote the full amount of their claims if otherwise proper, except as for such securities as are held upon partnership assets, while the value of any securities upon property of individual members of the firm are not securities which need be deducted in order to ascertain the value of claims against the firm.<sup>56</sup>

Creditors having claims which are secured or entitled to priority may, if they so desire, under the terms of the act, prove and have their claims allowed for the amount of the estimated excess over the security or priority and to that extent vote for the trustee,<sup>57</sup> or in case of preferred creditors, they may surrender the preference, prove their debts and participate to the full amount.<sup>58</sup> A creditor, who received a payment under an assignment more than a year before the bankruptcy proceedings, is entitled to have his claim counted and to vote on it in the amount less the credit.<sup>59</sup>

A sworn proof of claim negatives a preference and throws the burden of proof upon the creditors objecting on that ground to the voting power of a claim.<sup>60</sup>

53—Act of 1898, § 1 (23).

54—In re Stillwell, 7 N. B. R. 226, Fed. Cas. No. 13448.

55—In re Hunt, 17 N. B. R. 17205, Fed. Cas. No. 6881.

56—In re Coe, Powers & Co., 1 N. B. R. 294, 1 A. B. R. 275; In re Thomas & Sivyer, 8 Biss. 139.

57—Act of 1898, § 57e. In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526.

58—Act of 1898, § 57g. In re Eagles

& Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 695; In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10754; In re Bolton, 1 N. B. R. 83, 2 Ben. 189, Fed. Cas. No. 1614; In re Parham, 17 N. B. R. 300, Fed. Cas. No. 10712; Contra, In re Stillwell, 7 N. B. R. 266, Fed. Cas. No. 13448.

59—In re Folb, 1 N. B. N. 134, 1 A. B. R. 22, 91 Fed. 107.

60—In re Milne, Turnbull & Co., 159 Fed. 280, 20 A. B. R. 248.

**§ 452. — Relation of creditor and bankrupt as affecting vote.**

A creditor holding a valid claim cannot be barred from voting because he is a relative of or the attorney for the bankrupt<sup>61</sup> or in case of a bankrupt corporation because he is a stockholder, officer or attorney thereof.<sup>62</sup> However, where a vote is cast by a relative of the bankrupt, the court should convince itself before approving the election, that the trustee so elected is not in the interest of the bankrupt, but will perform his duties without fear or favor.<sup>63</sup>

**§ 453. — Fraudulent voting.**

A corrupt vote should be rejected; and if the result is not affected by such rejection, a new election need not be ordered.<sup>64</sup>

**§ 454. — Voting by attorney or proxy.**

While the act does not in so many words provide for representation at creditors' meetings otherwise than in the person of the creditor, yet in view of the fact that the term "creditor" comprehends any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy,<sup>65</sup> it is clear that the law-makers intended to sanction a mode of representation through a duly authorized agent, attorney or proxy and this was so understood by the supreme court.<sup>66</sup> This is further borne out by the fact that a penalty is provided for any person presenting under oath any false claim for proof against the estate of a bankrupt, or using any such claim in composition, personally or by agent, proxy or attorney, or as agent, proxy or attorney.<sup>67</sup>

An attorney, agent or proxy should be required, before being permitted to vote, to produce and file written authority from the creditor, which should be filed by the referee as part of his record.<sup>68</sup> While the authority of an attorney in good standing

61—In re Ployd, 183 Fed. 791, 25 A. B. R. 194.

62—In re Day & Co., 174 Fed. 164, 23 A. B. R. 56; In re Stradley & Co., 187 Fed. 285, 26 A. B. R. 149; In re Syracuse Paper & Pulp Co., 164 Fed. 275, 21 A. B. R. 174.

63—In re McGill, *supra*; In re Dayville Woolen Co., 114 Fed. 674, 8 A. B. R. 85. See In re Ployd, 183 Fed. 791, 25 A. B. R. 194.

64—In re Pfromm, 8 N. B. R. 357, Fed. Cas. No. 11061.

65—Act of 1898, § 1 (9). Matter of Kaufman, 179 Fed. 552, 24 A. B. R. 117.

66—G. O. IV.

67—Act of 1898, § 29b (3).

68—In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 695; In re Blankfein, 2 N. B. N. R. 49, 3 A. B. R. 165, 97 Fed. 191; In re Richards,

to appear and act for a client, whom he assumes to represent, is presumed and may be presumed in the ordinary matters arising in bankruptcy proceedings,<sup>69</sup> this presumption is limited to an attorney's ordinary duties, and voting for a trustee in bankruptcy is an act so essentially different in its nature and character from an attorney's ordinary duties and the considerations entering into the choice of a trustee are so foreign to a lawyer's ordinary functions or presumed knowledge or skill, that the right to vote cannot be deemed to be a part of his implied authority nor presumed to be conferred upon him from his mere retainer.<sup>70</sup>

The power of attorney should be acknowledged.<sup>71</sup> In states where justices of the peace are expressly authorized to take oaths, they may take the acknowledgment.<sup>72</sup> While the execution of a letter of attorney by one member of a firm for the firm is sufficient,<sup>73</sup> it must contain the oath of the person executing it showing that he is a member of the partnership.<sup>74</sup> A letter of attorney appointing three substitutes acknowledged before one of them would be irregular as to the one taking the acknowledgment, but would doubtless be valid as to the other two.<sup>75</sup>

The court does not look with favor upon the practice of canvassing creditors to secure votes,<sup>76</sup> and no attorney should be permitted to vote any claim that has come to him through the instrumentality of the bankrupt or his attorneys.<sup>77</sup> The referee

2 N. B. N. R. 1027, 103 Fed. 849; but see *In re Pauly*, 1 N. B. N. 405, 2 A. B. R. 334; *In re Brown*, 2 N. B. N. R. 590.

69—*In re Pauly*, 1 N. B. N. 405, 2 A. B. R. 333.

70—*In re Eagles & Crisp*, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 695; *In re Sugenhimer*, 1 N. B. N. 59, 1 A. B. R. 425, 91 Fed. 744; *In re Blankfein*, 2 N. B. N. R. 49, 3 A. B. R. 165, 97 Fed. 191; *In re Richards*, 2 N. B. N. R. 1027, 103 Fed. 849, 4 A. B. R. 631; *In re Scully*, 108 Fed. 372, 5 A. B. R. 717; *In re Finlay*, 3 N. B. N. R. 78; *In re Purvis*, 1 N. B. R. 163, Fed. Cas. No. 11476; *In re Knoepfel*, 1 N. B. R. 23, 1 Ben. 330, Fed. Cas. No. 7891; s. c. 1 N. B. R. 70, Fed. Cas. No. 7892; *Contra*, *In re Brown*, 2 N. B. N. R. 590.

*Contra*: *In re Crooker Co.*, 27 A. B. R. 241.

71—*In re Chistley*, 10 N. B. R. 268, Fed. Cas. No. 272; *Contra*, *In re Powell*, 2 N. B. R. 17, Fed. Cas. No. 11354.

72—G. O. XXI (5). *In re Roy*, 185 Fed. 551, 26 A. B. R. 4.

73—*In re Barrett*, 2 N. B. R. 165, 2 Hughes, 444, Fed. Cas. No. 1043; see *In re Finlay*, 3 A. B. R. 78.

74—G. O. XXI. *In re Blue Ridge Packing Co.*, 125 Fed. 619, 11 A. B. R. 36; *In re Finlay*, 3 A. B. R. 738.

75—*In re Sugenhimer*, 1 N. B. N. 59, 135, 1 A. B. R. 425, 91 Fed. 744.

76—*In re Fisher*, 193 Fed. 104, 26 A. B. R. 793.

77—*Falter v. Reinhard*, 104 Fed. 292, 2 N. B. N. R. 1119; *In re Law*, 13 A.



is warranted, therefore, when presiding at the first meeting of creditors to determine whether one holding a proxy obtained in the interest of the bankrupt should be permitted to vote for a trustee of his choice, and if convinced that the party offering to qualify as a voter does so in the interest of the bankrupt, he may be refused permission to vote, and should not be counted as present and necessary for a choice of trustee.<sup>78</sup> However, claims of creditors who have employed the attorney of the bankrupt in a regular way should not be disallowed merely because the attorney has acquired other claims unprofessionally.<sup>79</sup>

Where the referee determines that the attorneys representing the majority in number and amount of the creditors improperly procured their proxies or are improper persons to vote the claims of such creditors the meeting should be postponed for a reasonable time to enable such creditors to appoint proper representatives.<sup>80</sup> Where, however, he allows the minority creditors to elect a trustee, the person so elected may serve until another person is elected in his place.<sup>81</sup>

There is no statutory provision which forbids a creditor to have as his agent or attorney the person who acted as the attorney for the bankrupt in the preparation of his consent to an adjudication, but judicial policy greatly discourages a practice of attorneys at law acting as attorneys at the same time both for the bankrupt and for his creditors.<sup>82</sup> If, however, by want of proper advice creditors exercise their right to name and do name as their agent to act for them such attorney, they should not, for that reason alone, be absolutely denied the right to a voice in the selection of a trustee, but the election should be postponed in order to determine whether such attorney has ceased to be attorney for the bankrupt, or whether the creditors

B. R. 650; *In re Lloyd*, 148 Fed. 92, 17 A. B. R. 96. See also, *post*, Chapter XIX.

78—*In re McGill*, 106 Fed. 57, 5 A. B. R. 155, *aff'g* 104 Fed. 292, 4 A. B. R. 782; *In re Dayville Woolen Co.*, 114 Fed. 674, 8 A. B. R. 85.

79—*In re Lloyd*, 148 Fed. 92, 17 A. B. R. 96.

80—*In re Walker & Co.*, 204 Fed. 132, 29 A. B. R. 499; *Matter of Kaufman*, 179 Fed. 552, 24 A. B. R. 117.

81—*In re Walker & Co.*, 204 Fed. 132, 29 A. B. R. 499.

82—*In re Kaufman*, 179 Fed. 552, 24 A. B. R. 117.

Attorneys who filed the bankrupt's voluntary petition but who ceased to represent him after the petition was filed, and who solicited, while acting for the bankrupt, a part of the claims held by them, held improper proxies. *In re Walker & Co.*, 204 Fed. 132, 29 A. B. R. 499.

appointed him without any thought of the interest of the bankrupt.<sup>83</sup>

That the representative of a creditor who had mislaid his power of attorney was barred from participating in the election will not invalidate the same.<sup>84</sup>

The general rule is that a creditor whose claim has been allowed should be permitted to vote for trustee in person or by proxy, and any question as to whether his vote was improperly influenced should be reserved until the referee is called upon to approve the election, though he will not be held to have abused his discretion in refusing to allow one offering to qualify to vote, where he is convinced that the claims are not proven in good faith, or when the votes are in the interest of the bankrupt.<sup>85</sup>

#### § 455. — Change of vote.

A creditor has a right to change his mind after voting provided he does so in time, but he cannot change his vote on the ground of his own mistake, after the meeting has adjourned, and thereby give the court of bankruptcy the power to appoint a trustee; but such creditor may explain his mistake, or make other objection as to the choice of trustee to the court having to approve the selection.<sup>86</sup>

#### § 456. — Objections to claims and effect thereof.

Upon objection to a claim, a referee should require satisfactory evidence of a creditor's right to vote for a trustee.<sup>87</sup> The mere filing of objections to a claim should not exclude a creditor from voting, if he is otherwise qualified,<sup>88</sup> but the creditor whose claim is questioned has a right to be heard;<sup>89</sup> and, when a party is aggrieved by the ruling on his application for an opportunity to prove his right to vote, the meeting may be adjourned, and

83—In re Kaufman, 179 Fed. 552, 24 A. B. R. 117.

84—In re Blue Ridge Packing Co., 125 Fed. 619, 11 A. B. R. 36.

85—Falter v. Reinhard, 2 N. B. N. R. 1119, 104 Fed. 292; In re Henschel, 109 Fed. 861, 6 A. B. R. 305.

86—In re Scheiffer, 2 N. B. N. R. 179, Fed. Cas. No. 12445.

87—In re Northern Iron Co., 14 N. B. R. 356, Fed. Cas. No. 10322.

88—In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528.

89—In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526.

provision made for the determination of his right before the final vote is taken.<sup>90</sup> However, the action of the referee so excluding him will not be reviewed when no objection is made to the election and no facts presented raising the question of the rights of creditors in such cases.<sup>91</sup> The referee is not required, as was the register under the act of 1867, to certify all questions of fact and law to the judge for decision and hence the holding that a register could not, without special order, hear testimony as to creditor's right to vote, no longer applies.<sup>92</sup>

When objection is made to the proof of a claim, it should be heard in order to determine if made in good faith, and if well founded, the claim should not be allowed for voting purposes. It does not rest in the discretion of the referee to allow claims as voting bases when an apparently genuine objection is made, though in proper cases a provisional allowance or disallowance may be made in order that a trustee may be expeditiously elected, but the proceedings should not be so summary as to exclude consideration of all objections.<sup>93</sup> So, in a proper case, a claim proved and filed with the referee may be postponed for investigation by the trustee, and not allowed to be voted,<sup>94</sup> and such course, for instance, should be taken where the officers of a bankrupt corporation present large claims against it.<sup>95</sup> The court should not, however, permit the selection of a trustee to be indefinitely tied up by obstructive tactics, and which are obviously for purpose of delay.<sup>96</sup>

The effect of allowing or postponing the hearing on a particular claim affects only the creditor's right to vote at the first meeting, and, if it appears that his vote would not have affected

90—In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13229.

91—In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528.

92—In re Noble, 3 N. B. R. 25, 3 Ben. 332, Fed. Cas. No. 10282.

93—In re Malino, 118 Fed. 368, 8 A. B. R. 205, In re Milne, Turnbull & Co., 159 Fed. 280, 20 A. B. R. 248.

94—In re Frank, 5 N. B. R. 194, 5 Ben. 164, Fed. Cas. No. 5050; but see In re Barbusch, 9 N. B. R. 478, Fed. Cas. No. 1086.

The right of an alleged preferred

creditor may be suspended until his claim is investigated. In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526.

95—In re Lake Superior, 7 N. B. R. 376, Fed. Cas. No. 7997; see In re Herman, 3 N. B. R. 153, Fed. Cas. No. 6425; In re Chamberlain, 3 N. B. R. 173, Fed. Cas. No. 2574.

96—In re Duryea Powder Co., 159 Fed. 783, 20 A. B. R. 219; In re Malino, 118 Fed. 368, 8 A. B. R. 205; In re Sumner, 4 A. B. R. 123, 101 Fed. 224.

the result, the proceedings will not be disturbed to permit him to exercise a barren right; but, if the result would have been affected by his vote, the judge or referee may set aside the result, and order a new vote to be taken.<sup>97</sup>

The fact that part of a claim is contested will not destroy a creditor's right to vote for the trustee, where the balance thereof is separable and uncontested.<sup>98</sup>

### § 457. — Majority in number and amount required.

Section 56a of the act provides that for voting purposes a majority in number and amount of claims of all creditors whose claims have been allowed and "are present" controls.<sup>99</sup> The purpose of this clause is to vest the power of voting in those creditors who are present and not to allow a delay of the proceedings by those who are not sufficiently interested to participate or attend. If a claim is allowed, but not represented by proxy or by the creditor in person, or if allowed, but excluded from voting because of defective proxies, they are not to be treated as present, in computing the number and amount of claims for voting purposes.<sup>1</sup> Creditors are not to be counted as present simply because their claims have been allowed. They must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not.<sup>2</sup>

If there is a majority in number voting for one person and a majority in amount for another there is no election,<sup>3</sup> as where fifty creditors representing about \$1,000 of claims vote for one and twenty creditors representing about \$10,000 voted for another.<sup>4</sup> If only one creditor prove his debt, he has the right to choose the trustee.<sup>5</sup>

97—In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 696; In re Lake Superior Ship Canal, R. R. & Iron Co., 7 N. B. R. 376, Fed. Cas. No. 7997.

98—In re Wenatchee-Stratford Orchard Co., 205 Fed. 964, 30 A. B. R. 540.

99—See, In re Mackellar, 116 Fed. 547, 8 A. B. R. 669; In re Henschel, 113 Fed. 443, 7 A. B. R. 662.

1—In re Kaufman, 179 Fed. 552, 24 A. B. R. 117; In re Henschel, 113 Fed.

443, 7 A. B. R. 662; In re McGill, 106 Fed. 57, 45 C. C. A. 218, 5 A. B. R. 155; In re Mackellar, 116 Fed. 547, 8 A. B. R. 669.

2—In re Kaufman, 179 Fed. 552, 24 A. B. R. 117.

3—In re Richards, 2 N. B. N. R. 1027, 103 Fed. 849, 4 A. B. R. 631.

4—In re Pearson, 2 N. B. R. 151, Fed. Cas. No. 10878.

5—In re Haynes, 2 N. B. R. 78, Fed. Cas. No. 6269.

An attorney or committee to whom a number of claims have been assigned is entitled to but a single vote on all.<sup>6</sup>

Votes offered in favor of a candidate who was formerly an attorney for the bankrupt cannot be rejected entirely, so as to necessitate the appointment of another candidate who, were such votes disregarded, would have received a majority of the votes in number and amount.<sup>7</sup>

6—And see, *In re Kinney & Co.*, 136 Fed. 451, 14 A. B. R. 611; *In re Columbia Iron Works*, 142 Fed. 234, 14 A. B. R. 526.

7—*In re Machin and Brown*, 128 Fed. 315, 11 A. B. R. 449.

## CHAPTER XV

### AFFIDAVITS, EXAMINATIONS AND EVIDENCE

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## § 458. Oaths and affirmations.

### § 459. — Who may administer.

Oaths required by the Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.<sup>1</sup>

In addition to the referees, and officers specified, the federal courts, their clerks,<sup>2</sup> United States commissioners,<sup>3</sup> and justices of the peace, and notaries public<sup>4</sup> of the various states and territories and of the District of Columbia<sup>5</sup> are authorized to administer oaths, take affidavits and depositions. Acknowledgments or depositions abroad should be taken before diplomatic or consular officers of the United States, although no provision is made therefor in the general orders prescribed by the supreme court.<sup>6</sup>

### § 460. — Administration of oath by counsel.

While in the strict equity practice the general rule is that affidavits taken before an attorney of record will be deemed

1—Sec. 20a, act of 1898. Analogous provision, Act of 1867. "Sec. 11. . . . And shall annex to his petition a schedule, verified by oath before the court, or before a register in bankruptcy or before one of the commissioners of the circuit court. . . ."

"Sec. 22. . . . To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation, before the proper register or commissioner. . . ."

2—U. S. Rev. Stat., Sec. 725, Act of May 28, 1896, 2 Supp. R. S. 486.

3—In re Sheppard, 1 N. B. R. 115; Fed. Cas. No. 53, Act of May 28, 1896, 2 Supp. R. S. 486.

4—In re Bailey, 15 N. B. R. 48, Fed. Cas. No. 727.

5—U. S. Rev. Stat., Sec. 1778; 1 Supp. R. S. 123.

6—In re Sugenhimer, 1 N. B. N. 59, 135, 1 A. B. R. 425, 91 Fed. 744.

defective, in the majority of cases it is held to apply only to attorneys of record, that is, the person who at the time the affidavit was taken before him then appeared as attorney of record for the litigant in whose interest the affidavit was made, and, therefore, would not be applicable to an affidavit taken preparatory to the commencement of proceedings, as in the swearing to a bankrupt's petition and schedules;<sup>7</sup> nor does it apply to the case of proof of debt sworn to before the creditor's attorney.<sup>8</sup>

### § 461. — Affirmations.

Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.<sup>9</sup>

### § 462. — Form of oath.

The form of oath or acknowledgment prescribed by the general orders and forms should be carefully followed, and under the former law provisions as to the verification of the petition were held to be matters of substance to be strictly followed and could not be dispensed with,<sup>10</sup> though the form of oath prescribed for proving debts need not be followed in voting upon resolutions for compositions.<sup>11</sup>

### § 463. Certificate of acknowledgment.

When a deposition or proof of debt is taken before an officer authorized to administer oaths, he must authenticate the same by his seal as well as his signature, provided he is required to have one by law, and a seal used in common with others will not answer.<sup>12</sup> In those cases where the party administering the oath is not required by law to have a seal, his signature should be certified to by the proper officer. The requisites of the seal are fixed by the laws of the power making the appointment and

7—In re Kindt, 2 N. B. N. R. 306, 339, 98 Fed. 403, 3 A. B. R. 443; contra, In re Brumelkamp, 1 N. B. N. R. 360, 2 A. B. R. 318, 95 Fed. 814.

8—In re Kimball, 2 N. B. N. R. 46, 100 Fed. 777, 4 A. B. R. 144; McDonald v. Willis, 143 Mass. 542; contra, In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10073; In re Keyser, 9 Ben. 224, Fed. Cas. No. 7748.

9—Sec. 20b, act of 1898. Analogous provision, Act of 1867. "Sec. 48. . . . The word 'oath' shall include 'affirmation.' "

10—In re Keeler, 18 N. B. R. 10, Fed. Cas. No. 7647.

11—Ex p. Morris, 12 N. B. R. 170.

12—In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10073.



unless expressly required his name need not appear on it since it is the seal and not its composition or character of words and devices which raises the presumption of the official character of which the courts take notice, the presumption being that it is the seal of the person it purports to be and who signed the jurat.<sup>13</sup>

A notary's certificate of acknowledgment is sufficient although it contains no venue where his official character appears in his certificate, and this is specially true in the case of a power of attorney to vote as a proxy at a creditor's meeting, where it follows the form prescribed by the supreme court.<sup>14</sup>

#### § 464. Who may be examined.

#### § 465. — In general.

Before the amendment of 1903, the competency of witnesses, other than the bankrupt who was required<sup>15</sup> to submit to examination, was determined by the laws of the state in which the proceedings were pending, provided the state laws were not repugnant to the constitution of the United States,<sup>16</sup> but now any officer, bankrupt or creditor, including the bankrupt's wife, are made competent witnesses,<sup>17</sup> and the competency of witnesses is to be tested by the federal statutes.<sup>18</sup>

#### § 466. — Trustee, assignee or receiver.

Under the act of 1867, an assignee might be subpoenaed and required to testify in the same manner as any other witness, but he was not subject, as of course, to an examination by any creditor whenever the latter might desire it, but was protected from unnecessary annoyance by the refusal of an application for his examination, unless upon some issue regularly referred to the register.<sup>19</sup> The trustee is a competent witness under the present law and the foregoing rule with reference to the course of the register's examination would doubtless now apply to the trustee

13—In re Phillips, 14 N. B. R. 219, Fed. Cas. No. 11098.

14—In re Henschel, 113 Fed. 443, 7 A. B. R. 662, reversing 109 Fed. 861, 6 A. B. R. 305; *Carpenter v. Dexter*, 8 Wall. 513, 19 L. ed. 426.

15—Sec. 7 (9), act of 1898.

16—In re Jefferson, 1 N. B. N. 558, 3 A. B. R. 174, 96 Fed. 826.

17—Sec. 21a, act of 1898, as amended by act of 1903.

18—*Smith v. Township of Au Gres*, 150 Fed. 257, 9 L. R. A. (N. S.) 876, 17 A. B. R. 745.

19—In re Smith, 14 N. B. R. 432, Fed. Cas. No. 12988; *contra*, In re Hicks, 19 N. B. R. 449, Fed. Cas. No. 6457.

with equal propriety. A trustee might decline to answer with reference to a bankrupt's estate where his answer may tend to incriminate him.<sup>20</sup>

The trustee may examine a receiver appointed by a state court,<sup>21</sup> as well as a trustee in insolvency appointed more than four months prior to bankruptcy.<sup>22</sup>

### § 467. — Wife of bankrupt.

Under the amendment of 1903, the wife may be examined only touching business transacted by her or to which she is a party, and also for the purpose of determining the fact whether she has transacted or been a party to any business of the bankrupt.<sup>23</sup> Under the act of 1867, for good cause shown, the wife of any bankrupt might be examined as a witness and, if she failed to attend when ordered, he was refused a discharge, unless he proved his inability to secure her attendance, while she was liable to punishment for contempt. In the event she did appear and was examined, she was not at liberty to decline to answer because the matters inquired of were her private business.<sup>24</sup>

Prior to the amendment of 1903 there was no specific provision requiring or permitting a wife to attend as a witness either for or against her husband in any bankruptcy proceeding, but the matter was to be determined by the laws of the state in which the proceedings were pending;<sup>25</sup> thus, in Wisconsin,<sup>26</sup> Washington,<sup>27</sup> Tennessee,<sup>28</sup> and Missouri,<sup>29</sup> among other states, she was held in contempt for refusing to testify.<sup>30</sup>

20—In re Smith, 112 Fed. 509, 7 A. B. R. 213.

21—In re Hulse, 7 Ben. 40, Fed. Cas. No. 9864.

22—In re Pursell, 114 Fed. 371, 8 A. B. R. 96.

23—Sec. 21a, act of 1898, as amended by act of 1903.

24—In re Anderson, 23 Fed. 482, s. c. 9 N. B. R. 360, 2 Hughes 378, Fed. Cas. No. 351; In re Campbell, 17 N. B. R. 4, 3 Hughes 276, Fed. Cas. No. 2348; In re Woodford, 3 N. B. R. 113, 4 Ben. 9, Fed. Cas. No. 18029; In re Bellis, 3 N. B. R. 65, Fed. Cas. No. 1276; In re Craig, 4 N. B. R. 50, Fed. Cas. No. 3323; In re Van Tuyt, 2 N. B. R. 177, 3 Ben. 237, Fed. Cas. No. 16879.

25—In re Jefferson, 1 N. B. N. 558, 3 A. B. R. 174, 96 Fed. 826.

26—In re Fowler, 1 N. B. N. 265, 93 Fed. 147, A. B. R. 555; In re Mayer, 3 A. B. R. 222, 97 Fed. 328.

27—In re Jefferson, 1 N. B. N. 558, 3 A. B. R. 174, 96 Fed. 826.

28—In re Griffith, 1 N. B. N. 546.

29—In re Cohn, 104 Fed. 328, contra, In re Lynch, 1 N. B. N. 182, 1 A. B. R. 245; citing, Steffen v. Bower, 70 Mo. 399; Landy v. Kansas City, 58 Mo. App. 141; Brownlee v. Fenwick, 103 Mo. 420; McKee v. Spiro, 107 Mo. 452.

30—Under the act before the amendment of 1903, it was held that where the wife was a creditor of the bankrupt and a party to the proceedings, though she

The evident intent of the amendment of 1903, is to restrict the scope of the examination to business relations of the wife with the bankrupt, though the law as worded is not clear upon this point.

**§ 468. — Officers of bankrupt corporation.**

Testimony of the officers of the bankrupt corporation taken under sections 7, subdivision 9, and 21a is admissible in any proceedings against them other than criminal, as admissions against themselves.<sup>31</sup>

**§ 469. — Creditors and third persons.**

Under the law as enacted in 1898, any person who was a competent witness under the laws of the state in which the petition was pending might be examined in the bankruptcy proceedings; and an order made by a referee requiring such person to appear and be examined as a witness concerning the acts, conduct and property of the bankrupt, was valid without a formal application showing what questions were to be asked upon the examination, or as to what particular facts the witness was to be interrogated, the simple application or demand for such an order being all that was required to support it.<sup>32</sup>

Under the act as amended any competent witness may be examined concerning the bankrupt's acts, conduct or property,<sup>33</sup> although he may be a party to the proceedings instituted or to be instituted by the trustee to set aside liens procured by him, or preferential transfers made to him.<sup>34</sup> The trustee may examine a creditor, whose claim he disputes, concerning the

might not be compelled as the wife of the bankrupt to testify as to the property obtained directly or indirectly from her husband, as a creditor she could be fully examined as to her claim (*In re Post*, 1 N. B. N. 527; *In re Gilbert*, 3 N. B. R. 37, 1 Lowell 340, Fed. Cas. No. 5410; *In re Richards*, 17 N. B. R. 562, Fed. Cas. No. 11770). If she were not a creditor or did not file any claim against the estate or was not competent as a witness under the laws of the state, the proper proceeding was for the trustee to file a bill of discovery, under which she could be compelled to testify when the

purpose was to secure her evidence as to property fraudulently conveyed to her (*In re Fowler*, 1 N. B. N. 265, 93 Fed. 417, 1 A. B. R. 555; *In re Post*, 1 N. B. N. 527).

31—*In re Alphin & Lake Cotton Co.*, 131 Fed. 824, 12 A. B. R. 653.

32—*In re Howard*, 1 N. B. N. 488, 2 A. B. R. 582, 95 Fed. 415; *In re Blake*, 2 N. B. R. 10, Fed. Cas. No. 1492.

33—*In re Cliffe*, 97 Fed. 540, 3 A. B. R. 257.

34—*In re Feinberg*, 2 N. B. R. 137, 3 Ben. 162, Fed. Cas. No. 4716.

extent and nature of the bankrupt's indebtedness to him;<sup>35</sup> or as to the location, situation and condition of the bankrupt's property, and its fraudulent disposition,<sup>36</sup> and, if he has purchased claims against the bankrupt's estate, he is bound on pain of contempt to state where he obtained the money paid therefor, though he may say it did not come from the bankrupt.<sup>37</sup> He may be examined as to bankrupt's right and possible interest in property at the time of filing his petition in bankruptcy;<sup>38</sup> but he is not compelled to testify for his surety on a note in a suit by an administrator against him as principal and his surety,<sup>39</sup> nor can he be compelled to testify as to his private affairs which have no relation to the acts, conduct or property of the bankrupt.<sup>40</sup>

The words "concerning the property of the bankrupt" in section 21 mean the discovery of the existence, whereabouts or disposition of the property, and cannot be extended so as to draw from unwilling outsiders evidence as to the value of what the bankrupt owns and had in possession. So, an officer or a corporation in which the bankrupt owns stock, who is a stranger to the bankruptcy proceedings can only be compelled to answer questions concerning the acts, conduct or property of the bankrupt, and cannot be compelled to answer questions as to the value of such stock.<sup>41</sup>

## § 470. General rules applying to all examinations.

### § 471. — Who may apply for examination.

The act expressly provides that the application for the examination of persons in bankruptcy proceedings may be made by the bankrupt, a creditor or any officer,<sup>42</sup> the latter term including the clerk, marshal, receiver, referee and trustee.<sup>43</sup>

A receiver, whether appointed under the express grant of authority contained in the bankrupt law<sup>44</sup> or in the exercise of

35—In re Cliffe, 97 Fed. 540, 3 A. B. R. 257.

36—In re Blake, 2 N. B. R. 2, Fed. Cas. No. 1492.

37—In re Lathrop, 4 N. B. R. 93, Fed. Cas. No. 8106.

38—In re Dole, 7 N. B. R. 538, Fed. Cas. No. 3965.

39—Jenks v. Opp, 12 N. B. R. 19.

40—In re Carley, 106 Fed. 862, 5 A. B. R. 554.

41—In re Seligman, 192 Fed. 750, 26 A. B. R. 664.

42—Sec. 21a, act of 1898, as amended by act of 1903.

43—Sec. 1 (18), act of 1898.

44—In re Etheridge Fur. Co., 92 Fed. 329, 1 N. B. N. 139, 1 A. B. R. 112; In

the general equity powers possessed by the court of bankruptcy<sup>45</sup> to take charge of the property of a person against whom a petition in bankruptcy has been filed,<sup>46</sup> or any person who shows that he is actually a creditor of the bankrupt, as by being so named in the schedule, or by any other satisfactory evidence is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim,<sup>47</sup> or one creditor has already examined him;<sup>48</sup> or objection has been made to the claim;<sup>49</sup> or bankrupt claims an offset thereto.<sup>50</sup>

If the trustee refuses to undertake the examination of a third person at the request of a creditor, the court may, in its discretion grant the application of the creditor for such examination.<sup>51</sup> The creditor, however, has no unqualified right to such examination.

A creditor's right to an examination is suspended when opposed on the ground that a resolution of composition has been confirmed after adoption by the requisite number of creditors.<sup>52</sup> A party in interest, objecting to a composition<sup>53</sup> or to a claim proved against a bankrupt's estate, is entitled in support of his objection to examine claimant and other witnesses if their attendance can be procured without embarrassing delay, but the proceeding should not be suspended to obtain the evidence of witnesses beyond the court's jurisdiction, unless it is satisfied that the objection is interposed in good faith and that the evi-

re Sievers, 91 Fed. 366, 1 N. B. N. 68, 1 A. B. R. 117; aff'd in Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325.

45—Blake v. Francis-Valentine Co., 89 Fed. 691, 1 N. B. N. 47, 1 A. B. R. 372; see Keenan v. Shannon, Fed. Cas. No. 7640; Lansing v. Manton, Id. 8077.

46—In re Fixen & Co., 1 N. B. N. 568, 2 A. B. R. 822, 96 Fed. 748.

47—In re Samuelsohn, 174 Fed. 911, 23 A. B. R. 528; In re Rose, 163 Fed. 636, 19 A. B. R. 169; In re Kuffer, 153 Fed. 667, 18 A. B. R. 587; In re Jehu, 1 N. B. N. 509, 2 A. B. R. 498, 94 Fed. 638; In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 Fed. 550; see also In re Smith, Fed. Cas. No. 12977; In re Murdock, Id.

9939; In re Price, 91 Fed. 635, 1 A. B. R. 419.

48—In re Lanier, 2 N. B. R. 59, Fed. Cas. No. 8070.

49—In re Belden, 4 N. B. R. 57, Fed. Cas. No. 1241; In re Ray, 1 N. B. R. 203, 2 Ben. 53, Fed. Cas. No. 11589; see also In re Schwab, 8 Ben. 353, Fed. Cas. No. 12499.

50—In re Kingsley, 7 N. B. R. 558, 6 Ben. 300, Fed. Cas. No. 7818.

51—In re Andrews, 130 Fed. 383, 12 A. B. R. 267.

52—In re Tift, 18 N. B. R. 177, Fed. Cas. No. 14032; s. c. 17 N. B. R. 550, Fed. Cas. No. 14030.

53—In re Ash, 17 N. B. R. 19, Fed. Cas. No. 571.

dence desired is of substantial value and necessary to a just determination of the case.<sup>54</sup>

### § 472. — Time and manner of making application.

The application for an order of examination should be addressed to the court of bankruptcy or to the referee, and as a rule to the latter after the case has been referred,<sup>55</sup> and no notice thereof need be given.<sup>56</sup> It is usually made by petition or motion, no particular form being prescribed therefor, and need not be in writing or under oath, nor show the questions to be asked, or the particular facts to be proven, nor any cause whatever,<sup>57</sup> nor be supported by the referee's certificate as to the propriety therefor where made to the judge,<sup>58</sup> but a certificate of the referee that the petitioning creditors endeavored to examine the alleged bankrupt cannot be sustained as an application for an order to examine the bankrupt.<sup>59</sup>

### § 473. — Order for examination and subpoenas.

An order of the referee for the examination, reciting that it is made on the application of a party claiming to be interested in the estate, is in correct form;<sup>60</sup> and is in the nature of a summons.<sup>61</sup>

The order requiring the witness to appear may be issued by the clerk<sup>62</sup> and should be made returnable within fifteen days, unless the judge fixes a longer time.<sup>63</sup> The absence of a seal on a subpoena is a defect which may be waived by the appearance of the witness without objection on that ground.<sup>64</sup>

54—In re Sumner, 101 Fed. 224, 2 N. B. N. R. 681, 4 A. B. R. 123.

55—Sec. 38, act of 1898; Abbey Press, 134 Fed. 51, 13 A. B. R. 11.

56—In re McIntyre, 1 N. B. R. 11, 1 Ben. 277, Fed. Cas. No. 8811.

57—In re Abbey Press, 134 Fed. 51, 13 A. B. R. 11; In re Fixen, 1 N. B. N. 568, 96 Fed. 748, 2 A. B. R. 822; In re Howard, 1 N. B. N. 488, 95 Fed. 415, 2 A. B. R. 582; In re McBrien, 2 N. B. R. 73, 2 Ben. 513, Fed. Cas. No. 8665; In re Lanier, 2 N. B. R. 59, Fed. Cas. No. 8070; In re Solis, 4 N. B. R. 18, Fed. Cas. No. 13165; contra, In re Adams, 2 N. B. R. 33, 2 Ben. 503, Fed. Cas. No. 39.

58—In re Brands, 2 N. B. R. 109, Fed. Cas. No. 1813.

59—Craddock-Terry Co. v. Kaufman, 175 Fed. 303, 23 A. B. R. 724.

60—Vetterlein, 4 N. B. R. 194, Fed. Cas. No. 16926.

61—In re Bellamy, 1 N. B. R. 64, 1 Ben. 390, Fed. Cas. No. 1266.

62—In re Abbey Press, 134 Fed. 51, 13 A. B. R. 11.

63—Act 1898, § 18, as amended in 1903. Sundays and holidays included. In re Levy Outfitting Co., 29 A. B. R. 13.

64—In re Abbey Press, 134 Fed. 51, 13 A. B. R. 11.

**§ 474. — Before whom examination held.**

The act gives full opportunity to all parties concerned in bankruptcy proceedings to obtain desired testimony. If the witnesses cannot appear before the court or referee having jurisdiction of the case, they may be required to appear before a referee or judge of a state court where they may for the time be residing.

**§ 475. — Penalty for refusal to appear.**

The refusal of one to appear after being subpoenaed, to be sworn after appearing,<sup>65</sup> or to testify after being sworn renders such an one liable to contempt proceedings and punishment;<sup>66</sup> since courts of bankruptcy may punish contempts whether committed by failing to obey their lawful orders or those of referees;<sup>67</sup> but a witness cannot be required to attend at a place outside of the state of his residence or more than a hundred miles therefrom. The failure of a party to produce a witness within his power raises a presumption that the testimony would be unfavorable.<sup>68</sup>

The subject of Contempts is fully treated in Chapter XXXVI.

**§ 476. — Right to counsel.**

The bankrupt, or a creditor, is entitled to be represented by an attorney at his examination, but not a mere witness undergoing examination unless he is made a party to a new collateral proceeding by being cited to answer for an alleged contempt.<sup>69</sup> The examination by the trustee of witnesses other than the bankrupt is taken solely for the trustee's information to enable him to act intelligently in the premises and to take such steps as may be necessary for the protection and preservation of the estate, and the bankrupt's attorney has no right to take part therein.<sup>70</sup>

65—*In re Scott*, 1 N. B. N. 161, 1 A. B. R. 49, 95 Fed. 815.

66—Sec. 41, act of 1898. *In re Automatic Musical Co.*, 204 Fed. 334, 30 A. B. R. 328.

67—Secs. 2 (13), 2 (16), act of 1898; *In re Howard*, 1 N. B. N. 488, 2 A. B. R. 582, 95 Fed. 415.

68—*In re Kellogg*, 113 Fed. 120, 7 A. B. R. 623; *Graves v. U. S.*, 150 U. S. 118, 37 L. ed. 1021; *Runkle v. Burnham*, 153 U. S. 217, 38 L. ed. 695.

69—*In re Abbey Press*, 134 Fed. 51, 13 A. B. R. 11; *In re Howard*, 1 N. B. N. 488, 2 A. B. R. 582, 95 Fed. 415; *In re Comstock*, 13 N. B. R. 193, 3 Sawy. 517, Fed. Cas. No. 3080; *In re Stuyvesant Bk.*, 6 Ben. 33, Fed. Cas. No. 13582; *In re Cobb*, 7 A. B. R. 104; *In re Fredenburg*, 1 N. B. R. 268.

70—*In re Adler & Co.*, 21 A. B. R. 302; *In re Cobb*, 7 A. B. R. 104; see *In re Fixen*, 1 N. B. N. 568, 2 A. B. R. 822.

An attorney at law appearing before a referee is to be recognized unless put to the proof by a rule therefor; all others must produce formal powers of attorney<sup>71</sup> which need not, however, be acknowledged.<sup>72</sup>

Whether the bankrupt shall be allowed, during his examination, to consult with his counsel must be determined by the referee according to the circumstances of the case,<sup>73</sup> and of which the referee should be the judge.<sup>74</sup>

### § 477. — Scope of examination.

The examinations provided for by section 21 of the act, are intended as means of obtaining full information<sup>75</sup> touching the bankrupt's estate, in order that necessary steps may be taken for its possession and preservation.<sup>76</sup> A large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have property of the bankrupt.<sup>77</sup> The examination is largely for the purpose of discovery, and its extent must be determined by the sound judgment of the officer before whom it is taken, and the exercise of such court's discretion is not to be interfered with in an appellate court unless clearly abused.<sup>78</sup> Where questionable proceedings are disclosed, greater latitude should be allowed.<sup>79</sup>

Unless a foundation is laid for the belief that property of the bankrupt was withheld by him at the time of making an assignment long before the bankruptcy proceedings, and was still held by him at the time of the enactment of the bankruptcy law, an

71—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

72—In re Powell, 2 N. B. R. 17, Fed. Cas. No. 11354.

73—In re Lord, 3 N. B. R. 58, Fed. Cas. No. 8502; In re Collins, 1 N. B. R. 153, Fed. Cas. No. 3008.

74—In re Tanner, 1 N. B. R. 59, 1 Lowell 215, Fed. Cas. No. 13745.

75—In re Carley, 106 Fed. 862, 5 A. B. R. 554.

76—In re Horgan, 2 N. B. N. R. 233, 3 A. B. R. 253, 98 Fed. 414; aff'g 2 N. B. N. R. 53, 97 Fed. 319; In re Fixen & Co., 1 N. B. N. 568, 2 A. B. R. 822, 96

Fed. 748; In re Earle, Fed. Cas. No. 4244; In re Kreuger, Id. 7942; In re Lathrop, Id. 8106; In re Stuyvesant Bk., Id. 13582; In re Mendenhall, Id. 9423; In re Lathrop, Haskins & Co., 184 Fed. 534, 24 A. B. R. 911.

77—In re Lathrop, Haskins & Co., 184 Fed. 534, 24 A. B. R. 911; In re Lubber, 152 Fed. 492, 18 A. B. R. 476.

78—In re Forest, 1 N. B. N. 258, 93 Fed. 190, 1 A. B. R. 259.

79—In re Foerst, 1 N. B. N. 258, 1 A. B. R. 259; In re Horgan, 2 N. B. N. R. 233, 3 A. B. R. 253, 98 Fed. 414; In re Pittner, 2 N. B. N. R. 915.



inquiry into the circumstances under which such assignment was made is not material or proper;<sup>80</sup> but the inquiry is not limited to facts and transactions occurring within four months prior to the bankruptcy and may be directed to matters anterior to that if so doing will throw light on the issues involved.<sup>81</sup>

#### § 478. — Conduct of examination.

There is no reason why a witness may not be examined prior to the bankrupt.<sup>82</sup>

The referee need not allow the counsel to ask and permit witnesses to answer the same question over and over again, but upon noting the fact that the question has once been answered, or the demand to answer has once been refused, he may prevent vain repetition.<sup>83</sup> Unreasonable discursiveness may be checked by making the examining party pay for it; and, if plainly frivolous, prolix, to gratify malice or mere curiosity, it should be stopped.<sup>84</sup>

A witness should always be allowed to correct erroneous statement previously made by him.<sup>85</sup>

It is error for the court on the hearing of a controversy to refuse to take or to consider evidence which either party desires to offer, and to close the hearing before such evidence is presented to the court so that it can consider it and determine its admissibility,<sup>86</sup> but after a party has had an opportunity to call and examine his witnesses and the matter before the referee is closed, the case need not be reopened in the absence of a special showing.<sup>87</sup>

#### § 479. — Revenue law establishes rule of evidence.

The court of bankruptcy is essentially a federal institution. The revenue laws are essentially federal also. The laws laid down by congress regarding what may or may not be

80—In re Hayden, 1 N. B. N. 265, 1 A. B. R. 670, 96 Fed. 199.

81—In re Brundage, 100 Fed. 613, 4 A. B. R. 47; In re Pursell, 114 Fed. 371, 8 A. B. R. 96; Knittel v. McGowan, 134 Fed. 498, 14 A. B. R. 209.

82—In re Frendenberg, 1 N. B. R. 34, 2 Ben. 133, Fed. Cas. No. 5075.

83—In re Romino, 138 Fed. 837, 14 A. B. R. 785.

84—In re Salkey, 9 N. B. R. 107, 5 Biss. 486, Fed. Cas. No. 12252.

85—In re Hark Bros., 136 Fed. 986, 14 A. B. R. 624.

86—Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 21 A. B. R. 270.

87—In re Booss, 154 Fed. 494, 18 A. B. R. 658.

evidence "in any court" must, in the nature of things, be peculiarly applicable to courts existing under federal statutes. Hence unstamped notes while that law was in force will not be received in bankruptcy proceedings.<sup>88</sup>

### § 480. — Privileged communications.

While a bankrupt's communications to his attorney are privileged and cannot be brought out in evidence, counsel may be required to testify as to acts and things which have come to his knowledge by reason of his position as counsel, which were not communicated to him by the bankrupt or by some one through his direction.<sup>89</sup> An attorney cannot decline to testify concerning his own acts done in behalf of his client,<sup>90</sup> nor refuse to be sworn on the ground that he had acted as counsel for the bankrupt and is still his legal advisor;<sup>91</sup> hence he may be compelled to answer questions concerning a conveyance to him by the bankrupt of land and a subsequent conveyance by the former of the same land to the wife of the latter.<sup>92</sup>

### § 481. — Weight of evidence.

The general rule applies with reference to the weight to be given to the evidence of the bankrupt and others, and a witness may be as thoroughly discredited by the inherent improbability of his testimony as by the direct testimony of other witnesses.<sup>93</sup>

### § 482. — Variance.

The general rule that the proofs must agree with the allegations applies equally to proceedings in bankruptcy.<sup>94</sup>

### § 483. Examination of bankrupt.

### § 484. — Propriety.

The bankrupt may be examined concerning his acts, conduct and property,<sup>95</sup> but an examination of bankrupt should not be

88—In re Dobson, 2 N. B. R. 514.

89—In re Ruos, 159 Fed. 252, 20 A. B. R. 281; In re Aspinwall, 10 N. B. R. 448, Fed. Cas. No. 591.

90—In re O'Donohoe, 3 N. B. R. 59, Fed. Cas. No. 10435.

91—In re Woodward, 3 N. B. R. 477, 4 Ben. 102, Fed. Cas. No. 17999.

92—In re Bellis, 3 N. B. R. 49, 3 Ben. 386, Fed. Cas. No. 1274.

93—In re Leslie, 119 Fed. 406.

94—In re Musto, 2 N. B. R. 577; In re Devoe, 2 N. B. R. 27, 1 Lowell, 251, Fed. Cas. No. 3843.

95—Act of 1898, § 21a, as amended in 1903.

allowed when it is sought for the purpose of gratifying curiosity, or prying into the business of the debtor, or any purpose other than the furtherance of justice and the protection of the rights of creditors.<sup>96</sup>

The bankrupt is not a competent witness in a criminal proceeding against himself.<sup>97</sup>

### § 485. — Notice to bankrupt and creditors.

The provision that creditors shall have at least ten days' notice of all examinations of the bankrupt, unless they waive notice in writing, is mandatory; <sup>98</sup> but the examinations intended are those occurring in the regular course of the proceeding. The bankrupt may be examined solely for the purpose of preparing the schedules,<sup>99</sup> or to furnish information to aid the court and its officer or the receiver, in the preservation of the estate for the benefit of the creditors,<sup>1</sup> without notice to the creditors.

If the bankrupt is in court there seems to be no reason why he may not be examined without further notice,<sup>2</sup> or if in attendance at a meeting to show cause against his discharge,<sup>3</sup> or upon summons as a witness in respect to the hearing of a motion to expunge proof of claim,<sup>4</sup> or where it is desired to discover his estate in proceedings to satisfy a lien established prior to bankruptcy.<sup>5</sup>

In lieu of the subpoena or summons, an order of examination signed by the referee <sup>6</sup> should be delivered forthwith to the bankrupt, proof of service being made by affidavit or written acceptance of the bankrupt.

### § 486. — Attendance of imprisoned bankrupt.

An imprisoned bankrupt may be produced for examination on a writ of habeas corpus ad testificandum made by a judge, pos-

96—In re Salkey, 9 N. B. R. 107, 5 Biss. 486, Fed. Cas. No. 12252.

97—U. S. v. Black, 12 N. B. R. 340, 1 Hask. 570, Fed. Cas. No. 14602.

98—Sec. 58a, act of 1898. In re Gilbert, 2 N. B. N. R. 378.

99—In re Franklin Syndicate, 2 N. B. N. R. 522, 101 Fed. Cas. 402, 4 A. B. R. 511; In re Bromley, 3 N. B. R. 169; In re Salkey, 9 N. B. R. 107, 5 Biss. 486, Fed. Cas. No. 12252; In re Patterson, 1 N. B. R. 100, 1 Ben. 448, Fed. Cas. No. 10814.

1—In re Abrahamson & Bretstein, 1 N. B. N. 23, 1 A. B. R. 44.

2—In re Bromley, *supra*.

3—In re Brandt, 2 N. B. R. 76, Fed. Cas. No. 1812.

4—Canby v. McLearn, 13 N. B. R. 22, Fed. Cas. No. 2378.

5—Ex p. Taylor, 16 N. B. R. 40, 1 Hughes 617, Fed. Cas. No. 13773.

6—Official Form No. 28, § 1748, *post*.

sibly by a referee.<sup>7</sup> However, such writ need not be allowed regardless of circumstances or condition and, where the alleged bankrupt is confined in the hospital for the criminal insane of another state, the writ is properly quashed.<sup>8</sup>

### § 487. — Period during which examination may be had.

The act provides that a bankrupt "whose estate is in process of administration" may be examined.<sup>9</sup>

The decisions are conflicting as to whether this clause will permit an examination prior to the adjudication,<sup>10</sup> but the rule has been recently settled in favor of such right of examination by a decision of the supreme court, holding that a receiver having been placed in possession prior to adjudication, the estate was in the process of administration and the right of examination existed.<sup>11</sup>

The decisions, however, leave in doubt the question whether an examination is proper subsequent to the filing of the petition but prior to the time the court takes possession by the appointment of a receiver, though adopting the reasoning of the supreme court, the right would seem to exist. In announcing its decision the supreme court said, "The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed until after adjudication, which may not take place for twenty

7—In re Gilbert, 2 N. B. N. R. 378.

8—In re Thaw, 166 Fed. 71, 21 A. B. R. 561, 172 Fed. 288, 22 A. B. R. 687.

9—Act of 1898, § 21a.

10—*Bankrupt can be examined prior to adjudication.* In re Fleischer, 151 Fed. 81, 18 A. B. R. 194; Cameron v. United States, 192 Fed. 548, 27 A. B. R. 657.

*Bankrupt cannot be examined prior to adjudication.* In re Thompson, 179 Fed. 874, 24 A. B. R. 655; Skubinsky v. Bodek, 172 Fed. 332, 24 L. R. A. (N. S.) 985, 22 A. B. R. 689; In re Davidson, 158 Fed. 678, 19 A. B. R. 833; In re Crenshaw, 155 Fed. 271, 19 A. B. R. 266.

Bankrupt cannot be compelled to sub-

mit to an examination before trial as to his sanity, against the objections of his guardians. In re Ward, 161 Fed. 755, 20 A. B. R. 482.

An order directing a bankrupt to submit to an examination prior to adjudication, upon two days notice held improper where more than a year had elapsed since the filing of the petition, and the application for the order did not show an emergency that called for immediate and exceptional action. In re Wilkes-Barre Light Co., 208 Fed. 539, 31 A. B. R. 451.

11—Cameron v. United States, 231 U. S. 710, 58 L. ed. 448, 31 A. B. R. 604, rev'g 192 Fed. 548, 27 A. B. R. 657.

days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of, and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated.”<sup>11a</sup>

A person duly adjudged bankrupt may be ordered before the referee for examination before the first meeting of creditors in order to obtain information to make up the schedules,<sup>12</sup> or at the first meeting of creditors<sup>13</sup> or at any time during the pendency of the proceedings.<sup>14</sup> An application for an examination may be granted although the bankrupt has applied for his discharge,<sup>15</sup> or has already obtained his discharge,<sup>16</sup> since the right of examination continues for one year thereafter,<sup>17</sup> but not after the expiration of that period,<sup>18</sup> although this right may be lost by laches.<sup>19</sup>

#### § 488. — Length of examination.

The register was not allowed under the former act to fix beforehand the time within which the examination of the debtor must be concluded without regard to the nature of the questions or the interest in which they were propounded,<sup>20</sup> which is doubtless true under the present law.

#### § 489. — Adjournments and second examination.

The bankrupt may be examined on an adjourned day, notwithstanding the creditor failed to appear on the day originally

11a—Cameron v. United States, 231 U. S. 710, 58 L. ed. 448, 31 A. B. R. 604, rev'g 192 Fed. 548, 27 A. B. R. 657.

12—Sec. 7 (9), act of 1898. In re Franklin Syndicate, 2 N. B. N. R. 522, 101 Fed. 402, 4 A. B. R. 511; In re Bromley, 3 N. B. R. 169; In re Salkey, 9 N. B. R. 107, 5 Biss. 486, Fed. Cas. No. 12252; In re Patterson, 1 N. B. R. 100, 1 Ben. 448, Fed. Cas. No. 10814.

13—Sec. 55b, act of 1898.

14—In re Bryant, 188 Fed. 530, 26 A. B. R. 504.

15—In re Solis, 4 N. B. R. 18, Fed. Cas. No. 13165.

16—In re Westfall Bros. & Co., 8 A. B. R. 431.

17—In re Westfall Bros. & Co., 8 A. B. R. 431; In re Peters, 1 N. B. N. 165, 1 A. B. R. 248, citing In re Heath, 7

N. B. R. 448, Fed. Cas. No. 6304; In re Solis, 3 N. B. R. 186, 4 Ben. 143, Fed. Cas. No. 13165; and holding In re Dole, 7 N. B. R. 538, Fed. Cas. No. 39645; In re Jones, 6 N. B. R. 386, Fed. Cas. No. 7449; In re Dean, 3 N. B. R. 188, Fed. Cas. No. 3701; In re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17290, inapplicable. In re Peters, 1 N. B. N. 165, 1 A. B. R. 248; In re Heath, 7 N. B. R. 448, Fed. Cas. No. 6304; In re Westfall, supra; see In re Dean, 3 N. B. R. 188, Fed. Cas. No. 3701.

18—In re Dole, 7 N. B. R. 538, Fed. Cas. No. 3965.

19—In re Isador, 1 N. B. R. 33, 2 Ben. 123, Fed. Cas. No. 7105.

20—In re Tift, 17 N. B. R. 421, Fed. Cas. No. 14036.

fixed for the examination,<sup>21</sup> but if he has been examined at several adjourned meetings, further examination may be refused.<sup>22</sup>

Since the law places no limit upon the number of times a witness or the bankrupt may be examined, the frequency rests in the discretion of the officer to whom application is made, so that although a witness may be examined by one creditor, he may still be examined by another.<sup>23</sup> The bankrupt should not be unnecessarily harassed, vexed or annoyed, but where it appears that the creditors may be benefited by further examination, or for any other good reason appearing, the order should be allowed.<sup>24</sup> Where an examination has terminated, there would seem to be no reason why a new application might not be made,<sup>25</sup> though cause therefor would have to be shown.<sup>26</sup> The application of the trustee for a further examination of the bankrupt need not set forth the nature and character of the testimony intended to be adduced in detail.<sup>27</sup>

While bankrupt may be examined when<sup>28</sup> in attendance at a meeting to show cause against his discharge, a new examination will not ordinarily be allowed on the application of creditors opposing a discharge, after previous full examination, unless the first examination was elusive or deficient in material and specified particulars;<sup>29</sup> though the bankrupt's attendance and examination on the return of the order to show cause, which is required to enable creditors to form their specifications, will not excuse him from undergoing a further examination, on the application of objecting creditors, if the referee shall deem it reasonable and necessary.<sup>30</sup>

If the application for an examination is made on the return

21—In re Robinson, 2 N. B. R. 162, Fed. Cas. No. 11942.

22—In re Proby, 17 N. B. R. 175, Fed. Cas. No. 11439.

23—In re Adams, 2 N. B. R. 92, 3 Ben. 7 Fed. Cas. No. 40; In re Vogel, 5 N. B. R. 393, Fed. Cas. No. 16984.

24—In re Bryant, 188 Fed. 530, 26 A. B. R. 504.

25—In re Van Tuyl, 2 N. B. R. 35, Fed. Cas. No. 16881.

26—In re Gilbert, 3 N. B. R. 37, 1 Lowell 340, Fed. Cas. No. 5410; In re

Isador, 1 N. B. R. 33, 2 Ben. 123, Fed. Cas. No. 7105.

27—In re Bryant, 188 Fed. 530, 26 A. B. R. 504.

28—In re Brandt, 2 N. B. R. 76, Fed. Cas. No. 1812.

29—In re Frisbie, 13 N. B. R. 349, Fed. Cas. No. 5131; In re Frizzelle, 5 N. B. R. 119, Fed. Cas. No. 5132; In re Isador, 1 N. B. R. 33, 2 Ben. 123, Fed. Cas. No. 7105.

30—In re Kingsley, 16 N. B. R. 301, Fed. Cas. No. 7820.

day of the notice of the debtor's application for discharge, and no such examination has been previously had, to avoid delay, notice of the application for discharge should contain notice of the examination, and only one such examination, as regards discharge, should ordinarily be had; though if necessary such examination may be adjourned from time to time.<sup>31</sup>

### § 490. — Scope of examination.

The scope of the bankrupt's examination is the same as that with reference to witnesses generally in bankruptcy proceedings.<sup>32</sup> The inquiry may cover only such of the bankrupt's dealings and transactions as within a reasonable time of the bankruptcy proceedings can be taken to shed light upon his affairs at that time,<sup>33</sup> though it is not limited to facts and transactions occurring within four months of the bankruptcy, and may be directed to matters anterior to that time if the circumstances in question will throw any light upon the facts or issues pertinent to the proceedings.<sup>34</sup>

The bankrupt may be examined as to a transaction which may vest in him an equitable interest in property or the like for the purpose of establishing such interest;<sup>35</sup> and as to property acquired during the pendency of the bankruptcy proceedings and cannot refuse to give information as to such suddenly acquired wealth;<sup>36</sup> or where he evidences the possession of money, he may be examined fully as to it, though generally property acquired or business done after the filing of the petition in bankruptcy is not a proper subject for examination, provided the bankrupt states that the same has no connection with or reference to his estate or business prior to such filing.<sup>37</sup>

31—In re Price, 1 N. B. N. 131, 91 Fed. 635, 4 A. B. R. 419; In re Baum, 1 N. B. R. 7, 1 Ben. 274, Fed. Cas. No. 1116; In re Brandt, 2 N. B. R. 109, Fed. Cas. 1813; In re Mawson, 1 N. B. R. 271, Fed. Cas. No. 9320; In re Seckendorf, 1 N. B. R. 185, 2 Ben. 462, Fed. Cas. No. 12, 600; In re Vogel, 5 N. B. R. 396, Fed. Cas. No. 16984; In re Sherwood, 1 N. B. R. 74, Fed. Cas. No. 12774.

32—See *ante*, § 477.

33—In re Jacobs & Roth, 154 Fed. 988, 18 A. B. R. 728.

34—In re Brundage, 100 Fed. 613; 4 A. B. R. 47; see also In re Hayden, 1 N. B. N. 265, 1 A. B. R. 670, 96 Fed. 199; In re Headley, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 Fed. 765; *contra*, In re Barker, 2 N. B. N. R. 353.

35—In re Bonesteel, 2 N. B. R. 106, Fed. Cas. No. 1628.

36—In re Walton, 1 N. B. N. 533.

37—In re Walton, 1 N. B. N. 533; In re McBrien, 3 N. B. R. 90, 3 Ben. 481, Fed. Cas. No. 8666; In re Rosenfield, 1 N. B. R. 60, Fed. Cas. No. 12059.

### § 491. — Manner of examination.

The examination before the referee may be conducted by the party in person or his attorney, by direct and cross-examination according to the mode adopted in courts of law, and be taken down in writing by him, or under his direction, in narrative form, unless he decides it shall be by question and answer; and, when completed, shall be read over to and signed by the witness in the referee's presence, who shall note on the deposition any question objected to, with his decision thereon. The court has power to deal with the question of incompetent, immaterial or irrelevant testimony.<sup>38</sup> The bankrupt may be cross-examined by his own counsel;<sup>39</sup> or may appear as a witness in his own behalf and be so examined.<sup>40</sup> When a bankrupt once files his schedules, he asserts not only that he has the property but that he has no more, and he may be subjected to all legitimate cross-examination so long as it opens the way to no independent fact.<sup>41</sup>

It has been held that one creditor has no right to intervene and interpose objections to questions put in the course of the examination by another creditor.<sup>42</sup>

### § 492. — Admissibility of evidence.

A letter from debtor admitting his inability to pay his debts,<sup>43</sup> or his letters written to third parties admitting payment of certain claims to the prejudice of others,<sup>44</sup> or his admission before bankruptcy in support of a set-off pleaded by defendant in an action by a trustee to foreclose a mortgage given to the bankrupt,<sup>45</sup> has been held admissible. But a copy of bankrupt's statement to a commercial agency cannot be admitted to prove concealment of assets,<sup>46</sup> nor will his statement as to his condition at the time of borrowing money be admissible to show that his creditors had reasonable cause to believe him insolvent on a subsequent day,<sup>47</sup> though a question as to whether the bankrupt

38—In re Proby, 17 N. B. R. 175, Fed. Cas. No. 11439.

39—In re Leachman, 1 N. B. R. 91, Fed. Cas. No. 8157.

40—In re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17920.

41—In re Tobias, 215 Fed. 815, 31 A. B. R. 889.

42—In re Stuyvesant Bk., 7 N. B. R. 445, 6 Ben. 33, Fed. Cas. No. 13582.

43—In re Lange, 2 N. B. R. 85, 97 Fed. 197, 3 A. B. R. 231.

44—In re Hatje, 12 N. B. R. 548, 6 Biss. 436, Fed. Cas. No. 6215.

45—Von Sachs v. Kretz, 19 N. B. R. 83.

46—In re Hunter, 2 N. B. R. 490.

47—Goodrich v. Wilson, 14 N. B. R. 555.



signed a statement by means of which he obtained credit is not improper.<sup>48</sup> The testimony of bankrupt as to the number of his creditors will be accepted.<sup>49</sup> It has been held that testimony taken at any time during the proceedings may be admitted in subsequent proceedings,<sup>50</sup> but this would not be true where the proceedings in which the testimony was taken were dismissed, unless it be by stipulation of the parties.<sup>51</sup>

### § 493. — Answers compulsory.

The bankrupt must answer all proper questions on his examination,<sup>52</sup> even though they were asked at his previous examination by another creditor;<sup>53</sup> or if asked by the referee;<sup>54</sup> or as to whatever may concern parties interested, in reference to his debts, business or estate,<sup>55</sup> but he need not answer questions that on their face relate to property that does not belong to him,<sup>56</sup> though he should those relating to his wife's property.<sup>57</sup> He need not answer when his response might be incriminating, though in such case, his discharge may be denied for such refusal. While the referee cannot compel a witness to answer, he can report his refusal to the judge, who will punish for contempt.<sup>58</sup>

### § 494. — Incriminating evidence.

As under section 21a, the bankrupt is a competent witness, it becomes necessary to determine how far he may be compelled to testify. Lord Eldon tersely said: "It is one of the most sacred principles in the law of this country that no man can be called on to criminate himself, if he choose to object to it; but I have always understood that proposition to admit of a qualification

48—*In re Jacobs & Roth*, 154 Fed. 988, 18 A. B. R. 728.

49—*Clinton v. Mayo*, 12 N. B. R. 30, Fed. Cas. No. 2899.

50—*In re Bard*, 108 Fed. 208, 5 A. B. R. 810.

Testimony of bankrupt at creditors' meeting may be used against him on hearing of order to show cause. *Kirsner v. Taliaferro*, 202 Fed. 51, 29 A. B. R. 832.

51—*In re Rosenberg*, 116 Fed. 402.

52—*In re Holt*, 3 N. B. R. 58, Fed. Cas. No. 6646.

53—*In re Vogel*, 5 N. B. R. 393, Fed. Cas. No. 13984.

54—*In re Brundage*, 100 Fed. 613, 4 A. B. R. 47.

55—*In re Jay Cooke*, 10 N. B. R. 126, Fed. Cas. No. 3168.

56—*In re Van Seryl*, 1 N. B. R. 193, Fed. Cas. No. 16880.

57—*In re Craig*, 4 N. B. R. 50, Fed. Cas. No. 3323; *In re Clark*, 4 N. B. R. 70, Fed. Cas. No. 2805.

58—Sec. 41b, act of 1898; *In re Koch*, 1 N. B. R. 153, Fed. Cas. No. 4916.

with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to show he has property which he has not got according to law; as in the case of smuggling and the case of a clergyman carrying on a farm, and the case of persons having the possession of gunpowder in unlicensed places.”<sup>59</sup> On the same subject, Erskine, C. J., said: “You could not ask a man whether he had not robbed another of a sum of money, because, if he had so robbed, the money would not be the property of the assignees but of the party robbed; it would be, in fact, no discovery of the estate of the bankrupt. But I can see no objection to this question (unless it might be regarded as a chain in evidence to convict the party of robbery), namely, Had you not, on such a day and at such a place, one hundred pounds? and, according to the answer, you might then interrogate what he had done with it.”<sup>60</sup> That was the rule under the act of 1867.<sup>61</sup>

Although section 7(9) of the present law expressly provides that “no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding,” he cannot be compelled to answer any question propounded on such examination where his answer would tend to criminate him, for the statutory provision is not so broad as the constitutional privilege.<sup>62</sup> The immunity afforded by section 7, subdivision 9, is no bar to a prosecution for perjury for false swearing in giving testimony under the command of that section,<sup>63</sup> nor does it pre-

59—Cossens, *Buck's Cas.* 531; *Archb. Bank.* 277.

60—Heath, 2 *Dea. & Ch.* 214.

61—In *re Browley*, 3 *N. B. R.* 169; In *re Richards*, 4 *N. B. R.* 25, *Fed. Cas. No.* 11769; In *re Koch*, 1 *N. B. R.* 153, *Fed. Cas. No.* 7916.

62—In *re Hooks Smelting Co.*, 138 *Fed.* 954, 15 *A. B. R.* 83; *United States v. Goldstein*, 132 *Fed.* 789, 12 *A. B. R.* 755; In *re Feltstein*, 4 *A. B. R.* 321; In *re Nachman*, 114 *Fed.* 995, 8 *A. B. R.* 180; In *re Shera*, 114 *Fed.* 297; 7 *A. B. R.* 552; In *re Glassner*, 8 *A. B. R.* 184; *Thorington v. Montgomery*, 147 *U. S.* 490,

37 *L. ed.* 252; In *re Roser*, 1 *N. B. N.* 469, 2 *A. B. R.* 755, 96 *Fed.* 305; In *re Scott*, 1 *N. B. N.* 265, 95 *Fed.* 815, 1 *A. B. R.* 49; In *re Gilbert*, 2 *N. B. N. R.* 378; *Counselman v. Hitchcock*, 142 *U. S.* 547, 35 *L. ed.* 1110; *comp.* In *re Hathorn*, 1 *N. B. N.* 361, 2 *A. B. R.* 298; In *re Sapiro*, 1 *N. B. N.* 136, 92 *Fed.* 340, 1 *A. B. R.* 296; In *re Shera*, 114 *Fed.* 207, 7 *A. B. R.* 552; In *re Henschel*, 7 *A. B. R.* 207; *contra* *Mackel v. Rochester*, 2 *N. B. N. R.* 880, 4 *A. B. R.* 1, 102 *Fed.* 314, In *re Sapiro*, 1 *A. B. R.* 296.

63—*Cameron v. United States*, 231 *U. S.* 710, 58 *L. ed.* 448, 31 *A. B. R.* 604,

vent the use of testimony other than that made the basis of the charge from being used as evidence in the prosecution.<sup>64</sup> It follows as a necessary corollary from this construction, that the bankrupt cannot be compelled to testify in any particular in which the immunity does not protect him, and if he fears a charge of perjury upon testimony already given, he may upon subsequent questions, claim his privilege.<sup>65</sup>

While this right to decline to testify is conceded, yet in a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to testify or furnish documents and papers which cannot possibly injure him, he will not be permitted to shield himself behind the privilege.<sup>66</sup>

No question can be said to be outside the range of some crime, and to allow the bankrupt to stand mute in all cases is to give him the privilege of keeping silence as to all of his affairs, in the interest of merely pedantic and verbal integrity of principle. While in all cases he must be given the benefit of all doubts, there must be something which gives rise to a probability of damage upon which a doubt may be based.<sup>67</sup> The mere claim of constitutional privilege is not enough.<sup>68</sup> Where the bankrupt claims his constitutional privilege and refuses to give the information required by the Bankruptcy Act, on the ground that it may incriminate him, it must at least appear to the court from the character of the information sought on the question propounded, that his claim is justified, or the bankrupt must produce facts upon which he bases such claim, in order that the court may judge of their sufficiency to support it.<sup>69</sup> If the question is of such a description that the answer may or may not

rev'g 192 Fed. 548, 27 A. B. R. 657; *Glickstein v. United States*, 222 U. S. 139, 56 L. ed. 128, 27 A. B. R. 786; *Wechsler v. United States*, 158 Fed. 579, 19 A. B. R. 1, rev'g 16 A. B. R. 1. Contra: *United States v. Simon*, 146 Fed. 89, 17 A. B. R. 41; *Edelstein v. United States*, 149 Fed. 636, 9 L. R. A. (N. S.) 236, 17 A. B. R. 649; *United States v. Brod*, 176 Fed. 165, 23 A. B. R. 740.

64—*Daniels v. United States*, 196 Fed. 459, 27 A. B. R. 790.

65—See *Daniels v. United States*, 196 Fed. 459, 27 A. B. R. 790.

66—*In re Kanter*, 117 Fed. 356, 9 A. B. R. 104.

67—*In re Bendheim*, 180 Fed. 918, 24 A. B. R. 254.

68—*In re Tobias*, 215 Fed. 815, 31 A. B. R. 889.

69—*Podolin v. Leshner Warner Dry Goods Co.*, 210 Fed. 97, 31 A. B. R. 796, aff'g 205 Fed. 563, 30 A. B. R. 576; *In re Bendheim*, 180 Fed. 918, 24 A. B. R. 254; *In re Kanter*, 117 Fed. 356, 9 A. B. R. 104.

incriminate the bankrupt, he can refuse to answer, but if the court is convinced that the answer to the question cannot by any possibility incriminate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer.<sup>70</sup>

While section 860 of the Revised Statutes providing that no pleading, or evidence obtained by means of a judicial proceeding shall be used against the party or witness in a subsequent criminal proceeding has been repealed,<sup>71</sup> its repeal does not deprive a bankrupt examined while the section was in force, of the benefit of its provisions.<sup>72</sup>

Where the bankrupt has begun to disclose his ownership of property, he must continue and disclose it fully, for any privilege in regard to it has thereby been waived,<sup>73</sup> and a cross-examination on matter volunteered in his petition or schedules or in his previous testimony, is clearly proper.<sup>74</sup> The filing of a voluntary petition is not a waiver of the constitutional privilege.<sup>75</sup>

The bankrupt must plead his privilege, if any privilege legally exists, to the particular questions propounded, and the proper rulings can then be made.<sup>76</sup>

Testimony although privileged may be used for all purposes, when once it is brought out,<sup>77</sup> and all the testimony of the bankrupt taken upon interrogatories cannot be excluded on the ground that the bankrupt has refused to answer some of the cross-interrogatories on the ground that the answers thereto might incriminate him.<sup>78</sup>

### § 495. — Weight of evidence.

The bankrupt is a competent witness as to all matters relating to his estate, and no objection can lie to his testimony save as to its credibility,<sup>79</sup> and if disposed to comply with the law and

70—*In re Louis Levin*, 131 Fed. 388, 11 A. B. R. 382.

71—Act of May 7, 1910, 36 Stat. at L. 352.

72—*Cameron v. United States*, 231 U. S. 710, 58 L. ed. 448, 31 A. B. R. 604, rev'g 192 Fed. 548, 27 A. B. R. 657.

73—*In re Bendheim*, 180 Fed. 918, 24 A. B. R. 254.

74—*In re Walsh*, 2 N. B. N. R. 1031, 104 Fed. 518.

75—*United States v. Goldstein*, 132 Fed. 789, 12 A. B. R. 755.

76—*In re Mellen*, 2 N. B. N. R. 69, 3 A. B. R. 226, 97 Fed. 326.

77—*In re Bendheim*, 180 Fed. 918, 24 A. B. R. 254.

78—*Carey v. Donohue*, 209 Fed. 328, 31 A. B. R. 210.

79—*In re Campbell*, 17 N. B. R. 4, 3 Hughes 276, Fed. Cas. No. 2348.

candidly account for his property he should have fair consideration; but, if he is contumacious and fails to testify fully, fairly and truthfully, his testimony should only be accepted when corroborated by other evidence, and, if at any point found unworthy of credit, may be rejected altogether.<sup>80</sup>

**§ 496. — Effect of incomplete examination.**

Whether an incomplete examination of bankrupt can be used against him is not a question arising in the course of his examination, and must be decided by the judge before whom the examination may be offered.<sup>81</sup> No vote can be taken on a composition, if a creditor objects, until bankrupt's examination is complete, which should be confined to a true exhibit of his affairs.<sup>82</sup>

**§ 497. Depositions.**

**§ 498. — Federal law governs.**

Section 21b of the act provides that "the right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided." Very detailed provisions are made in the laws of the United States for taking testimony,<sup>83</sup> which, in addition to the other provisions, authorize the taking of depositions of witnesses in cases pending at law or in equity in the district or circuit courts of the United States, in the mode prescribed by the laws of the state in which the court is held.<sup>84</sup>

**§ 499. — Notice.**

Notice of the taking of depositions must be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.<sup>85</sup>

80—In re Tudor, 2 N. B. N. R. 168, 100 Fed. 796, 4 A. B. R. 78; In re Kamsler, 2 N. B. N. R. 97, 97 Fed. 194.

81—In re Noyes, 11 N. B. R. 111, 2 Lowell, 352, Fed. Cas. No. 10370.

82—In re Holmes, 12 N. B. R. 86, 8 Ben. 74, Fed. Cas. No. 6632.

83—Secs. 853-879, 1778 U. S. Rev. Stat., 1 Supp. Rev. Stat. 123.

84—2 Supp. Rev. Stat. 4.

85—Sec. 21c, act of 1898.

The requirement that all notices be given by the referee unless otherwise ordered by the judge, does not seem to comprehend notices for the taking of depositions, but such notices should be given by the attorney.

**§ 500. — Grounds for taking depositions.**

Testimony of any witness may be taken in any civil cause pending in a district of the United States by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of deposition, before the time of trial or when he is ancient and infirm. The deposition may be taken before any judge, United States commissioner, clerk of a district or circuit court, or any chancellor, justice or judge of a supreme court or superior court, mayor, or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties, nor interested in the event of the cause.<sup>86</sup>

If a non-resident creditor, whose claim is contested, cannot personally appear, without hardship, an order will be made to take his testimony before one of the officers authorized to do so in his neighborhood.<sup>87</sup>

**§ 501. — Manner of taking depositions.**

A deposition in an examination before a referee must be taken down in writing by him or under his direction in the form of narrative, unless, in his judgment, it should be by question and answer, and when completed, it must be read over to the witness and signed by him in the presence of the referee.<sup>88</sup> Depositions so taken and afterwards transcribed may be suppressed when not read to and signed by the witness.<sup>89</sup> For this purpose, the referee is authorized to administer oaths or affirmations,<sup>90</sup> and, upon request of the trustee, may authorize the employment of a

86—U. S. Rev. Stat., Sec. 863.

87—In re Kyler, 2 N. B. R. 649, 2 Ben. 414, Fed. Cas. No. 7956.

88—G. O. XXII.

89—In re Cary, 9 Fed. 754.

90—Sec. 20, act of 1898. United States v. Liberman, 176 Fed. 161, 23 A. B. R. 734.

stenographer, at the expense of the estate, to report and transcribe the proceedings.<sup>91</sup> He must note upon the deposition any question objected to, with his decision thereon.<sup>92</sup>

A deposition taken before a referee authorized to administer oaths, no objection being made, and the witness being examined and cross-examined, is properly taken and, the deposition being subsequently placed on file, the party at whose instance it was taken cannot object to its being read by the opposite party, on the ground of irregularity or informality.<sup>93</sup>

If the officer, administering the oath, fails to sign the jurat in a deposition, the omission may be supplied if he recollects the fact of the creditor signing and verifying in his presence, otherwise the party may be sworn and the deposition filed *nunc pro tunc*; <sup>94</sup> and the jurat need not contain a venue when it appears from the deposition that the oath was administered where the officer resides.<sup>95</sup>

A deposition which has been altered to correct an error must be resworn before it can be filed.<sup>96</sup>

### § 502. — Original exhibits as part of deposition.

Original papers exhibited to the court and annexed to depositions, and marked and referred to therein as exhibits, become a part of the depositions, and cannot be withdrawn and a copy substituted therefor, except upon the application of a party who can show a proper use therefor.<sup>97</sup>

### § 503. Production of books and papers.

The bankrupt may be compelled to produce his books and papers not shown to contain incriminating evidence.<sup>98</sup> Where such books contain incriminating evidence, or the bankrupt so claims, he cannot be compelled to surrender same, though no criminal proceedings against him are pending,<sup>99</sup> for as stated in

91—Sec. 38 (5), act of 1898; see also *post*, § 504.

92—G. O. XXII; *In re DeGottardi*, 114 Fed. 328.

93—*Lawrence v. Graves*, 5 N. B. R. 279, Fed. Cas. No. 8138.

94—*In re McKibben*, 12 N. B. R. 97, Fed. Cas. No. 8859.

95—*In re Hill*, Fed. Cas. No. 6485; see also § 21.

96—*Walther v. Walther*, 14 N. B. R. 273, Fed. Cas. No. 17126.

97—*In re McNair*, 2 N. B. R. 109, Fed. Cas. No. 8908.

98—*In re Hess & Co.*, 136 Fed. 988, 14 A. B. R. 826.

99—*In re Tracy & Co.*, 177 Fed. 532, 23 A. B. R. 438; *In re Hess*, 134 Fed. 109, 14 A. B. R. 559.

Contra: *In re George Harris*, 164 Fed. 292, 20 A. B. R. 911.

In *re Hess*,<sup>1</sup> "The meaning of the constitutional privilege is not simply that he shall not be compelled to produce books and papers which may contain evidence tending to incriminate him in a pending prosecution for a criminal offense against him, but its object is to insure him against such compulsory production of his books and papers containing incriminating evidence in any proceeding or investigation whether such compulsory disclosure is sought directly to establish his guilt, or indirectly and incidentally for the purpose of proving facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against him as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him thereafter, such disclosure would be an accusation of himself, within the meaning of the constitutional provision."

The court will not, however, permit him to shield himself behind the privilege when it is clear that the party mistakenly or contumaciously refuses to furnish that which cannot possibly injure him,<sup>2</sup> or because they may disclose concealed assets and supply evidence in a civil suit by the trustee,<sup>3</sup> and, where the bankrupt pleads his constitutional privilege against a production of books alleged to contain incriminating evidence, he should be required to bring the same before the court or referee to determine whether his plea is well founded, and if the court finds it is well founded, it may make such order in the case as will fully protect the bankrupt from the discovery of the evidence, and at the same time, if possible, enable the trustee to obtain such information as is necessary in the settlement of the estate.<sup>4</sup>

The constitutional privilege against self-incrimination is waived by the surrender by the bankrupt of his books of account without protest, and the books may thereafter be used in criminal proceedings against the bankrupt.<sup>5</sup>

1—134 Fed. 109, 14 A. B. R. 559.

2—In *re Kanter*, 117 Fed. 356, 9 A. B. R. 104; In *re Franklin Syndicate*, 114 Fed. 205; see *People v. Swartz*, 8 A. B. R. 487.

3—In *re Horgan*, 2 N. B. N. 233, 3 A. B. R. 253, 98 Fed. 414; *aff'g s. c.* 2 N. B. N. R. 53, 97 Fed. 319.

4—In *re Hark Bros.*, 136 Fed. 986, 14 A. B. R. 624; In *re Hess*, 134 Fed. 109, 14 A. B. R. 559.

5—In *re Tracy & Co.*, 177 Fed. 532, 23 A. B. R. 438.



It has been held that by filing a voluntary petition the bankrupt elects to place his books of account, at the disposal of the court, and such petition operates as a waiver of any privilege he would otherwise have to withhold them on the ground that they contain incriminating evidence, but this does not seem tenable.<sup>6</sup>

Where fraud is charged against the purchaser from the bankrupt, any books or documents of such purchaser showing or tending to show the receipt and disposition of the property purchased, or in any other way relating thereto, are subject to examination; and the custodian of such books and documents cannot refuse to produce them, or to answer questions relating thereto, on the ground that they contain nothing relating to the bankrupt's property, since that is not left to the opinion of the witness but is to be determined by the court.<sup>7</sup> But the assignee under a general assignment made more than four months before the bankruptcy should not be required to produce bankrupt's books unless a foundation is laid for the belief that the latter withheld property at the time of the assignment and still had it long subsequently,<sup>8</sup> though this should not be confounded with the case where an assignment is made within the four months, which is subsequently avoided, in which event the books should be produced.

While the referee may order the production of the minute book of a corporation whose dealings with the bankrupt are being investigated,<sup>9</sup> a subpoena duces tecum directed to the officer of a corporation in which the bankrupt owns stock which requires the production of the records relating to the financial condition of the company is too broad.<sup>10</sup> An order requiring an officer of the bankrupt corporation to produce his private memorandum book cannot be resisted upon the mere claim that the same contains a mere compilation from the books of the bankrupt. Whether or not any particular entry is obnoxious to some valid objection must be determined by the referee with the book before him.<sup>11</sup>

6—In *re* Sapiro, 1 N. B. N. 136, 1 A. B. R. 296, 92 Fed. 340. See *United States v. Goldstein*, 132 Fed. 789, 12 A. B. R. 755.

7—In *re* Fixen, 1 N. B. N. 568, 2 A. B. R. 822, 96 Fed. 748.

8—In *re* Hayden, 1 N. B. N. 265, 1 A. B. R. 670, 96 Fed. 199.

9—In *re* United States Graphite Co., 159 Fed. 300, 20 A. B. R. 280.

10—In *re* Seligman, 192 Fed. 750, 26 A. B. R. 664.

11—In *re* E. S. Wheeler & Co., 158 Fed. 603, 19 A. B. R. 461, *rev'g* 151 Fed. 542, 18 A. B. R. 421.

The court cannot compel the production of a tax statement filed by the bankrupt with a local board of assessors where the state law under which it is filed provides that the same shall not be used for any other purpose except the making of an assessment.<sup>12</sup>

An application for a subpoena *duces tecum*, based on an affidavit of counsel that he expects to show facts pertinent to the proceeding by the books asked for, should be granted and if they are the property of a person or corporation within the jurisdiction of the court, the fact that the books are beyond the jurisdiction is immaterial and they should nevertheless be produced.<sup>13</sup>

The referee has jurisdiction to make an order directing the bankrupt to turn over books and papers, without the issuance of a subpoena *duces tecum*,<sup>14</sup> but the order should not be made without giving the bankrupt an opportunity to be heard.<sup>15</sup>

A debtor is not entitled to an examination of the bankrupt's books, and hence the application of a creditor for the examination of the bankrupt's books will be denied where it is apparent that the application is not made in good faith, but merely for the purpose of enabling debtors of the bankrupt to examine the books.<sup>16</sup>

The exercise of this power of compelling the production of books necessarily involves a wide discretion which should not be interfered with by an appellate court unless manifestly abused.<sup>17</sup>

#### § 504. Powers and duties of examiners, masters and referees.

The referee has authority to make an order, requiring any designated person, including the bankrupt, to appear and be examined.<sup>18</sup> The referee should be personally present when the evidence is taken which he is to pass upon, unless, in the case of

12—In re Reid, 155 Fed. 933, 17 A. B. R. 477.

13—In re Dews, 1 N. B. N. 140.

14—In re Soloway & Katz, 195 Fed. 103, 28 A. B. R. 228.

15—In re Soloway & Katz, 195 Fed. 100, 28 A. B. R. 225.

16—In re Daniel Sully & Co., 142 Fed. 895, 15 A. B. R. 304.

17—In re Horgan, *supra*.

18—In re Lanier, 2 N. B. R. 59, Fed. Cas. No. 8070; In re Pioneer Paper Co., 7 N. B. R. 250, Fed. Cas. No. 17178.

purely formal evidence, his presence is waived.<sup>19</sup> He should have the testimony taken down preferably in narrative form.<sup>20</sup>

The examiner, master or referee conducting the examination is authorized and it is his duty to pass on objection made to a question, and a witness would have no right to refuse to answer a question on the ground of irrelevancy, since the questions of relevancy and materiality are for the court.<sup>21</sup> Upon objection raised, the officer should require the matter to be presented by question, to which the objection and reason thereof is to be noted; although the question is ruled to be improper, an answer thereto should be allowed; in such case the exception and ruling of the referee are to be preserved for the ultimate decision of the court,<sup>22</sup> the equity rules of the supreme court of the United States being followed as nearly as may be in matters of this nature.<sup>23</sup> From this rule evidence plainly privileged, the testimony of privileged witnesses, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, and immaterial, that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted.<sup>24</sup>

The referee need not certify objections made to his rulings every time a question is asked which he rules is objectionable,<sup>25</sup> and may refuse to suspend an examination until the questions

19—*In re Wilde's Sons*, 131 Fed. 142, 11 A. B. R. 714.

20—G. O. XXII.

21—*Peoples Bank of Buffalo v. Brown*, 112 Fed. 652, 7 A. B. R. 475.

22—*In re Isaacson*, 175 Fed. 292, 23 A. B. R. 665; *In re Sturgeon*, 139 Fed. 608, 14 A. B. R. 681; *Bank of Ravenswood v. Johnson*, 143 Fed. 463, 16 A. B. R. 206; G. O. XXII; *In re DeGottardi*, 114 Fed. 328, 395, 7 A. B. R. 723; *In re Lipset*, 119 Fed. 379, 9 A. B. R. 32; *Dressel v. Lumber Co.*, 119 Fed. 531; see *In re Rosenfield*, 1 N. B. R. 60, Fed. Cas. No. 12059; *In re Bond*, 3 N. B. R. 2, Fed. Cas. No. 1618; *First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436; *In re Clark*, 21 A. B. R. 776; *Missouri-American Elec. Co. v.*

*Hamilton-Brown Shoe Co.*, 165 Fed. 283, 21 A. B. R. 270; *In re Romine*, 138 Fed. 837, 14 A. B. R. 785.

Contra: *In re Ruos*, 159 Fed. 252, 20 A. B. R. 281; *In re Harrison Bros.*, 197 Fed. 320, 28 A. B. R. 293; *In re Wilde's Sons*, 131 Fed. 142, 11 A. B. R. 714.

23—*United States v. Liberman*, 176 Fed. 161, 23 A. B. R. 734; *In re Lipset*, supra; *In re Sturgeon*, 139 Fed. 608, 14 A. B. R. 681.

24—*Matter of Clark*, 21 A. B. R. 776; *Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 21 A. B. R. 270; *First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436.

25—*In re Romine*, 138 Fed. 837, 14 A. B. R. 785.

certified by him are decided.<sup>26</sup> While he cannot compel a witness to answer, if he refuses,<sup>27</sup> nor commit him for derelictions, he does have the power and it is his duty to certify the facts of such offense to the judge, who may proceed in a summary manner and inflict such punishment as if the contempt had been committed before the court itself,<sup>28</sup> or if the question be material and approved by the court, he may be refused a discharge.<sup>29</sup>

During the examination of the bankrupt or other proceedings, the referee may authorize the employment of stenographers, upon the application of the trustee, at the expense of the estate, at a compensation not to exceed ten cents per folio for reporting and transcribing the testimony.<sup>30</sup>

The manner of taking depositions is also treated in § 501.

### § 505. Exemption of witness from service of process.

Hearings in bankruptcy before the judge, as well as before referees and commissioners are judicial in character, so as to exempt a person in attendance from being subjected to the service of process.<sup>31</sup> That the appearance is voluntary is immaterial.<sup>32</sup> This privilege is personal, however, and may be waived.<sup>33</sup>

### § 506. Fees and compensation.

A bankrupt when ordered to appear for examination in reference to his bankruptcy is not entitled to any fees or compensation therefor;<sup>34</sup> nor will petitioning creditors be reimbursed for attorneys' fees on such examinations after the trustee is appointed, such services being either for the trustee or the cred-

26—Bank of Ravenswood v. Johnson, 143 Fed. 463, 16 A. B. R. 206; In re Tiff, 17 N. B. R. 550, Fed. Cas. No. 14030.

27—In re Koch, 1 N. B. R. 153, Fed. Cas. No. 7916.

28—Sec. 41b, act of 1898. In re Ro-mine, 138 Fed. 837, 14 A. B. R. 785; In re Automatic Musical Co., 204 Fed. 334, 30 A. B. R. 328.

29—Sec. 14b (6), *post*, § 1503.

30—Sec. 38, act of 1898.

31—Morrow v. Dudley & Co., 144 Fed. 441, 16 A. B. R. 459.

Attending creditor or officer of bankrupt corporation exempt. Powell & Smith v. Pangborn, 145 N. Y. S. 1073, 31 A. B. R. 650.

32—Powell v. Pangborn, 145 N. Y. S. 1073, 31 A. B. R. 650.

A delay of three weeks in insisting upon the privilege held not a waiver.

33—Morrow v. Dudley & Co., 144 Fed. 441, 16 A. B. R. 459.

34—In re McNair, 2 N. B. R. 77, Fed. Cas. No. 8907; In re O'Kell, 1 N. B. R. 52, Fed. Cas. No. 10474.

itors individually.<sup>35</sup> Where an examination is unreasonably discursive, the party making it may be required to pay the expense of the same.<sup>36</sup>

When the wife of a bankrupt is a competent witness in bankruptcy proceedings, she is entitled to mileage and witness fees the same as any other witness, payment thereof for at least one day's attendance being necessary at the time of service of the order for her examination to insure her attendance.<sup>37</sup> The same rule applies to the husband of the bankrupt where the bankrupt is a married woman.<sup>38</sup>

35—*In re Silverman*, 2 N. B. N. R. 18, 3 A. B. R. 97, Fed. 325.

36—*In re Foerst*, 1 N. B. N. 258, 1 A. B. R. 259, 93 Fed. 190.

37—*In re Post*, 1 N. B. N. 527; *In re*

*Griffin*, 1 N. B. R. 83, 2 Ben. 209, Fed. Cas. No. 5810.

38—*In re Marcus*, 160 Fed. 229, 20 A. B. R. 397.

## CHAPTER XVI

### PROVABLE DEBTS

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### § 507. General tests of provability.

The rights of the creditors are determined by the law in force at the time of the adjudication.<sup>1</sup>

Section 63 of the act enumerates the classes of debts which may be proved, section 64b determines the order of their priority, and section 67 determines their validity as liens. These sections must be construed together in determining the allowance of claims against the estate, whether unsecured or preferred.<sup>2</sup>

The status of a claim depends upon its provability at the time the petition was filed,<sup>3</sup> and if it arises after the filing of the petition though before the adjudication,<sup>4</sup> or if it arises after the adjudication,<sup>5</sup> it is not provable.

1—In re Photo Electrotpe Engraving Co., 155 Fed. 684, 19 A. B. R. 94.

2—In re Sterne & Levi, 26 A. B. R. 535.

3—Act of 1898, § 63a. *Slocum v. Soliday*, 183 Fed. 410, 25 A. B. R. 460; In re Simon, 197 Fed. 105, 28 A. B. R. 611; In re Neff, 157 Fed. 57, 28 L. R. A. (N. S.) 249, 19 A. B. R. 23; In re Ameri-

can Vacuum Cleaner Co., 192 Fed. 939, 26 A. B. R. 621; In re Pettingill & Co., 137 Fed. 143, 14 A. B. R. 728.

4—In re Adams, 130 Fed. 788, 12 A. B. R. 368; In re Thompson Milling Co., 144 Fed. 314, 16 A. B. R. 454.

5—Claim accruing after bankruptcy cannot be proved, regardless of whether

A provable debt must be fixed, that is "determined, settled," as opposed to "undetermined, unsettled, uncertain," and must be absolutely owing, that is "completely, perfectly, finally, without any condition or encumbrance,"<sup>6</sup> as opposed to depending on some condition or the doing of some act, or happening of some event, at the time the petition is filed.<sup>7</sup> It is, however, sufficient that a claim becomes provable as a result of bankruptcy,<sup>8</sup> and the fact that the time of payment is deferred is no objection.<sup>9</sup>

Questions as to the origin of a debt or the motive of the claimant are immaterial in determining the provability of a claim.<sup>10</sup>

### § 508. Advances.

A claim for the amount of a bonus advanced to the bankrupt under a contract which is afterwards abandoned because of the bankruptcy may be allowed.<sup>11</sup> A claim for money advanced to the bankrupt to pay rent has been held provable though she obtained the money advanced from the property of her children.<sup>12</sup> So a creditor of a bankrupt has been held entitled to the amount paid in redeeming a diamond pawned by bankrupt which was afterwards claimed by and delivered to the trustee.<sup>13</sup>

Claims for money advanced in pursuance to a fraudulent scheme to defraud other creditors or to aid a debtor in committing an act of bankruptcy will not be allowed.<sup>14</sup>

it is secured or not. *British & American Mortgage Co. v. Stuart*, 210 Fed. 425, 31 A. B. R. 465, 544.

6—*Bouvier's Law Dic.*

7—*In re Hartman*, 166 Fed. 776, 21 A. B. R. 610; *Colman Co. v. Withoft*, 195 Fed. 250, 28 A. B. R. 328; *In re Ellis*, 143 Fed. 103, 16 A. B. R. 221; *In re Burka*, 104 Fed. 326, 5 A. B. R. 12; *In re Chambers, Calder & Co.*, 2 N. B. N. R. 864; *In re Arnstein*, 101 Fed. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106; *In re Scrafford*, 14 N. B. R. 184, Fed. Cas. No. 12557; *In re Frost*, 11 N. B. R. 69, 6 Biss. 213, Fed. Cas. No. 5134.

8—*In re Neff*, 157 Fed. 57, 28 L. R. A. (N. S.) 349, 19 A. B. R. 23. See *post*, § 521.

9—*Phenix Nat. Park Bank v. Waterbury*, 197 N. Y. 161, 23 A. B. R. 250, aff'g 123 App. Div. (N. Y.) 453, 20 A. B. R. 140,

10—*In re Lazarovic*, 1 A. B. R. 476; *In re Sully & Co.*, 152 Fed. 619, 18 A. B. R. 123.

11—*Sturgiss v. Meurer*, 191 Fed. 9, 26 A. B. R. 851.

12—*In re American Specialty Co.*, 191 Fed. 807, 27 A. B. R. 463.

13—*In re Rudd*, 180 Fed. 312, 25 A. B. R. 35.

14—*In re Friedman*, 164 Fed. 131, 21 A. B. R. 213; *In re Hatje*, 12 N. B. R. 543, 6 Biss. 436, Fed. Cas. No. 6215.



### § 509. Alimony or annuities in lieu thereof.

The supreme court of the United States in considering the question of alimony held that it was neither released by a discharge, nor was it such a liability as was provable in bankruptcy, whether past due or to become due.<sup>15</sup> While its conclusions are sweeping they appear to have been based upon the fact that alimony is not founded upon a contract, but is rather in the nature of a penalty imposed for failure to perform a duty, and where a judgment of divorce, granting alimony is sued on in a state other than that of the entry thereof, it is held that a judgment recovered in such action is not for alimony, but is a mere money judgment, or judgment of indebtedness and as such is provable.<sup>16</sup>

Where in lieu of alimony the bankrupt agrees to give his former wife an annuity for life secured by a deed of trust, the fact that the parties later remarry does not bar the wife's claim for the annuity.<sup>17</sup>

In this connection reference should be had to the chapter relating on the discharge and its effect upon the debts of the bankrupt.<sup>18</sup>

### § 510. Assigned claims.

The right of an assignee to prove a claim and the manner of proof is treated elsewhere.<sup>19</sup>

The assignment of a claim against a bankrupt gives the assignee a provable claim if the assignor be estopped from making the same claim,<sup>20</sup> and this though the assignee holds the claim merely as collateral security for a loan made to the owner thereof, and the dividend receivable by him may exceed the amount of the loan.<sup>21</sup> A claim for wages held by an assignee

15—Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 5 A. B. R. 829; In re Lochmeyer, 18 N. B. R. 270, 14 Fed. Cas. No. 914; In re Shepard, 97 Fed. 187, 5 A. B. R. 857; In re Anderson, 97 Fed. 321, 5 A. B. R. 858; In re Nowell, 99 Fed. 931, 3 A. B. R. 837; Barclay v. Barclay, 184 Ill. 375, 2 N. B. N. R. 552; In re Smith, 3 A. B. R. 67; Contra, In re Honestro, 94 Fed. 119, 2 A. B. R. 107; In re Van Orden, 96 Fed. 86, 2 A. B. R. 801; In re Challoner, 98 Fed. 82, 3 A. B. R. 442.

16—In re Williams Estate, 118 N. Y. S. 562, 23 A. B. R. 394.

17—Savage v. Savage, 141 Fed. 346, 15 A. B. R. 599, *certiorari* denied 201 U. S. 646, 50 L. ed. 904.

18—See *post*, § 1552.

19—See *post*, §§ 596, 610.

20—In re Miner, 114 Fed. 998, 8 A. B. R. 248.

21—In re American Specialty Co., 191 Fed. 807, 27 A. B. R. 463.

in which the assignment was made subsequent to filing the petition, is nevertheless provable.<sup>22</sup>

An order by a contractor on his employer directing the latter to pay to the assignee therein any moneys due such contractor is not to be regarded as a transfer as of its date but as of the date when the order was made effective by being presented.<sup>23</sup>

### § 511. Claims of assignee for creditors and receivers.

A claim for services rendered as state receiver should be allowed only to the extent that such services were beneficial to the estate.<sup>24</sup> So, claims of an assignee under an assignment for the benefit of creditors for his compensation and expenditures in administering the estate prior to the filing of the petition are not provable, not being debts of the bankrupt, but debts incurred by the assignee himself in an attempt to prevent the administration of the estate in bankruptcy. It is immaterial that he acted in good faith and in conformity to the insolvency laws of the state.<sup>25</sup> The costs incurred by him in the care and preservation of the property, when they result in benefit to the estate generally and do not lead to a duplication of charges, and a reasonable sum as custodian, in the court's discretion, under its equity powers, might be allowed to be proved, provided the utmost good faith has been shown throughout.<sup>26</sup> On the same principle, a judgment creditor, who has set aside a fraudulent conveyance but lost his prior right to the fund by the adjudication of the bankrupt, is allowed reasonable indemnity for his expenses in

22—*In re Brown*, 3 N. B. R. 177, 4 Ben. 142, Fed. Cas. No. 1974.

23—*Johnston v. Huff, Andrews & Moyler Co.*, 133 Fed. 704, 13 A. B. R. 287.

24—*In re Weedman Stave Co.*, 199 Fed. 948, 29 A. B. R. 460; *In re Rogers v. Stefani*, 156 Fed. 267, 19 A. B. R. 566.

25—*In re Harson Co.*, 11 A. B. R. 514; *In re Congdon*, 129 Fed. 478, 11 A. B. R. 219; *In re Standard Dairy and Ice Co.*, 20 A. B. R. 321; *Stearns v. Flick*, 2 N. B. N. R. 1046, 103 Fed. 919; *In re Gilblom & King*, 2 N. B. N. R. 60; *In re Solomon*, 2 N. B. N. R. 460; see also *In re Francis-Valentine Co.*, 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522, aff'g 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188;

*In re Kenney*, 2 N. B. N. R. 140, 97 Fed. 554, 3 A. B. R. 353; *Wilbur v. Watson*, 111 Fed. 493, 7 A. B. R. 54; *In re Busey*, 6 A. B. R. 603; *In re McCauley*, 2 N. B. N. R. 1089; *In re Peter Paul Book Co.*, 5 A. B. R. 105; see *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413, 7 A. B. R. 421.

Assignee's expenses in resisting the adjudication not allowed. *In re Hays*, 179 Fed. 222, 24 A. B. R. 691.

26—*In re Levitt*, 126 Fed. 889, 11 A. B. R. 411; *In re Harson Co.*, 11 A. B. R. 514; *In re Pauly*, 1 N. B. N. 405, 2 A. B. R. 333; *In re Kingman*, 1 N. B. N. 518; *In re Tatum*, 112 Fed. 50, 7 A. B. R. 52; *In re Mayo*, 114 Fed. 600, 7 A. B. R. 764; *In re Busey*, 6 A. B. R.

securing such result.<sup>27</sup> If the assignee, pending an adjudication in bankruptcy, make a beneficial sale of the insolvent's estate, he is entitled to retain a reasonable sum, allowed by the state court, for the services of himself and his attorneys.<sup>28</sup>

### § 512. Attorney's fees.

A reasonable attorney's fee dependent on the services rendered and their value, to be determined on evidence or the court's knowledge,<sup>29</sup> including the services of counsel when really required, which must be confined to the bankruptcy proceedings, excluding previous consultations or advice, as well as all unnecessary attendance during the proceeding as counsel,<sup>30</sup> is provable and is entitled to priority in four cases (1) when the services were rendered the petitioning creditors in involuntary cases, (2) to the bankrupt in involuntary cases while performing the duties prescribed by the act, (3) to the bankrupt in voluntary cases,<sup>31</sup> and (4) when the services of an attorney are really necessary and required by a receiver or trustee in the performance of his duties.<sup>32</sup> Where a trustee is substituted for a bankrupt in a suit, but afterwards withdraws and assigns all interest to another, an attorney's fee is provable only for the period the trustee occupied the bankrupt's place.<sup>33</sup>

After the beginning of bankruptcy proceedings a bankrupt cannot directly or indirectly create any charge on the assets for legal services rendered or to be rendered him in courts other than that of bankruptcy.<sup>34</sup>

A claim for legal services rendered an assignee or receiver in a state court is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial,<sup>35</sup> and a claim for legal services rendered in insolvency proceedings in a state court will not be allowed where the plain object of

603; *In re Lock-Stub Check Co.*, 5 A. B. R. 106, note.

27—*In re Lesser*, 2 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815.

28—*In re Scholtz*, 106 Fed. 834, 5 A. B. R. 782.

29—*In re Curtis*, 100 Fed. 784, 4 A. B. R. 17.

30—*In re Kross*, 1 N. B. N. 566, 96 Fed. 816, 3 A. B. R. 187.

31—Sec. 64b, *post*, § 1314; see, also, Sec. 60d, *post*, § 983.

32—*In re Standard Fuller's Earth Co.*, 186 Fed. 578, 26 A. B. R. 562; *In re Hudleston*, 167 Fed. 428, 21 A. B. R. 669.

33—*In re Litchfield*, 18 N. B. R. 347, Fed. Cas. No. 8386.

34—*Musica v. Prentice*, 211 Fed. 326, 31 A. B. R. 687, *aff'g* 205 Fed. 413, 30 A. B. R. 555.

such proceedings was to obstruct and delay bankruptcy proceedings.<sup>36</sup> However, in a proper case, a claim for services in preparing a general assignment for creditors may be proved as an unsecured claim<sup>37</sup> but such claim cannot be asserted directly by the attorney.<sup>38</sup>

The validity and effect of a provision in a note stipulating for an attorney's fee is to be determined not by the laws of the state where the note was executed, but is a question which falls within the domain of general or commercial law upon which the federal courts must exercise their own judgment.<sup>39</sup> Such fees do not constitute a provable claim unless the note was due and payable at the time of the filing of the petition and had prior to such filing been presented to the attorney for collection.<sup>40</sup> Nor is such a claim provable where no effort is made to collect the same until after bankruptcy though the note matures prior thereto;<sup>41</sup> nor where the note does not mature until after the adjudication and is thereafter paid by the trustee in full, though an attorney is engaged to defeat a contest as to the validity of the security.<sup>42</sup> So, an attorney's fee of a certain per cent of the amount of the debt, provided for in a mortgage in case of foreclosure, is not provable against the bankrupt mortgagor's estate, though the mortgagee has proved his claim as a secured claim and the property mortgaged has been sold by the trustee

35—In re Standard Fuller's Earth Co., 186 Fed. 578, 26 A. B. R. 562; In re Congdon, 129 Fed. 478, 11 A. B. R. 219.

36—In re Zier & Co., 142 Fed. 102, 15 A. B. R. 646, aff'g 127 Fed. 399, 11 A. B. R. 527.

37—Randolph v. Scruggs, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1.

38—Claim of attorney for trustee or assignee for creditors has no standing except as it may be based upon the title or possession of the assignee to property passing to the estate. In re Marble Products Co., 199 Fed. 668, 29 A. B. R. 384.

39—Mechanics-American Nat. Bank v. Coleman, 204 Fed. 24, 29 A. B. R. 396.

40—In re Thompson Milling Co., 144 Fed. 314, 16 A. B. R. 454; In re Edens & Co., 151 Fed. 940, 18 A. B. R. 643; In re Gebhard, 140 Fed. 571, 15 A. B. R.

381; In re Tersey, 171 Fed. 1004, 22 A. B. R. 863.

Attorney's commissions on notes and mortgages are not fixed liabilities to the payee of the note, under the law of Pennsylvania, but are in the nature of penalties for his indemnification for expense of collection. McCabe v. Patton, 174 Fed. 217, 23 A. B. R. 335.

A claim for attorney's fees based upon a judgment providing for "five per cent attorney's commission if collected by legal process" has been allowed, though bankruptcy intervened before the judgment was satisfied. In re Hershberger, 208 Fed. 94, 30 A. B. R. 635.

41—In re Keeton, Stell & Co., 126 Fed. 426, 11 A. B. R. 367.

42—In re Jenkins, 192 Fed. 1000, 27 A. B. R. 860.

at private sale, the attorney's fee not having become due according to the contract.<sup>43</sup>

The percentage fixed in the note is not conclusive as to the value of the services and no allowance can be made without proof of the reasonable value thereof.<sup>44</sup>

The withdrawal of an attorney from the prosecution of a case does not defeat his right to prove a claim for reasonable compensation.<sup>45</sup>

### § 513. Claims of banks.

The claim of a bank holding the bankrupt's note, payable after the filing of the petition, for the balance after applying bankrupt's deposit as a set-off against the amount of the note is provable;<sup>46</sup> but a note taken for money loaned by a savings bank prohibited by law from loaning money on personal security is not a provable debt.<sup>47</sup> Where a depositor gave a check for the full amount of his deposit and received the dividend thereon, which the bank offered, there is nothing to prove.<sup>48</sup>

### § 514. Bonds and recognizances.

There is a distinction between a contract of indemnity and a contract whereby a person obligates himself to pay the debt of the bankrupt. In the case of a mere contract or bond of indemnity, the claim of the surety is not provable, even though there has been a breach of the bond prior to bankruptcy, where there has been no actual payment of the debt by the surety.<sup>49</sup>

The obligee in a bond, or the holder of a claim, upon which several persons are personally liable, may prove his claim against the estate of those who become bankrupt and may at the same time pursue the others at law, and, notwithstanding

43—British & American Mortgage Co. v. Stuart, 210 Fed. 425, 31 A. B. R. 465, 544; In re Weiland, 197 Fed. 116, 28 A. B. R. 620; In re Roche, 101 Fed. 956, 4 A. B. R. 369; see Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9338.

44—Mechanics-American Nat. Bank v. Coleman, 204 Fed. 24, 29 A. B. R. 396.

45—In re Creasinger, 17 A. B. R. 538.

46—In re Kalter, 2 N. B. N. R. 264; Hough v. Bk., 4 Biss. 349, Fed. Cas. No. 6721; Ex p. Howard Nat. Bk., 16

N. B. R. 420, 2 Lowell 487, Fed. Cas. No. 6764; In re Petrie, 7 N. B. R. 332, 5 Ben. 110, Fed. Cas. No. 11040.

47—In re Jaycox & Green, 13 N. B. R. 122, Fed. Cas. No. 7244.

48—Bk. v. Dewey, 19 N. B. R. 314, Fed. Cas. No. 897; Hodeman v. Dewey, 7 N. B. R. 269, 2 Hughes 341, Fed. Cas. No. 6607.

49—Williams & Co. v. U. S. Fidelity & Guaranty Co., 11 Ga. App. 635, 28 A. B. R. 802.

partial payments after the bankruptcy by other obligors or their estates, he may recover dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein until from all sources he has received full payment of his claim, but no longer.<sup>50</sup> A claim based on the bankrupt's suretyship upon a bond given the claimant by a third person is not contingent, and where the record expressly determines the amount of the defalcation, and the amount recoverable through sources other than the bond, and contains an express concession as to the amount, if any, to be allowed, it is liquidated, and the fact that the suit at law brought upon the bond has not been determined is not material.<sup>51</sup>

The claim of one furnishing material to the bankrupt, a contractor, based upon the bankrupt's liability as obligor in a bond given the United States conditioned upon the bankrupt's prompt payment to all persons furnishing work and material, is not provable, the claim not having been liquidated in the manner provided for by the bond.<sup>52</sup>

A bond of a deputy tax collector, running to the county treasurer as such, is not a public bond, but a common-law bond, given for the benefit of the county treasurer who is entitled to prove a claim for any defalcation of the deputy.<sup>53</sup>

The liability of the bankrupt as surety on the bond of an administrator is a provable debt though not payable at the date of the filing of the petition, if prior to that time it has become fixed by a decree of the probate court ascertaining the amount of his personal responsibility.<sup>54</sup>

The claim of the United States upon a judgment against the bankrupt who had become surety on a criminal recognizance will not be allowed for the full amount of the recognizance, but only for the amount of actual costs incurred.<sup>55</sup>

Corporate bonds, see post, section 564.

50—Board of County Com'rs v. Hurley, 169 Fed. 92, 22 A. B. R. 209.

51—Loeser v. Alexander, 176 Fed. 265, 24 A. B. R. 75.

52—In re Hawley, 194 Fed. 751, 28 A. B. R. 58.

53—Loeser v. Alexander, 176 Fed. 265, 24 A. B. R. 75.

54—Hibbard v. Bailey, 129 Fed. 575, 12 A. B. R. 104, rev'g 123 Fed. 185, 10 A. B. R. 545.

55—In re Caponigri, 193 Fed. 291, 27 A. B. R. 513.

### § 515. Claims by and against brokers.

If a broker make a general assignment or be adjudged a bankrupt, a demand and tender are not necessary to enable the customer to assert a breach of contract.<sup>56</sup> One who puts up margins with a broker on purchases of commodities for future delivery cannot prove his claim therefor against the estate of the broker, where there is no evidence to show the result of the transactions, or that any returns were received by the bankrupt broker therefrom.<sup>57</sup>

Where a broker holds stock on a margin an unreasonable length of time after the buyer's bankruptcy, and then sells without notice at a loss, the balance is not provable against the buyer's estate.<sup>58</sup>

### § 516. Commercial paper.

#### § 517. — In general.

A debt based on a promissory note is provable if absolutely owing at the time of filing the petition, though not then payable.<sup>59</sup> A note assigned after the filing of the petition is provable.<sup>60</sup> A note on which the holder has received, or becomes entitled to receive, a dividend from one party to it, is provable against the other only for the difference.<sup>61</sup> Notes void between the original parties thereto, pledged as collateral security for an indebtedness, are provable by the pledgees for enough to secure dividends to the full amount of their claim.<sup>62</sup> Notes given in consideration of money borrowed to enable the bankrupt to settle an offer of composition made to and accepted by its creditors may be proved.<sup>63</sup>

56—In re Swift, 112 Fed. 315, 7 A. B. R. 374.

57—In re Knott, 109 Fed. 626, 6 A. B. R. 749; see Knott v. Putnam, 107 Fed. 907, 6 A. B. R. 80; In re Aetna Cotton Mills, 171 Fed. 994, 22 A. B. R. 629; In re Chandler, 9 N. B. R. 514, Fed. Cas. No. 2590; In re Green, 15 N. B. R. 198, 7 Biss. 338, Fed. Cas. No. 5751.

58—In re Daniels, 13 N. B. R. 46, 6 Biss. 405, Fed. Cas. No. 3566.

59—See In re Percy Ford Co., 199 Fed. 334, 28 A. B. R. 919; In re Thompson Milling Co., 144 Fed. 314, 16 A. B. R.

454; In re McCauley & Sons, 2 N. B. R. 1085; In re Schaefer, 104 Fed. 973; In re Loder, Fed. Cas. No. 8457; In re Riker, Fed. Cas. No. 11833; see contra, In re Gerson, 3 N. B. R. 249, 5 A. B. R. 89, 105 Fed. 891.

60—In re Murdock, 3 N. B. R. 36, 1 Lowell 362, Fed. Cas. No. 9939.

61—Ex p. Talcott, 9 N. B. R. 502, 2 Lowell 320, Fed. Cas. No. 13184.

62—Bailey v. Nicholas, 2 N. B. R. 151, Fed. Cas. No. 741.

63—In re Bennett Shoe Co., 162 Fed. 691, 20 A. B. R. 704.

The taking of a note does not discharge the original debt, and either is provable, and, if the original contract was in violation of statutory provisions regarding contracts by counties, the county may waive it and the other party cannot urge it;<sup>64</sup> nor does the giving of a renewal note to a bank, where it retains the original, discharge the precedent debt for which it was given, unless such is the arrangement.<sup>65</sup> The fact that the signature of the bankrupt's wife appears above his on a note, and that the same is secured by a mortgage upon her separate property is not conclusive that the debt is hers and not the bankrupt's.<sup>66</sup>

Notes are not provable if given for a claim upon which bankrupt is not legally liable;<sup>67</sup> or if based on a prior gift as consideration;<sup>68</sup> or if subject to off-set for an amount greater than the amount of the note;<sup>69</sup> or where interest in advance has been put into a note, and the maker is adjudged a bankrupt before it becomes due for the interest yet to accrue;<sup>70</sup> or where the individual note of one joint maker is accepted in payment of the joint note, the old note is not provable against the estate of the other joint maker.<sup>71</sup>

Unstamped notes given during the operation of the War Revenue Law are not provable, though they may be allowed to be withdrawn to remedy the defect;<sup>72</sup> nor a non-negotiable note in the hands of an assignee unless his assignor could have proved it;<sup>73</sup> nor notes purchased for less than their face by creditors at bankrupt's request to secure an extension of time, the creditors being unaware of bankrupt's insolvency and acting in perfect good faith, though the amount paid is provable.<sup>74</sup>

A note given by the bankrupt after the filing of the petition is not provable<sup>75</sup> and where the bankrupt executed a note prior to bankruptcy and after bankruptcy substituted another note therefor, neither note can be made the basis of a provable claim,

64—In re Worcester Co., 102 Fed. 808, 4 A. B. R. 496.

65—Hadden v. Dooley, 92 Fed. 274.

66—In re Carter, 138 Fed. 846, 15 A. B. R. 126.

67—In re Young, 15 N. B. R. 205, Fed. Cas. No. 18149.

68—In re Cornwall, 6 N. B. R. 305, 9 Blatch. 114, Fed. Cas. No. 3250.

69—In re Ford, 16 N. B. R. 426, Fed. Cas. No. 4932.

70—In re Riggs, Lechtenberg & Co., 8 N. B. R. 90.

71—In re Morrill, 8 N. B. R. 117, 2 Sawy. 356, Fed. Cas. No. 9821.

72—In re Dobson, 2 N. B. R. 514.

73—In re Goodman Shoe Co., 96 Fed. 949, 3 A. B. R. 200.

74—In re Glassburner, 2 N. B. R. 634.

75—In re O'Neil, 189 Fed. 1010, 27 A. B. R. 5.



where the evidence shows that the intention of the parties was that the second note should operate as a payment of the first.<sup>76</sup>

Notes signed by the bankrupt corporation by its president and secretary and under the corporate seal given for money indisputably advanced at the time of their execution are prima facie liabilities of the corporation.<sup>77</sup> An officer of the bankrupt corporation is not estopped to prove his claim based on its notes by the fact that its liability thereon was omitted from credit statements, in the absence of proof of the officer's knowledge of such omission, nor by the omission of the liability from a list of creditors signed by such officer, where no creditor subsequently extended credit relying thereon.<sup>78</sup>

That a third person is secondarily liable on notes on which the bankrupt is primarily liable does not affect the provability of the claim based thereon.<sup>79</sup> A note is provable in full against the estate of the maker, though the indorser has paid part, the excess of the sum due the holder being payable to the indorser.<sup>80</sup>

In a case where an indorser has paid the note in whole or in part, the holder of the note, if he should receive from the bankrupt its entire amount, would hold an amount equal to that which the indorser had paid in trust for the indorsee, and would be obliged to reimburse him to that amount; but, where an indorser has paid in part, the holder is entitled to receive the entire dividends from the bankrupt under his proof as holder until the amounts paid to the holder in the shape of dividends from the bankrupt and the amount paid by the indorser pay the note in full.<sup>81</sup>

The holder of a note has the burden of proving not only the amount thereof, but to correctly prove payments made thereon;<sup>82</sup> and while the holder of a note is ordinarily presumed to be a holder in good faith, yet where the illegality of consideration is shown the burden is on him to show that he is such holder.<sup>83</sup>

76—In re O'Neil, 189 Fed. 1010, 27 A. B. R. 5.

77—Spencer v. Lowe, 198 Fed. 961, 29 A. B. R. 876.

78—Spencer v. Lowe, 198 Fed. 961, 29 A. B. R. 876.

79—In re Girvin, 160 Fed. 206, 20 A. B. R. 320.

80—Swarts v. Fourth Nat. Bank, 8 A. B. R. 673; In re Bingham, 94 Fed.

796, 2 A. B. R. 223; Ex p. Talcott, 9 N. B. R. 502, 2 Lowell 320, Fed. Cas. No. 13184; In re Ellerhorst & Co., 5 N. B. R. 144, Fed. Cas. No. 4381.

81—In re Manhattan Brush Mfg. Co., 209 Fed. 997, 31 A. B. R. 747.

82—In re Graves, 182 Fed. 443, 25 A. B. R. 372.

83—In re Hill & Sons, 187 Fed. 214, 26 A. B. R. 133.

A mere negligent purchase or acceptance of bills of exchange drawn on the bankrupt does not, however, impute to the claimant a knowledge of any unlawful diversion of the proceeds by the drawer.<sup>84</sup>

The trustee of the maker of a negotiable note can avail himself only of the defenses available to the bankrupt and cannot raise collateral issues between indorsers subsequent to delivery.<sup>85</sup>

### § 518. — Liability of bankrupt as indorser or surety.

The liability of an indorser prior to the maturity of the obligation is not a fixed liability but a conditional one, and not a debt absolutely owing until the happening of the contingency of dishonor by the maker and notice to the indorser thereof. Where the obligation does not become due until after the filing of the petition, the indorser's liability is not a fixed one absolutely owing when the petition is filed and hence his claim is not provable under section 63, subdivision a, (1),<sup>86</sup> though it has been held that a claim upon a contract of indorsement of a promissory note is provable under clause 4 of subdivision "a" of that section, even if the note does not fall due and the liability become fixed until after the petition is filed.<sup>87</sup>

A claim based on a promissory note overdue at the time of the filing of the petition, indorsed by the bankrupt, which had been duly protested for non-payment, is provable,<sup>88</sup> and it is held that a claim against a bankrupt indorser is provable though no notice of non-payment was given him, where the trustee of the maker was also the trustee of the indorser.<sup>89</sup>

84—In re New York Car Wheel Works, 139 Fed. 421, 14 A. B. R. 595.

85—In re Schwarz, 200 Fed. 309, 29 A. B. R. 700.

86—In re Chambers, Calder & Co., 2 N. B. N. R. 864; In re Schafer, 104 Fed. 973, 3 N. B. N. R. 261; In re Loder, Fed. Cas. No. 8457; In re Riker, Fed. Cas. No. 11833; In re McCauley, 2 N. B. N. R. 1085; see In re Dunnigan, 2 N. B. N. R. 755; Hayes v. Comstock, 7 A. B. R. 493; Phillips v. Dreher Shoe Co., 112 Fed. 404, 7 A. B. R. 326; contra, Smith v. Wheeler, 3 N. B. N. R. 337, 66 N. Y. S. 780.

87—In re Rothenberg, 140 Fed. 798, 15 A. B. R. 485; In re Smith, 146 Fed. 923, 17 A. B. R. 112; Cohen v. Pechar-

sky, 67 Misc. (N. Y.) 72, 23 A. B. R. 754; In re McIntyre & Co., 198 Fed. 579, 28 A. B. R. 459; In re Simon, 197 Fed. 105, 28 A. B. R. 611; In re Semmer Glass Co., 135 Fed. 77, 14 A. B. R. 25, appeal dismissed, 203 U. S. 141, 51 L. ed. 128; In re Gerson, 3 N. B. N. R. 249, 5 A. B. R. 89, 105 Fed. 891; Mock v. Market St. Nat. Bank, 107 Fed. 897, 6 A. B. R. 11; see In re Garlington, 8 A. B. R. 602; In re Marks, 6 A. B. R. 641; Colman Co. v. Withoft, 195 Fed. 250, 28 A. B. R. 328.

88—Whitwell v. Wright, 136 App. Div. (N. Y.) 246, 23 A. B. R. 747.

89—In re McIntyre & Co., 198 Fed. 579, 28 A. B. R. 459.

Paper indorsed by the bankrupt can be proved only for the amounts actually paid by the holders with lawful interest.<sup>90</sup>

A note is provable against an indorser notwithstanding payments by the maker, so long as both payments do not exceed the face of the note,<sup>91</sup> and the holder may prove against the estates of both maker and indorser.<sup>92</sup>

The rights of a creditor in the estate of a bankrupt indorser or surety though ordinarily determined as of the date of the filing of the petition, are open to adjustment as of that date by after-occurring equities, such as payment in full by the principal debtor prior to declaration of a dividend,<sup>93</sup> and, in case of partial payment by the maker or the receipt of a dividend from his estate, the claim is provable only for the balance due.<sup>94</sup>

The claim of the holder of an accommodation indorsement of bills of exchange against a bankrupt to secure the payment of which the drawers and acceptors have given collateral security, is provable as if unsecured,<sup>95</sup> but not that of a holder who has granted an extension of time to the maker against the estate of a bankrupt indorser.<sup>96</sup>

An accommodation indorser who pays a note upon which the bankrupt is a prior accommodation indorser has a provable claim for the full amount thereof.<sup>97</sup> A claim against an indorser should not be rejected on its face because of a misstatement that all of certain notes were overdue, or because of a misstatement of the date of substitution of certain notes.<sup>98</sup>

Commercial paper acquired in good faith before maturity may be proved by the indorsee, upon showing a valuable consideration paid by him,<sup>99</sup> but not if without such consideration.<sup>1</sup>

90—In re Many, 17 N. B. R. 514, Fed. Cas. No. 9054.

91—In re Weeks, 13 N. B. R. 263, 8 Ben. 265, Fed. Cas. No. 17349.

92—Bk. v. Porter, 17 N. B. R. 329.

93—In re Levy, 30 A. B. R. 91.

94—In re Hicks, 19 N. B. R. 299, Fed. Cas. No. 6456.

But see, In re Simon, 197 Fed. 105, 28 A. B. R. 611, holding that a claim against a bankrupt indorser may be proved for the full amount of the note notwithstanding payments thereon have been made by the maker or his trustee in bankruptcy.

95—In re Dunkerson & Co., 12 N. B. R. 413, 4 Biss. 253, Fed. Cas. No. 4157.

96—In re Granger & Sabin, 8 N. B. R. 30, Fed. Cas. No. 5684; see In re Ankeny, 1 N. B. N. 511, 2 N. B. N. R. 349, 100 Fed. 614, 4 A. B. R. 72.

97—In re McCord, 174 Fed. 72, 22 A. B. R. 204.

98—In re Stevens, 107 Fed. 243, 5 A. B. R. 806.

99—In re Elletson Co., 193 Fed. 84, 28 A. B. R. 434.

In re Lake Superior Ship Canal, R. R. & Canal Co., 10 N. B. R. 76, Fed. Cas. No.

### § 519. — Claims of sureties, guarantors, and persons secondarily liable.

The claim of any person as indorser, surety, guarantor, or otherwise, secondarily liable for a bankrupt is provable if the creditor fails to prove, in the creditor's name.<sup>2</sup> In the event he discharges the obligation in whole or in part he becomes entitled to that extent to the right of subrogation.<sup>3</sup> But, if a surety pays a claim against which there is a good defense, his claim for such payment is not provable.<sup>4</sup> Where a third person who guaranteed payment of a creditor's claim surrenders a note of the bankrupt to such creditor as further security, the creditor may prove upon both his original claim and the note.<sup>5</sup> Where one of three parties who have signed a note is adjudicated a bankrupt before the note becomes due, and it is paid in full at maturity by the third person, who is admittedly an accommodation party, and contingently liable, and bankrupt's liability to him was contingent upon his paying the note partly or wholly, such party has no provable claim.<sup>6</sup> A note on which an undischarged bankrupt is indorser, maturing after the bankruptcy and paid by him after protest, is provable by him as after acquired property against the estate of the other bankrupt.<sup>7</sup> The payment of a note by a surety relates back to the signing thereof, for the purpose of fixing the date when the indebtedness of the principal to him on account of overpayment had its inception.<sup>8</sup>

The claim of an accommodation indorser of the bankrupt's note who has paid the same is provable,<sup>9</sup> and this though the

7998. And see, *Bank of Wayne v. Gold*, 146 App. Div. (N. Y.) 296, 26 A. B. R. 722.

Accommodation paper of a corporation may be made the basis of a provable claim where in the hands of a holder in good faith, for value, who took it before maturity in the usual course of business without knowledge of its infirmity. In re *Akron Twine & Cordage Co.*, 11 A. B. R. 321.

1—In re *Hook*, 11 N. B. R. 282, Fed. Cas. No. 6672.

2—Sec. 57i, *post*, § 597.

3—*Phillips v. Dreher Shoe Co.*, 112 Fed. 404, 7 A. B. R. 326; In re *Bingham*, 94 Fed. 796, 1 N. B. N. 351, 2 A.

B. R. 223; *Jervis v. Smith*, 3 N. B. R. 147; *Ex p. Talcott*, 9 N. B. R. 502, 2 Lowell 320, Fed. Cas. No. 13184; but see In re *Kalter*, 2 N. B. N. R. 264.

4—In re *Spring*, 2 N. B. N. R. 509.

5—In re *Keep Shirt Co.*, 200 Fed. 80, 28 A. B. R. 765.

6—In re *Dunnigan*, 2 N. B. N. R. 755.

7—In re *Smith*, 1 N. B. N. 136, 1 A. B. R. 37.

8—In re *Stout*, 109 Fed. 794, 6 A. B. R. 505.

9—*Farmers & Merchants' Bank v. Akron Machine Co.*, 14 Ohio Fed. Dec. 188, 12 A. B. R. 6.

In re *Salvator Brewing Co.*, 193 Fed. 989, 28 A. B. R. 56.

payment was not made until after bankruptcy,<sup>10</sup> but when the surety having actual knowledge of the bankruptcy proceedings of the maker, pays the note, his claim is barred by the maker's discharge.<sup>11</sup>

A claim based upon the bankrupt's guarantee of the payment of dividends by a corporation at a certain rate is not provable as to dividends to accrue after the filing of the petition in bankruptcy, even though the corporation whose stock is guaranteed becomes insolvent before the claim is proved.<sup>12</sup>

### § 520. Composition as affecting provability.

A debt which has been discharged by a composition agreement is revived upon a failure to carry out the agreement and its provability is not affected thereby, except to the extent that payments have been received under it.<sup>13</sup> Where a creditor demands payment in full in advance as a condition for signing a composition, and is required to return the money to the trustee, and the composition fails, such claim is nevertheless provable.<sup>14</sup> If, after a composition the debtor gives new notes for notes held before the composition, and makes some payments, and again becomes bankrupt, the new notes are provable.<sup>15</sup>

An agreement entered into after a composition offer has been accepted by creditors, whereby the bankrupt in consideration of a loan from one of his creditors for use in paying the consideration of the composition, agrees to pay such creditor in full is valid and a claim based thereon may be proved in subsequent bankruptcy proceedings.<sup>16</sup>

### § 521. Contracts—In general.

Section 64a (4) of the act provides, that debts of the bankrupt which are "founded upon an open account, or upon a contract, express or implied" are provable. The first subdivision of the same section provides that a debt to be provable must be a "fixed liability absolutely owing at the time of the filing of the petition." These sections must be interpreted together and the

10—*Smith v. Wheeler*, 5 A. B. R. 46.

11—*Hager v. Comstock*, 7 A. B. R. 493.

12—*In re Pettingill & Co.*, 137 Fed. 143, 14 A. B. R. 728.

13—*In re Carton & Co.*, 148 Fed. 63, 17 A. B. R. 343.

14—*Brookmire v. Bean*, 12 N. B. R. 217, 3 Dill. 136, Fed. Cas. No. 1942.

15—*In re Merriman's estate*, 18 N. B. R. 411, 44 Conn. 587, Fed. Cas. No. 9497.

16—*In re Hawks*, 204 Fed. 309, 30 A. B. R. 365.

language "fixed liability absolutely owing" in subdivision one construed as limiting the words "upon open account or upon contract express or implied" in subdivision four. The provability of a claim of the class mentioned in subdivision four must therefore be determined as of the date of the filing of the petition,<sup>17</sup> though there are numerous decisions holding that subdivision one does not limit subdivision four,<sup>18</sup> and that an executory contract may give rise to a provable claim.<sup>19</sup>

A claim for damages for breach of contract is provable, especially where the damages are liquidated by the terms of the contract,<sup>20</sup> though where no actual damage has been sustained by the breach, a claim for liquidated damages, provided for in the contract will not be allowed.<sup>21</sup>

Whether bankruptcy is such a breach of contract by the bankrupt as to render provable, claims for damages based thereon is a moot question. The proper test would seem to be the right of the creditor to maintain a suit at law or in equity for damages. As said by Lowell J, in an early case on the subject: "If the bankrupt, at the time of bankruptcy, by disabling himself from the performance of the contract, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disablement and repudiation." <sup>22</sup>

17—*Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R. 493; *In re Roth & Appel*, 181 Fed. 667, 31 L. R. A. (N. S.) 270, 24 A. B. R. 588, aff'g 174 Fed. 64, 22 A. B. R. 504.

18—*In re Lyons Beet Sugar Refining Co.*, 192 Fed. 445, 27 A. B. R. 610; *In re Smith*, 146 Fed. 923, 17 A. B. R. 112; *In re Gerson*, 107 Fed. 897, 6 A. B. R. 11; *Cobb v. Oberman*, 109 Fed. 65, 54 L. R. A. 369, 6 A. B. R. 324.

"While the language 'debts of the bankrupt \* \* \* which are \* \* \* founded upon an open account, or upon a contract express or implied' may not include contingent liabilities, it does include obligations no longer contingent, though they were contingent at the date

of the filing of the petition." *In re Smith*, 146 Fed. 923, 17 A. B. R. 112.

19—*In re Glick*, 184 Fed. 967, 25 A. B. R. 871; *In re Stern*, 116 Fed. 604, 8 A. B. R. 569; *In re Spittler*, 151 Fed. 942, 18 A. B. R. 425.

20—*In re Adams*, 130 Fed. 788, 12 A. B. R. 368.

21—*Northwest Fixture Co. v. Kilbourne & Clark*, 128 Fed. 256, 11 A. B. R. 725.

22—*In re Pettingill & Co.*, 137 Fed. 143, 14 A. B. R. 728. And see *In re Stoeve*, 127 Fed. 394, 11 A. B. R. 345. *In re Duquesne Incandescent Light Co.*, 176 Fed. 785, 24 A. B. R. 419; *contra*, *In re Inman & Co.*, 175 Fed. 312, 23 A. B. R. 566. *In re Imperial Brewing Co.*, 143 Fed. 579, 16 A. B. R. 110.

A claim against a holding corporation of which the bankrupt corporation was a part cannot be proved against the estate of the latter where credit was extended solely to the former.<sup>23</sup>

If the liability arising under a contract is fixed and absolutely owing, when the petition is filed, it is provable, as a claim of a county for services performed by its convicts;<sup>24</sup> or a claim for freight and demurrage<sup>25</sup> or a claim on a contract to pay a certain sum monthly, the payments under which had become due.<sup>26</sup> The agreement of a mercantile agency to furnish the bankrupt with information regarding credit of third persons for a period extending after the date of the filing of the petition in bankruptcy may be made the basis of a provable claim for the full amount of the contract price.<sup>27</sup>

### § 522. — Illegal contracts.

A claim based on a contract void as against public policy or avoided by legislative enactment cannot be proved,<sup>28</sup> though an exception is sometimes made where the contract has been executed.<sup>29</sup> So, a debt is not provable if incurred as a speculative option, commonly called "a put;"<sup>30</sup> or if growing out of a slave contract;<sup>31</sup> or if based upon an agreement between the bankrupt corporation and one of its officers which agreement was dependent upon the vote of such officer.<sup>32</sup> Money paid to the bankrupt in pursuance to an unlawful purpose may be the basis of a provable claim if the money was still intact and in the possession of

23—*In re Canton Iron & Steel Co.*, 197 Fed. 767, 28 A. B. R. 791.

24—*In re Wright*, 2 A. B. R. 592, 1 N. B. N. 428, 95 Fed. 807.

25—*Sturgiss v. Meurer*, 191 Fed. 9, 26 A. B. R. 851.

26—*Bray v. Cobb*, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788; *In re Bartenbach*, 11 N. B. R. 61, Fed. Cas. No. 1068; *In re Haake*, 7 N. B. R. 61, 2 Sawy. 231, Fed. Cas. No. 5883; *In re New Brunswick Carpet Co.*, 4 Fed. 574.

27—*In re Buffalo Mirror & Beveling Co.*, 15 A. B. R. 122. *In re Glick*, 184 Fed. 967, 25 A. B. R. 871.

28—*In re Paddock*, 6 N. B. R. 132, Fed. Cas. No. 10657; *In re Eady*, 3 N. B. N. R. 434. *In re Clark*, 21 A. B. R. 776; *In re Fenn*, 177 Fed. 334, 24 A. B.

R. 130, rev'g 172 Fed. 620, 22 A. B. R. 833; *In re Wyoming Valley Co-operative Ass'n*, 198 Fed. 436, 28 A. B. R. 462.

29—*In re Dorr*, 186 Fed. 276, 26 A. B. R. 408.

30—*In re Chandler*, 9 N. B. R. 514, Fed. Cas. No. 2590; see *In re Green*, 15 N. B. R. 198, 7 Biss. 338, Fed. Cas. No. 5751.

Claim for balance alleged to be due upon a contract for the future delivery of cotton, actual delivery not being contemplated, disallowed. *In re Aetna Cotton Mills*, 171 Fed. 994, 22 A. B. R. 629.

31—*Buckner v. Street*, 7 N. B. R. 255, Fed. Cas. No. 2098.

32—*In re McCarthy Portable Elevator Co.*, 196 Fed. 247, 28 A. B. R. 45.

the bankrupt at the time of his bankruptcy, or if the bankrupt devoted the same to a purpose other than that for which it was entrusted to him.<sup>33</sup> A claim for spirituous liquors sold and delivered in the original imported packages, though in a state where the sale of such liquors is prohibited by law, is provable.<sup>34</sup> A claim founded on due bills given by the bankrupt to a foreign corporation illegally doing business in the state where the loan was made is not provable even though the due bills have been assigned.<sup>35</sup>

An objection that the valid part of a creditor's claim should not be allowed because of the cost unjustly imposed upon the bankrupt estate in meeting the illegal part of his claim, affects only the question of costs in the district court, and will not be considered on appeal.<sup>36</sup>

As the war revenue law of 1898 declared a rule of evidence with reference to certain written instruments, notes and other papers drawn while such law was in force, and which were not stamped pursuant thereto, and which were filed in support of a proof of a claim, have been disallowed.<sup>37</sup>

The burden of proving the illegality is upon the trustee<sup>38</sup> and notes claimed to have been given for a gaming contract, will be held valid until the party attacking them shows by clear and conclusive evidence that they are invalid.<sup>39</sup>

Fraud or preference as affecting provability, see post, § 535.

### § 523. — *Ultra vires contracts.*

An obligation arising out of an *ultra vires* contract of the bankrupt corporation is not provable.<sup>40</sup> So, a claim based upon a collateral agreement between the bankrupt corporation and a

33—In re Norris, 190 Fed. 101, 26 A. B. R. 945.

34—In re Town, 8 N. B. R. 38, Fed. Cas. No. 14111; In re Murray, 3 N. B. R. 187, 1 Hask. 267, Fed. Cas. No. 9954.

35—In re Montello Brick Works, 163 Fed. 621, 20 A. B. R. 855.

36—Streeter v. Lowe, 184 Fed. 263, 25 A. B. R. 774.

37—In re Dobson, 2 N. B. N. R. 514.

38—Jacobs v. Ballantine Breweries Co., 193 Fed. 393, 27 A. B. R. 918; West v.

McLaughlin & Co., 162 Fed. 124, 20 A. B. R. 654.

39—Hill v. Levy, 2 N. B. N. R. 180, 98 Fed. 94, 3 A. B. R. 374.

40—In re Waterloo Organ Co., 134 Fed. 341, 13 A. B. R. 466; Mapes v. German Bank of Tilden, 176 Fed. 89, 23 A. B. R. 713; In re Liquor Dealer's Supply Co., 177 Fed. 197, 24 A. B. R. 399; In re Smith Lumber Co., 132 Fed. 625, 13 A. B. R. 118.



subscriber to its stock to redeem or repurchase the stock at any time will not be allowed.<sup>41</sup>

A claim based upon the debt of a bankrupt corporation in excess of the amount of indebtedness it is authorized to incur, while not ordinarily provable,<sup>42</sup> may be proved where it appears that the debt was subsequently validated by an amendment of the articles of incorporation authorizing an indebtedness in excess of all debts then existing.<sup>43</sup> A claim is provable against a bankrupt corporation, whose articles limit its indebtedness to one-half its paid-up capital, if it does not exceed one-half the original capital stock and the stock dividends duly authorized, though it does exceed one-half its available assets.<sup>44</sup>

An indorsement given for full value will bind a corporation, though the form is that of an accommodation indorsement, and this is within the knowledge of the parties;<sup>45</sup> but an indorsement which ordinarily implies value will not bind a corporation to an indorsee who has knowledge of the facts, provided no value is really given.<sup>46</sup> Where a note is issued by officer of a bankrupt corporation without authority and not in the business of the company the burden is on the claimant to show that he acquired it in good faith.<sup>47</sup>

A claim based on the contract of a corporation is presumed to be *intra vires* until the contrary is made to appear, and the burden is upon the trustee or objecting creditor to prove its invalidity.<sup>48</sup>

### § 524. — Contracts for services.

The provability of a claim for unearned salary depends upon whether a breach of the contract of employment occurred before bankruptcy or whether the bankruptcy itself constituted the

41—*In re Owen Pub. Co.*, 20 A. B. R. 639.

A contract of the bankrupt corporation to repurchase stock from a purchaser thereof cannot be made the basis of a provable claim where demand was not made prior to bankruptcy, and this whether recovery is sought on express or quasi contract. *In re Tichenor-Grand Co.*, 203 Fed. 720, 29 A. B. R. 409.

42—*In re Sapulpa Produce Co.*, 26 A. B. R. 900.

43—*In re Benedict Tea & Coffee Co.*, 192 Fed. 1011, 27 A. B. R. 409.

44—*Cunningham v. German Ins. Bk.*, 101 Fed. 977, 4 A. B. R. 363.

45—*In re Prospect Worsted Mills*, 126 Fed. 1011, 11 A. B. R. 502.

46—*In re Prospect Worsted Mills*, 126 Fed. 1011, 11 A. B. R. 502.

47—*In re Hooper-Morgan Co.*, 156 Fed. 525, 19 A. B. R. 518.

48—*In re Castle Braid Co.*, 145 Fed. 224, 17 A. B. R. 143.

breach.<sup>49</sup> The holder of a claim for future salary will not be permitted to share in the distribution of the assets with those creditors whose claims were absolute at the filing of the petition,<sup>50</sup> though, if the employee was thrown out by the voluntary act of the employer prior to the bankruptcy, whatever claim existed against the employer at the time the petition was filed would be provable.<sup>51</sup> Where a contract of employment expressly provides that in case the corporation is dissolved before the expiration thereof, the contract might, at its option be declared void, an employee discharged after the filing of a petition in bankruptcy against the corporation, has no provable claim for damages for a breach of the contract, even though the act of bankruptcy alleged in the petition is a voluntary admission by the corporation of its insolvency.<sup>52</sup> The claim of a garnishing creditor for wages where bankrupt secures their release from garnishment by a new agreement, is provable.<sup>53</sup>

The mere rendition of services does not create a provable debt. To render a claim based on services rendered provable, the circumstances of the rendition must be such that, in law, they will be presumed to have been rendered for the benefit of such party, and not the claimant.<sup>54</sup> It is incumbent upon the claimant to prove his contract, and that he fairly performed the services called for by it. If he fails to sustain the burden so placed upon him, he can only recover upon a quantum meruit, and, as to this, the burden is still upon him.<sup>55</sup>

The fact that a minor son of the bankrupt paid for his board out of wages paid him by the bankrupt has been held not to show an emancipation of the son justifying the allowance of a claim by him for unpaid wages.<sup>56</sup>

Priority of wage claims, see post, chapter XXXII.

49—In re D. Levy & Sons Co., 208 Fed. 479, 31 A. B. R. 25.

50—In re Pevear, 17 N. B. R. 461, Fed. Cas. No. 11053; In re Inman & Co., 171 Fed. 185, 22 A. B. R. 524; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 A. B. R. 621.

51—In re Silverman, 101 Fed. 219, 4 A. B. R. 83.

52—In re Sweetser, Pembroke & Co., 142 Fed. 131, 15 A. B. R. 650.

53—In re Bragg, 2 N. B. R. 82.

54—In re McCarthy Portable Elevator Co., 196 Fed. 247, 28 A. B. R. 45.

55—Mason v. St. Albans Furniture Co., 149 Fed. 898, 17 A. B. R. 868.

56—In re Riff, 205 Fed. 406, 30 A. B. R. 594.

**§ 525. — Sales of personalty.**

A claim on a contract of sale to be executed on a fixed day is not provable where the petition in bankruptcy is filed prior to that day.<sup>57</sup>

A claim for damages for breach of warranty in the sale of personalty is a claim arising out of contract, even if in case of actual fraud there might be an independent claim purely in tort,<sup>58</sup> and such claim is provable though the damages are unliquidated.<sup>59</sup>

If a contract to supply goods be broken, the loss to the purchaser may be proved for the entire term, though it had not elapsed at the time of filing the claim, if at the time of breaking the market price had increased.<sup>60</sup> The measure of damages where the bankrupt fails to furnish goods under a contract with another when it is known that the other party is about to contract for their sale with a third party, is the difference between the purchasing price from the bankrupt and the selling price to the third party.<sup>61</sup>

A claim for the purchase price of goods left in a vendor's warehouse and marked with vendee's name and there destroyed by fire is provable,<sup>62</sup> as is a claim for damages for a breach of a contract to purchase property to be manufactured,<sup>63</sup> the measure of damages in the latter case being the difference between the contract price and the cost of production.<sup>64</sup> Speculative profits are not an element of damage for the breach of an executory contract,<sup>65</sup> but where the bankrupt contracts for goods to be manufactured and refuses to receive the same after the claimant has placed an order for their manufacture with a third party, the measure of damages is the difference between

57—*Phenix Nat. Park Bank, v. Waterbury*, 197 N. Y. 161, 23 A. B. R. 250, 123 App. Div. (N. Y.) 453, *aff'g* 20 A. B. R. 140.

58—*Grant Shoe Co. v. Laird Co.*, 212 U. S. 445, 53 L. ed. 591, 21 A. B. R. 484. But see *In re Morales*, 105 Fed. 761, 5 A. B. R. 425.

59—*In re Grant Shoe Co.*, 130 Fed. 881, 12 A. B. R. 349, *aff'g* 125 Fed. 576, 11 A. B. R. 48.

60—*In re Stern*, 116 Fed. 604, 8 A. B. R. 569; *In re Manhattan Ice Co.*, 114 Fed. 399, 7 A. B. R. 408.

61—*In re Structural Steel Car Co.*, 14 Ohio Fed. Dec. 609, 13 A. B. R. 373.

62—*Ex p. Safford*, 15 N. B. R. 564, 2 Lowell, 563, Fed. Cas. No. 12212.

63—*Pratt v. Auto Spring Repairer Co.*, 196 Fed. 495, 28 A. B. R. 483. See *In re Duquesne Incandescent Light Co.*, 176 Fed. 785, 24 A. B. R. 419.

64—*Pratt v. Auto Spring Repairer Co.*, 196 Fed. 495, 28 A. B. R. 483.

65—*In re Saxton Furnace Co.*, 142 Fed. 293, 15 A. B. R. 445.

the contract price and the price demanded by the manufacturer.<sup>66</sup> The manufacturer's profits in such case cannot be considered.<sup>67</sup>

The vendor in conditional sale contract who takes possession of the personalty upon default in the payment of installments, is not entitled to prove a claim for the amount unpaid upon the purchase price notes,<sup>68</sup> or for rent.<sup>69</sup>

### § 526. — Sales of real property.

The vendor under an executory contract for the sale of land is not entitled to prove his claim for the unpaid balance of the purchase price where he has accepted a rescission of the contract and a release of the bankrupt's interest in the land.<sup>70</sup>

### § 527. — Subscriptions.

A claim founded on the verbal promise of bankrupt to another to pay a certain sum, if such other would subscribe a portion of the church's debt to him, expenses having been incurred on the faith of the subscriptions generally,<sup>71</sup> is provable, though voluntary subscriptions are not generally provable.<sup>72</sup> A note for a subscription, partly paid and on the faith of which, together with other subscriptions, liabilities are incurred, is provable.<sup>73</sup>

### § 528. Claims for conversion.

A claim for the embezzlement, misappropriation or conversion of personal property possession of which was not obtained by false pretenses or representations is provable as a debt upon a contract expressed or implied,<sup>74</sup> notwithstanding the claimant

66—*In re Structural Steel Car Co.*, 14 Ohio Fed. Dec. 609, 13 A. B. R. 385.

67—*In re Structural Steel Car Co.*, 14 Ohio Fed. Dec. 609, 13 A. B. R. 385.

68—*In re Norton*, 181 Fed. 901, 24 A. B. R. 794.

69—*In re Merwin v. Willoughby Co.*, 206 Fed. 116, 30 A. B. R. 485; *In re Quaker Drug Co.*, 204 Fed. 689, 30 A. B. R. 398.

70—*In re Davis*, 179 Fed. 871, 24 A. B. R. 667; *Kenyon v. Mulert*, 184 Fed. 825, 26 A. B. R. 184.

71—*Capelle v. Trinity M. E. Church*, 11 N. B. R. 536, Fed. Cas. No. 2392.

72—*In re Ore. Bull. Pr. & Pub. Co.*, 13 N. B. R. 503, Fed. Cas. No. 10559.

73—*Sturgis v. Colby*, 18 N. B. R. 168, Fed. Cas. No. 13566.

74—*In re Camelo*, 195 Fed. 632, 28 A. B. R. 353; *Reynolds v. New York Trust Co.*, 188 Fed. 611, 39 L. R. A. (N. S.) 391, 26 A. B. R. 698; *Clark v. Rogers*, 183 Fed. 518, 26 A. B. R. 413, *aff'd*, 228 U. S. 534, 57 L. ed. 953, 30 A. B. R. 39. *Burgoyne v. McKillip*, 182 Fed. 452, 25 A. B. R. 387; *Maxwell v. Martin*, 130 App. Div. (N. Y.) 80, 22 A. B. R. 93; *In re Hale*, 161 Fed. 387, 20 A. B. R. 633; *Clingman v. Miller*, 160 Fed. 326, 20 A. B. R. 360; *Fechter v. Postel*, 114 App. Div. (N. Y.) 776, 17 A. B. R. 316.

has elected to sue in tort,<sup>75</sup> or has reduced his claim to judgment.<sup>76</sup>

### § 529. Costs and fees.

There are two classes of costs which are provable, (1) costs taxable against an involuntary bankrupt as plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute, and (2) taxable costs incurred in good faith by a creditor in an action on a provable debt, but both must be prior to the filing of the petition.<sup>77</sup> It was held under the act of 1867 that the debt or principal must be proved and allowed before the costs,<sup>78</sup> though there appears to be no reason under the present law why they may not be proved together.

Costs need not inure to the benefit of the estate to be provable,<sup>79</sup> and if incurred in an attachment proceeding, founded on a provable debt, prior to the filing of the petition, may be proved and allowed<sup>80</sup> and will be entitled to priority of payment if such is given by the state law, otherwise not,<sup>81</sup> though the contrary appears to have been the rule under the former law.<sup>82</sup> The fact that a creditor at the time of the levying of an execution believed the bankrupt to be in financial straits does not show such bad faith as to prevent costs so incurred being provable as an incident to the judgment.<sup>83</sup> The burden is upon the trustee to show that a claim for costs is unreasonable.<sup>84</sup>

Costs adjudged against bankrupt after his adjudication in a suit brought by him prior to the filing of the petition, are not provable,<sup>85</sup> though a claim for costs paid by the surety on an

75—*Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 12 A. B. R. 659, rev'g 201 Ill. 581.

76—*In re Hale*, 161 Fed. 387, 20 A. B. R. 633.

77—Sec. 63a, Act of 1898.

78—*In re Preston*, 5 N. B. R. 293, Fed. Cas. No. 11393.

79—*In re Harnden*, 200 Fed. 172, 29 A. B. R. 504.

80—*In Amoratis*, 178 Fed. 919, 24 A. B. R. 565; *In re Thompson Mercantile Company*, 11 A. B. R. 579; *In re Lewis*, 99 Fed. 935, 4 A. B. R. 51; *In re Allen*, 96 Fed. 512, 3 A. B. R. 38; but see *In re Young*, 2 A. B. R. 673, 1 N. B. N. 428, 96 Fed. 606.

81—*In re Lewis*, supra; *In re Allen*, supra.

82—*In re Preston*, 6 N. B. R. 545, Fed. Cas. No. 11394; *In re Jenks*, 15 N. B. R. 301, Fed. Cas. No. 7276.

83—*In re Harnden*, 200 Fed. 172, 29 A. B. R. 504.

84—*In re Harnden*, 200 Fed. 172, 29 A. B. R. 504.

85—*In re Marcus*, 104 Fed. 331, 5 A. B. R. 19, s. c. in 45 C. C. A. 115, 3 N. B. N. R. 407; *In re Marcus et al.*, 105 Fed. 907, 5 A. B. R. 365; *Sanford v. Sanford*, 12 N. B. R. 565; *In re Williams*, 2 N. B. R. 79, Fed. Cas. No. 17705.

appeal bond given by the bankrupt is provable notwithstanding the judgment on appeal is not rendered until after the adjudication in bankruptcy.<sup>86</sup>

Costs awarded by a state court against the trustees of a bankrupt, as substituted defendants in an action of replevin, pending at the time of the bankruptcy, are provable,<sup>87</sup> and taxable costs in an action by the trustee in which a creditor has recovered on a counterclaim are provable though judgment on the counterclaim is rendered after the expiration of more than a year and a half from the filing of the petition.<sup>88</sup>

Expenses, but not costs, defrayed by an attaching creditor after the dissolution of his lien by the adjudication in bankruptcy in the care and preservation of the property, may be allowed for such sum as was reasonably necessary for that purpose under that provision of the law authorizing the actual and necessary costs for preserving the estate subsequent to filing the petition.<sup>89</sup>

Fees of a sheriff attaching the property of the bankrupt prior to bankruptcy will be allowed to the extent that the attachment proceedings preserved the property for the benefit of the estate.<sup>90</sup>

The fees of the referee and stenographers in an equity suit against the bankrupt instituted prior to the bankruptcy proceedings are to be considered as costs in the equity suit and not as a debt due prior to the institution of the bankruptcy proceedings on a contract express or implied, although the parties to the suit entered into an express stipulation with reference to the amount thereof which was in excess of the statutory allowance.<sup>91</sup>

See also Judgments, post, section 540.

### § 530. Claims of creditors of third persons.

Creditors of third persons whose debts bankrupt has assumed have provable claims.<sup>92</sup>

Where the bankrupt receives a fraudulent transfer of prop-

86—In re Lyons Beet Sugar Refining Co., 192 Fed. 445, 27 A. B. R. 610.

87—In re Neely, 108 Fed. 371, 5 A. B. R. 836.

88—In re Havens, 182 Fed. 367, 25 A. B. R. 116.

89—In re Allen, *supra*.

90—In re Heller, 176 Fed. 656, 23 A. B. R. 792.

91—In re Brewster & Co., 180 Fed. 109, 24 A. B. R. 838.

92—In re Baumblatt, 153 Fed. 485, 18 A. B. R. 720.

erty from a debtor, other creditors of the transferee who have obtained judgment in an action to set aside such transfer may prove their claim based thereon.<sup>93</sup> An unpaid vendor cannot prove his claim against the bankrupt estate of one who has purchased the property from the vendee without notice of the conditional sale contract under which it was held.<sup>94</sup>

### § 531. Equitable demands.

Equitable demands are provable if within the purview of the general rules in equity, even though they have no status in courts of law.<sup>95</sup>

### § 532. Executors and administrators.

The right of an executor to prove an indebtedness to his testator who died after the adjudication of the debtor is not affected by a provision in the will which provides for a deduction of the debt of the bankrupt from the amount to be received by him as a legacy, where the amount of such legacy cannot be determined at the time of making proof.<sup>96</sup>

### § 533. Fines, bonuses, penalties and forfeitures.

A question not without serious doubt is as to the provability of a judgment imposing a fine as a penalty or punishment. While it has been held that a judgment obtained against bankrupt for fines, upon an indictment for unlawful retailing, is dischargeable, and, therefore, would be provable,<sup>97</sup> such decision seems hardly tenable in view of the fact that, if this be true, a discharge would operate substantially as a pardon, and which is not within the province of a bankruptcy law.<sup>98</sup> Under the former acts, such fines were not considered debts.<sup>99</sup>

It may be safely said, therefore, that a judgment for a fine, as distinguished from a judgment on a contract express or implied, or for damages, is not provable, since provable debts include only civil liabilities.<sup>1</sup>

93—In re Adler, 144 Fed. 659, 16 A. B. R. 414.

94—In re Builders' Lumber Co., 148 Fed. 244, 17 A. B. R. 449.

95—In re Putman, 193 Fed. 464, 27 A. B. R. 923.

96—In re Woods, 133 Fed. 82, 13 A. B. R. 240.

97—In re Alderson, 98 Fed. 588, 3 A. B. R. 554.

98—In re Moore, 111 Fed. 145, 6 A. B. R. 590.

99—People v. Spalding, 4 How. 21, 11 L. ed. 858, 10 Paige, Cr. R. 284; In re Sutherland, 3 N. B. R. 314, Fed. Cas. No. 13639; Macy v. Jordan, 2 Den. 570.

1—In re Moore, 111 Fed. 145, 6 A. B. R. 590.

Under section 57j of the act, debts owing to the United States, a state, a county, a district or a municipality as a penalty or forfeiture cannot be allowed except for the amount of pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued according to law. This clause of the act cannot be deemed as in derogation of their general rights in the collection of claims, but is merely a limitation on the amount of recovery out of an estate. A bonus due the state upon the increase of the capital stock of a corporation is provable,<sup>2</sup> but a claim for a penalty for failure to make a return on increase of capital stock or for failure to file capital stock report<sup>3</sup> or for failure to comply with an order of the Public Service Commission<sup>4</sup> is not entitled to allowance under this section.

### § 534. Claims for fraud and deceit.

A claim for damages for fraud and deceit and for the obtaining of property by false pretenses or false representations is not provable;<sup>5</sup> nor is a claim based on a representation of the bankrupt whereby a claimant was induced to purchase certain property from a third person.<sup>6</sup> However, a claim which originated in contract, is provable even though induced by fraud and prosecuted in an action for damages, although the fraud may have to be proved to entitle the plaintiff to recover.<sup>7</sup>

### § 535. Fraud of creditor or preference as affecting provability.

Whether a claim is created by fraud of the bankrupt or not, or a preference be given on it, or a judgment be obtained which the bankruptcy proceedings annul, it is still provable in the bankruptcy proceedings,<sup>8</sup> and a creditor does not lose his right to prove his claim by submitting the question of the validity of

2—*In re York Silk Mfg. Co.*, 188 Fed. 735, 26 A. B. R. 650, aff'd, 192 Fed. 81, 27 A. B. R. 525.

3—*Commonwealth of Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81, 27 A. B. R. 525, aff'g 188 Fed. 735, 26 A. B. R. 650.

4—*In re Wenatchee Heights Orchard Co.*, 212 Fed. 787, 31 A. B. R. 550.

5—*Maxwell v. Martin*, 130 App. Div. (N. Y.) 80, 22 A. B. R. 93.

6—*Switzer v. Henking*, 158 Fed. 784, 15 L. R. A. (N. S.) 1151, 19 A. B. R. 300.

7—*Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 12 A. B. R. 659, rev'g 201 Ill. 581; *In re Schwarz*, 15 N. B. R. 330, 14 Blatch. 196, Fed. Cas. No. 12502.

8—*In re Lazarovic*, 1 A. B. R. 476; *In re Norcross*, 1 A. B. R. 644; *In re Richard*, 2 A. B. R. 506, 1 N. B. N. 487, 94 Fed. 633; *In re Black*, 17 N. B. R. 399, Fed. Cas. 1459; *In re Arnold*,



alleged preferences to the court,<sup>9</sup> or by filing it under a general assignment, in ignorance of certain alleged fraudulent transactions.<sup>10</sup> The claim of a creditor which he was induced to release by the fraudulent representations of another creditor is provable,<sup>11</sup> but a claim for expenses incurred in trying to obtain a preference is not.<sup>12</sup>

The failure to record a sale or mortgage does not render the debt evidenced thereby invalid, nor release the bankrupt therefrom,<sup>13</sup> and does not prevent the creditor from surrendering his preference and sharing in the estate.<sup>14</sup>

A committee representing the bondholder's of the bankrupt corporation does not deprive itself of the right to prove its debt by conniving to transfer the bankrupt's property to hinder and delay other creditors,<sup>15</sup> but a claim based upon a note of the bankrupt given in the purchase of shares of its own stock in fraud of creditors will be rejected.<sup>16</sup> Similarly a claim based upon a secret agreement between a corporation and one of its stockholders under which the former agreed to redeem the stock on notice, being void, will not be allowed, nor will the claim of an officer of the bankrupt corporation who fails to account for and surrender property of the bankrupt traced to his hands in excess of his demands against the bankrupt.<sup>17</sup>

Where a creditor has interposed a claim the larger part of which is fraudulent, he is not entitled to any recovery, because the fraud permeates the entire account.<sup>18</sup>

The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more careful scrutiny than would be the case if no relationship existed. Nevertheless the

2 N. B. R. 61; Fed. Cas. No. 551; In re Schoenenberger, 15 N. B. R. 305, Fed. Cas. No. 12473; In re Rundle & Jones, 2 N. B. R. 49, Fed. Cas. No. 12138; but see In re Knox, 98 Fed. 585.

In case of involuntary surrender of preference, see *post*, § 618.

9—In re Oppenheimer, 140 Fed. 51, 15 A. B. R. 267.

10—In re Curtis, 94 Fed. 630, 1 N. B. N. 357; 2 A. B. R. 226

11—Michaels v. Post, 12 N. B. R. 152, 21 Wall. 398, 22 L. ed. 520.

12—In re Archenbrow, 8 N. B. R. 429, Fed. Cas. No. 503.

13—In re Ewald & Brainard, 135 Fed. 168, 14 A. B. R. 267; In re Burlage Bros., 169 Fed. 1006, 22 A. B. R. 410.

14—In re Ewald & Brainard, 135 Fed. 168, 14 A. B. R. 267.

15—In re Medina Quarry Co., 179 Fed. 929, 24 A. B. R. 769.

16—In re Smith Lumber Co., 132 Fed. 618, 13 A. B. R. 123; In re Owen Pub. Co., 20 A. B. R. 639.

17—In re Royce Dry Goods Co., 133 Fed. 100, 13 A. B. R. 257.

18—In re Friedman, 164 Fed. 131, 21 A. B. R. 213; In re Flick, 105 Fed. 503, 5 A. B. R. 465.

honest or dishonest character of a debt is not to be determined by any mere question of relationship.<sup>19</sup> Each claim is to be treated separately and to be judged by the evidence which tends to prove or disprove it,<sup>20</sup> and the decision of the referee thereon will not be reversed except in a very clear case.<sup>21</sup>

The fact that claims are purchased for the purpose of controlling the majority of the claims, does not necessarily prevent their allowance, though the transaction should be carefully scrutinized.<sup>22</sup> The fact that the stockholders of the two corporations are largely the same, that the corporations are under the same management, and that their affairs have been for years involved and intermingled is not conclusive against the validity of a claim of the one against the bankrupt estate of the other.<sup>23</sup>

Surrender of Preferences, as Condition Precedent to Proof of Claim, see post, section 618.

### § 536. Claims of husband or wife of bankrupt.

Whether a claim of the wife of the bankrupt is provable depends upon the state law. In those states where a husband and wife may contract with each other, there is nothing to prevent the proof of a claim by either husband or wife against the estate of the other becoming bankrupt, if it is otherwise provable.<sup>24</sup> A statute providing that a woman may not sue her husband except for divorce or the recovery of her separate estate, does not prevent her proving a claim against his estate. Nor will a statute which forbids husband and wife to testify

19—In re McCauley, 18 A. B. R. 459; In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342, Fed. Cas. No. 9420; In re Wooten, 118 Fed. 670, 9 A. B. R. 247; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 24 L. R. A. (N. S.) 184, 20 A. B. R. 40.

20—Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 24 L. R. A. (N. S.) 184, 20 A. B. R. 40.

Where sons of bankrupt a few days before the filing of the petition took over certain mechanic liens which were subject to setoff on book accounts for material sold by the bankrupt to the original claimants, and the bankrupt then collected the

book accounts, held that the claim of the son could not be allowed because fraudulent. In re Kyte, 182 Fed. 166, 25 A. B. R. 337.

21—In re Rider, 3 A. B. R. 193, 96 Fed. 811; In re Mendelsohn, 12 N. B. R. 533, Fed. Cas. No. 9420.

22—In re Headley, 2 N. B. R. 250, 3 A. B. R. 272, 97 Fed. 765.

23—In re Watertown Paper Co., 169 Fed. 252, 22 A. B. R. 190.

24—In re Remmerde, 206 Fed. 826, 30 A. B. R. 707; In re Hill, 190 Fed. 390, 27 A. B. R. 146; Tucker v. Curtin, 148 Fed. 929, 17 A. B. R. 354, rev'g 129 Fed. 922, 12 A. B. R. 594.

against each other have that effect.<sup>25</sup> A state rule of law that a husband may not contract with his wife, is not construed to prevent the enforcement against his estate of all rights in their nature contractual, provided they did not originate in a contract made directly between the couple.<sup>26</sup>

A loan made to the bankrupt by his wife may be made the basis of a provable claim.<sup>27</sup> When a wife deposits money with her husband and receives portions thereof, leaving a balance due at the time of his bankruptcy, such balance is provable against his estate, and cannot be offset by the value of reasonable gifts from him, or of an insurance policy on his life for the benefit of herself and children.<sup>28</sup> Where a marriage portion is placed by the wife in her husband's hands in good faith and he uses it in his business a trust is created for her and she may prove a claim for the amount thereof.<sup>29</sup> But if a wife allows her husband to appropriate the income from her separate estate in support of the family, this does not create such a debt on his part as would be provable;<sup>30</sup> though it would be different if it were principal.<sup>31</sup> If a husband reduces a legacy to his wife to possession and gives her a note for the proceeds, the note is not provable where it created no separate estate in the wife.<sup>32</sup>

In states where contracts between husband and wife are not enforceable, a claim may be proved by her because of her subrogation where she joins with her husband as maker of a note, but is in fact a surety and pays the note with her money.<sup>33</sup> Where property owned jointly by husband and wife is mortgaged to secure the debts of the husband, the wife's claim for the whole amount of the mortgage debt will not be allowed in the absence of a showing what amount thereof she will be compelled to pay.<sup>34</sup>

25—In re Domenig, 128 Fed. 146, 11 A. B. R. 552.

26—In re Nickerson, 8 A. B. R. 707; Butler v. Ives, 139 Mass. 202.

27—In re Hill, 190 Fed. 390, 27 A. B. R. 146; In re Foss, 147 Fed. 790, 17 A. B. R. 439; and see James v. Gray, 12 A. B. R. 573, 137 Fed. 401.

28—In re Bigelow, 2 N. B. R. 170, 3 Ben. 198, Fed. Cas. No. 1398; In re Blandin, 5 N. B. R. 39, 1 Lowell 543, Fed. Cas. No. 1527.

29—In re Neiman, 109 Fed. 113, 6 A. B. R. 329.

30—In re Talbot, 110 Fed. 924, 7 A. B. R. 29.

31—In re Jones, 9 N. B. R. 556, 6 Biss. 68, Fed. Cas. No. 7444.

32—Canby v. McLearn, 13 N. B. R. 22, Fed. Cas. No. 2378.

33—In re Nickerson, 116 Fed. 1003, 8 A. B. R. 707.

34—In re West, 17 A. B. R. 393.

A note given by the bankrupt to his wife without consideration is a provable claim unless the bankrupt was in debt at the time,<sup>35</sup> but an intended gift of a husband is not consummated so as to become provable, where he loans the money to the firm of which he is a member and executes to her, firm notes for the amount, which he retains in his possession.<sup>36</sup>

Unless there is a specific agreement on the part of a husband to compensate his wife for services rendered outside of her household duties, none can be implied, because he is entitled to the personal services and earnings of his wife, and no provable claim can arise in her behalf;<sup>37</sup> nor would such a specific agreement create a provable claim in certain states,<sup>38</sup> though in other states the contrary would be true.<sup>39</sup> The failure of the wife who acted as bookkeeper for the bankrupt to insert her claim for services in a financial statement given a creditor has been held not to estop her from proving her claim it appearing that no creditor was injured thereby.<sup>40</sup>

Under a law providing that a wife, who is granted a divorce, shall be entitled to one-third of his personal property absolutely, the interest of the wife in the husband's personal property after the commencement of an action for divorce but before decree is not a provable claim.<sup>41</sup> A claim based on the contract of the bankrupt to support his divorced wife until she remarries and to pay for the support of their children during minority, is not provable, where the contingencies provided for have not occurred.<sup>42</sup>

35—In re Kyte, 164 Fed. 302, 21 A. B. R. 110.

36—In re Chapman et al., 105 Fed. 901, 5 A. B. R. 570.

37—In re Wolf, 2 N. B. R. 908; In re Trombly, 16 A. B. R. 599.

38—In re Kaufmann, 105 Fed. 768, 5 A. B. R. 104.

Claim of wife of bankrupt for services as clerk in his store disallowed. In re Suckle, 176 Fed. 828, 23 A. B. R. 861.

Wife's claim for services rendered as bookkeeper is not provable, where the state statute provides that "the individual earnings of every married woman, except those accruing from labor per-

formed for her husband, or in his employ, or payable by him, shall be her separate property." In re Winkels, 132 Fed. 590, 12 A. B. R. 696.

39—Wife may prove a claim for services as clerk in bankrupt's store. Moore v. Crandall, 205 Fed. 689, 30 A. B. R. 517.

Claim for services as bookkeeper allowed. In re Cox, 199 Fed. 952, 29 A. B. R. 456.

40—In re Cox, 199 Fed. 952, 29 A. B. R. 456.

41—Hawk v. Hawk, 2 N. B. R. 940, 102 Fed. 679, 4 A. B. R. 463.

42—Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 10 A. B. R. 139.

### § 537. Insurance.

A claim for the amount paid as premium on a fire insurance policy by a pledgee of such policy is provable against the estate of the bankrupt insured,<sup>43</sup> but where a note given for the insurance premium on a vessel provides that if the note be not paid at maturity the policy becomes void while it remains unpaid and, after the note becomes due, the vessel strands, whereupon the note is paid, and then a gale destroys the vessel, a claim for the premium is not provable against the estate of the bankrupt insurance company.<sup>44</sup> The claim of a holder of a fire insurance policy where he has not submitted proper proof of loss, nor made proof of debt in bankruptcy proceedings, nor commenced suit within the prescribed period, is not provable.<sup>45</sup> A debt secured by an insurance policy on the life of the bankrupt, is provable less the surrender value of the policy.<sup>46</sup> It has been held that policies reinsured in another company upon the bankruptcy of the latter, are provable in full, without reference to the amount paid the holders.<sup>47</sup> Where there is an agreement between the insured and the various creditors as to the value of the property of each creditor, burned while in the bankrupt's possession, proof of a larger claim cannot be permitted because a creditor alleges his valuation did not include a lien upon his property.<sup>48</sup>

### § 538. Interest.

A claim for accrued interest,<sup>49</sup> as well as interest up to the date of filing the petition in bankruptcy, is provable,<sup>50</sup> but not

43—*In re Hamilton*, 102 Fed. 683, 2 N. B. N. R. 957, 4 A. B. R. 543.

44—*Cardwell v. Ins. Co.*, 12 N. B. R. 253, Fed. Cas. No. 2396.

45—*In re Ins. Co.*, 8 N. B. R. 123, Fed. Cas. No. 4796.

46—*In re Davison*, 179 Fed. 750, 24 A. B. R. 460; *In re Newland*, 7 N. B. R. 477, 9 Ben. 342, Fed. Cas. No. 10170.

47—*In re Republic Ins. Co.*, 8 N. B. R. 197, Fed. Cas. No. 11705.

48—*In re Reliable Storage & Warehouse Co.*, 105 Fed. 351, 5 A. B. R. 249.

49—*Embry v. Bennett*, 162 Fed. 139, 20 A. B. R. 651; *Sloan v. Lewis*, 12 N. B. R. 173, 22 Wall. 150, 22 L. ed. 832.

50—Sec. 63a (1) Act of 1898; *In re Broich*, 15 N. B. R. 11, 7 Biss. 303, Fed. Cas. No. 1921; *Davis v. Louisville Trust Co.*, 181 Fed. 10, 30 L. R. A. (N. S.) 1011, 25 A. B. R. 621; *In re Stevens*, 173 Fed. 842, 23 A. B. R. 239.

Claimant who had been induced by fraudulent representations to a mercantile agency to subscribe and pay for stock in bankrupt corporation held entitled to amount paid in with interest from date of rescission to date of filing of petition. *Davis v. Louisville Trust Co.*, 181 Fed. 10, 30 L. R. A. (N. S.) 1011, 25 A. B. R. 621.

subsequent thereto,<sup>51</sup> unless the claim is secured, in which case interest may be allowed up to the time money is realized from the property pledged;<sup>52</sup> or unless there are sufficient funds in the hands of the trustee to do so, in which case it should be paid up to the date of payment of dividends.<sup>53</sup>

Interest and dividends accruing upon securities after the date of the petition may be applied to the after accruing interest upon the debt.<sup>54</sup> A secured creditor has been held to be entitled to interest after the time specified for payment of the principal.<sup>55</sup>

Usurious Contracts, see post, section 571.

### § 539. Joint obligations.

A joint indebtedness is provable against the estate of either of the joint debtors who may become bankrupt, without reference to the fact that it may be subject to be marshaled.<sup>56</sup>

### § 540. Judgments.

#### § 541. — In general.

Claims founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge will be allowed, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.<sup>57</sup>

Judgment debts are, as a rule, provable in bankruptcy, though a court may look beyond the form of the judgment and consider the nature of the liability upon the original cause of action.<sup>58</sup> Where there has been merely a verdict and no judgment prior to bankruptcy, the debt is not provable as a judgment.<sup>59</sup> Although

51—*Sexton v. Dreyfus*, 219 U. S. 339, 55 L. ed. 244, 25 A. B. R. 363.

52—*In re Stevens*, 173 Fed. 842, 23 A. B. R. 239; and see *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513.

53—*Johnson v. Norris*, 190 Fed. 459, 27 A. B. R. 107; *In re Hagan*, 10 N. B. R. 383, Fed. Cas. No. 5893; *In re Bousfield & Poole Mfg. Co.*, 17 N. B. R. 153, Fed. Cas. No. 1704; *In re Bk.*, 12 N. B. R. 130, Fed. Cas. No. 895; *Wilson & Shafer v. Bk.*, 10 N. B. R. 289, Fed. Cas. No. 894.

54—*Sexton v. Dreyfus*, 219 U. S. 339, 55 L. ed. 244, 25 A. B. R. 363.

55—*In re Bartenbach*, 11 N. B. R. 61, Fed. Cas. No. 1068.

56—*Gray v. Rollo*, 9 N. B. R. 337, 18 Wall. 629, 21 L. ed. 927; and see *Board of County Com'rs v. Hurley*, 169 Fed. 92, 22 A. B. R. 209.

57—Sec. 63a (5) Act of 1898.

58—*Turner v. Turner*, 108 Fed. 785, 6 A. B. R. 289.

59—*In re Ostrom*, 185 Fed. 988, 26 A. B. R. 273; *Black v. McClelland*, 12 N. B. R. 481, Fed. Cas. No. 1462; *In re Williams*, 2 N. B. R. 79, 2 Low. 72, Fed. Cas. No. 17705; see *In re Sullivan*, 1 N. B. R. 380, 2 A. B. R. 30.

a judgment is rendered within four months of the bankruptcy and therefore void, as a preference, it might still be evidence of the debt, but the claim would have to be proved as unsecured.<sup>60</sup>

A judgment in action for a tort is provable, whenever it may be resolved into an implied contract,<sup>61</sup> as are judgments for fraud, conspiracy and deceit;<sup>62</sup> or against the principal's estate, notwithstanding a joint judgment has been recovered therefor against both principal and surety;<sup>63</sup> or a set-off which a defendant fails to prove in a suit brought by one who becomes bankrupt before trial and judgment is rendered against him.<sup>64</sup> A judgment from which an appeal is taken before bankruptcy has been held to be a provable debt; but no dividend will be paid until judgment on the writ of error;<sup>65</sup> and, on proof of claim, the judgment of the appellate court is not conclusive, where terms are imposed.<sup>66</sup> Where a judgment ceases to be a lien by reason of lapse of time, unless renewed as provided by the laws of the state, it is not provable.<sup>67</sup>

An objection that the court was without jurisdiction of the subject-matter, or that the judgment was obtained by fraud, may be made to a claim based on a foreign judgment, since such a judgment is only *prima facie* evidence of the debt adjudged to be due to the plaintiff, and open to examination, but not as to a domestic judgment if rendered by a court of competent jurisdiction.<sup>68</sup>

Where a claimant has been sued by the trustee and has recovered on a counterclaim in such action, he has no provable claim, the judgment being rendered after the expiration of a year from the filing of the petition.<sup>69</sup>

60—In re Richard, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506.

61—In re Putman, 193 Fed. 464, 27 A. B. R. 923; Howland v. Carson, 16 N. B. R. 372.

A judgment against agent in conversion for failure to account for proceeds of sales is provable. In re Hale, 161 Fed. 387, 20 A. B. R. 633.

Judgment rendered after adjudication in bankruptcy in an action brought under an employer's liability statute is not founded upon an express or implied contract. In re Crescent Lumber Co., 154 Fed. 724, 19 A. B. R. 112,

62—In re Van Buren, 19 N. B. R. 149, Fed. Cas. No. 16833.

63—In re Kitzinger, 19 N. B. R. 152, Fed. Cas. No. 7861.

64—In re Safe Dep. & Sav. Inst., 18 N. B. R. 493.

65—In re Sheehan, 8 N. B. R. 345, Fed. Cas. No. 12737.

66—In re Shelburne, 19 N. B. R. 359, Fed. Cas. No. 12745.

67—In re Farmer, 116 Fed. 763, 9 A. B. R. 19.

68—Michaels v. Post, 12 N. B. R. 152, 21 Wall. 398, 22 L. ed. 520.

69—In re Havens, 182 Fed. 367, 25 A. B. R. 116,

### § 542. — Seduction, support, bastardy, etc.

By the amendment of 1903, it is specifically provided that liabilities for alimony, maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation, shall not be discharged. Prior to the amendment it was held that a judgment was provable in a suit brought by a woman against her seducer for breach of contract to marry;<sup>70</sup> or for the seduction of one's daughter, though, if the action for seduction was brought by the woman under a statute giving her this right to sue, and in a state where the act is made a criminal offense, it was not provable, since it was the result of a willful and malicious injury to the person, the word "willful" meaning "intentional" or "deliberate," while "malice," in the legal acceptance of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another.<sup>71</sup>

Under the present law a judgment for the support of a bastard child, is considered in the nature of a police regulation and not a civil debt, and, therefore, not provable and not released by a discharge.<sup>72</sup>

### § 543. — Judgment recovered after petition filed.

While a judgment of a state court, after or within four months prior to the filing of a petition in bankruptcy, occasions no lien and confers no additional rights, the bankruptcy act recognizes two classes of judgment debts which may be proved: 1st, a debt evidenced by a judgment obtained prior to the filing of the petition in bankruptcy; and 2d a debt founded on a provable debt reduced to judgment pending bankruptcy proceedings, for this is not a new debt, created during the bankruptcy, but retains the character of the indebtedness out of which it arose and is provable less costs incurred and interest accrued after the filing of the petition and up to the time judgment was entered.<sup>73</sup> But

70—In re McCauley, 101 Fed. 223, 4 A. B. R. 122; In re Fife, 109 Fed. 880, 6 A. B. R. 258.

71—In re Sullivan, 1 N. B. N. 380, 2 A. B. R. 30.

72—In re Baker, 96 Fed. 964, 3 A. B. R. 101.

73—In re McBride, 2 N. B. N. R. 345, 3 A. B. R. 729, 99 Fed. 686; see Beers v. Hanlin, 99 Fed. 695, 3 A. B. R. 745; In re Fife, 109 Fed. 880, 6 A. B. R. 258.



the time for proving a debt of this class is not enlarged beyond the year to which proof is limited.<sup>74</sup>

Where a creditor, between the filing of the petition and the discharge, entered judgment for an amount smaller than his debt in an action begun prior to the filing of the petition, the debt was held not merged in the judgment but still subsisted for the purpose of proof in bankruptcy and the creditor might prove his debt with interest and costs accrued in the action to the date of filing the petition.<sup>75</sup>

#### § 544. — Judgment against trustee.

A claim based upon a judgment recovered against the trustee as garnishee may be allowed where the trustee has funds of the judgment debtor in his possession and does not object.<sup>76</sup>

#### § 545. Claims of landlord.

#### § 546. — Rent and damages for breach of lease.

Rent accrued up to the date of the filing of a petition in bankruptcy is a provable debt.<sup>77</sup> However, the adjudication does not constitute a breach of the contract to lease so as to allow proof of a claim for damages from the breach.<sup>78</sup> And rent for the unexpired term of a lease though it provides that for such unexpired term it shall become due and payable upon lessee's becoming bankrupt, or upon default in the payment of rent, which occurs prior to the bankruptcy, is not provable;<sup>79</sup> nor is

74—*In re Leibowitz*, 108 Fed. 617, 6 A. B. R. 268.

75—*In re Pinkel*, 1 N. B. N. 138, 161, 1 A. B. R. 333; see *Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985.

76—*In re Kranich*, 182 Fed. 849, 25 A. B. R. 50.

77—*Bray v. Cobb*, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788; *In re Arnstein*, 2 N. B. N. R. 106, 101 Fed. 706, 4 A. B. R. 246; *In re Jefferson*, 1 N. B. N. 288, 2 A. B. R. 206, 93 Fed. 948; *In re Shilliday*, 1 N. B. N. 475; *In re Gerson*, 1 N. B. N. 315, 2 A. B. R. 170.

78—*In re Sterne & Levi*, 30 A. B. R. 915; *Watson v. Merrill*, 136 Fed. 359, 69 L. R. A. 719, 14 A. B. R. 453.

A claim for damages for breach of a mining lease caused by the bankruptcy of

the lessee held contingent and not provable. *In re Gallagher Coal Co.*, 205 Fed. 183, 29 A. B. R. 766.

79—*In re Cress-McCormick Co.*, 25 A. B. R. 464; *In re Pittsburg Drug Co.*, 164 Fed. 482, 20 A. B. R. 227; *In re Cronson*, 1 N. B. N. 474; *In re Mahler*, 3 N. B. N. R. 39, 105 Fed. 428, 55 A. B. R. 453; *Atkins v. Wilcox*, 105 Fed. 595, 53 L. R. A. 118, 5 A. B. R. 313; *contra*, *In re Keith-Gara Co.*, 203 Fed. 585, 29 A. B. R. 466; *In re Goldstein*, 1 N. B. N. 422, 2 A. B. R. 603.

Default in the payment of installment of "rent" under a contract leasing a store fixture held to make the entire "rental" due, and to authorize the proof of such rental as a fixed liability. *In re Coswell-Massey Co.*, 208 Fed. 571, 31 A.

a penalty provided in the lease in case of lessee's bankruptcy, nor notes given for instalments of rent to accrue in the future, since such penalty or notes cannot be regarded as due and owing at the time of filing the petition, but accrued subsequently.<sup>80</sup>

The rent to become due during the remainder of the term of the lease after the bankruptcy of the lessee cannot be said to be a "fixed liability then absolutely owing," payable in the future or a debt of any kind, but it is an unmatured obligation to pay in the future a consideration for the future enjoyment and occupancy of the premises, and is not, therefore, a provable debt;<sup>81</sup> nor is an indemnity provided for in the lease in case of lessee's bankruptcy against all loss of rent and other payments that may be incurred by reason thereof during the residue of the term.<sup>82</sup> While rent accruing after bankruptcy is not a provable debt against the general estate of the bankrupt, the lien of a landlord for such rent, existing by virtue of the state statute is enforceable under section 64(5).<sup>83</sup>

The action of a lessor in reletting the building to another after the bankruptcy of the lessee, amounts to the eviction of the bank-

B. R. 426; *In re Miller Bros. Grocery Co.*, 208 Fed. 573, 31 A. B. R. 430.

80—*Slocum v. Soliday*, 183 Fed. 410, 25 A. B. R. 460; *In re Rhoads*, 2 N. B. N. R. 179; *Atkins v. Wilcox*, 105 Fed. 595, 53 L. R. A. 118, 5 A. B. R. 313.

81—*In re Sapinsky & Sons*, 206 Fed. 523, 30 A. B. R. 416; *Colman Co. v. Withoff*, 195 Fed. 250, 28 A. B. R. 328; *Shapiro v. Thompson*, 160 Ala. 363, 24 A. B. R. 91; *Watson v. Merrill*, 136 Fed. 359, 69 L. R. A. 719, 14 A. B. R. 453; *In re Cress-McCormick Co.*, 25 A. B. R. 464; *In re Roth & Appel*, 174 Fed. 64, 22 A. B. R. 504, 181 Fed. 667, 31 L. R. A. (N. S.) 270, 24 A. B. R. 588; *In re Rubel*, 166 Fed. 131, 21 A. B. R. 566; *In re Sterne & Levi*, 26 A. B. R. 535; *In re Mahler*, 3 N. B. N. R. 39; *In re Arnstein*, 2 N. B. N. R. 106, 101 Fed. 706; *In re Frankel*, 2 N. B. N. R. 840; *In re Jefferson*, supra; *In re Shilliday*, 1 N. B. N. R. 475; *In re Collignon*, 2 N. B. N. R. 660, 4 A. B. R. 250; *Bray v. Cobb*, supra; *In re Mahler*, 2 N. B. N. R. 76; s. c. 105 Fed. 428, 5 A. B. R. 453; *In re Schierman*, 2 N. B. N. R. 118; *In re Ellis*, 2 N. B.

N. R. 357; aff'd 2 N. B. N. R. 360, 98 Fed. 967, 3 A. B. R. 564; *In re May & Merwin*, 9 N. B. R. 419, 7 Ben. 238, Fed. Cas. No. 9325; *Ex p. Lake*, 16 N. B. R. 497, 2 Lowell 544, Fed. Cas. No. 7991; *Treadwell v. Marden*, 18 N. B. R. 353; but see *In re Wynne*, 4 N. B. R. 5, Chase 227, Fed. Cas. No. 1817.

Claim for royalties accruing after bankruptcy disallowed. *In re Gallagher Coal Co.*, 205 Fed. 183, 29 A. B. R. 766.

Landlord's claim for rent after petition not provable nor entitled to priority where landlord re-entered, and this though state law provided that landlord was entitled to preferred claim for one year's rent although taking possession before rent was due. *South Side Trust Co. v. Watson*, 200 Fed. 50, 29 A. B. R. 446.

82—*In re Ellis*, 2 N. B. N. R. 360, 98 Fed. 967, 3 A. B. R. 564; *In re Roth & Appel*, 181 Fed. 667, 31 L. R. A. (N. S.) 270, 24 A. B. R. 588, aff'g 174 Fed. 64, 22 A. B. R. 504.

83—*In re Scruggs*, 205 Fed. 673, 31 A. B. R. 94; *In re Sapinsky*, 206 Fed. 523, 30 A. B. R. 416.

rupt and the termination of the lease,<sup>84</sup> and where the landlord re-enters with the intention of terminating the lease, his claim for rent for the unexpired term, though otherwise provable, will be deemed waived,<sup>85</sup> though it is held that where the landlord sublets the premises at a lower rental within a few months after the filing of the petition, his claim is liquidated within the year and becomes provable as a claim founded upon a contract express and implied under section 63(a)4.<sup>86</sup>

If a note given for rent is not paid at maturity, the claim is provable as if the note had never been given.<sup>87</sup> Where premises under a lease are condemned for a public use, and damages are paid to the tenant therefor upon the basis that his obligation to pay rent during the remainder of the term will continue, upon the bankruptcy of the tenant, the unpaid instalments of rent, at their value at the time of bankruptcy, would doubtless be provable.<sup>88</sup>

Rent on property fraudulently conveyed to the claimant by the bankrupt is not a provable debt.<sup>89</sup>

A claim for rent due from the bankrupt as tenant in common can only be based upon an express agreement to pay rent,<sup>90</sup> and a claim based upon the agreement of the bankrupt to pay his cotenant one-half of any sum which he might be required to obtain a rescission of a lease, is not provable, where the rescission is not obtained until after bankruptcy.<sup>91</sup>

Damages resulting from a failure of the trustee to surrender the premises at the expiration of the lease, though recoverable in a suit against the trustee, may be allowed against the estate to prevent circuitry of action, since the trustee would be entitled to reimbursement against the estate in the event of a recovery against him.<sup>92</sup>

Rental during the time title is being determined, based on terms of payment termed rentals in a contract of conditional

84—In re Mahler, 105 Fed. 428, 5 A. B. R. 453.

85—In re Desmond & Co., 198 Fed. 581, 28 A. B. R. 456.

86—In re Caloris Mfg. Co., 179 Fed. 722, 24 A. B. R. 609.

87—In re Bowne & Ten Eyck, 12 N. B. R. 529, Fed. Cas. No. 1741.

88—In re Clancy, 10 N. B. R. 215, Fed. Cas. No. 2782.

89—In re Hurst, 23 A. B. R. 554.

90—In re Miller, 132 Fed. 414, 13 A. B. R. 87.

91—Colman Co. v. Withoft, 195 Fed. 250, 28 A. B. R. 328.

92—In re Hunter, 151 Fed. 904, 18 A. B. R. 477.

sale under which the bankrupt holds machinery under bailment at the time of the bankruptcy is not a provable claim where trustee does not elect to continue the contract.<sup>93</sup>

A lessor of personal property who upon the bankruptcy of the vendee takes possession of the property waives his rights to rent accruing after bankruptcy, though the lease provides that upon the bankruptcy of the lessee the entire rental shall become due.<sup>94</sup>

Liens for Rent, see post, § 912; Priority of Claims for Rent, see post, §§ 1366, 1392.

### § 547. — Repairs.

The cost of restoring premises under covenant to do so at expiration of a lease is not provable<sup>95</sup> though where the bankrupt as lessee undertook to make all repairs at his own expense, and the lessor is obliged to pay to a city board a sum for repairs, the lessor has a provable claim for the sum so paid.<sup>96</sup>

### § 548. — Taxes and water rents.

A landlord is not entitled to have a claim for water rent payable to the city allowed as part of the rent, though the bankrupt has covenanted to pay the same.<sup>97</sup>

A claim against a bankrupt lessee based on his covenant to pay taxes is provable if at the time of bankruptcy the taxes were assessed, though not payable until after adjudication, and though the lease is subsequently assigned by the receiver.<sup>98</sup>

### § 549. Claims barred by statute of limitation.

Formerly statutes of limitations were strictly construed, but it has been the tendency of the courts in later years to consider

93—In re Daterson Pub. Co., 188 Fed. 64, 26 A. B. R. 582.

94—In re Merwin & Willoughby Co., 206 Fed. 116, 30 A. B. R. 485; In re Quaker Drug Co., 204 Fed. 689, 30 A. B. R. 398.

95—In re Arnstein, 101 Fed. 706, 2 N. B. R. 106, 4 A. B. R. 246; In re International Milling Co., 175 Fed. 308, 23 A. B. R. 664.

96—In re Shomacker Piano Forte Mfg. Co., 163 Fed. 413, 20 A. B. R. 899.

97—In re Family Laundry Co., 193 Fed. 297, 27 A. B. R. 517.

Claim of landlord for taxes and water rents owing under terms of lease disallowed where property has been sold under agreement that estate should be released from rent, it appearing that the claim was presented on and in behalf of the purchaser. *Ellis v. Rafferty*, 199 Fed. 80, 29 A. B. R. 192.

98—In re Sherwood's, Inc., 210 Fed. 754, 31 A. B. R. 769; but see *Ellis v. Rafferty*, 199 Fed. 80, 29 A. B. R. 192, *supra*.

them as statutes of repose; so that, if a claim be barred by the statute, it will not be revived unless the intent to revive it is so obvious that no other construction could be put upon the act which is claimed to be revived.<sup>99</sup>

Whether a claim barred by the statute of limitations is provable unless the bar extends throughout the United States,<sup>1</sup> the statute being a law of the forum and not controlling proceedings in the federal courts though ordinarily applied by them in legal proceedings arising within the state,<sup>2</sup> is a question of some difficulty. The weight of authority, however, and sound reason seem to require that a claim barred by the statute of limitations of the state where the petition is filed should not be provable,<sup>3</sup> whether the creditor resides in the same state or not,<sup>4</sup> or the claim is valid in the state of the creditor's residence.<sup>5</sup>

Where a note payable in one year is exchanged at maturity for a new and similar note, and this is repeated year after year, the statute runs from the date of the last note.<sup>6</sup>

A claim for sums of money lent at different times, no notes being taken, does not constitute a running account, and each item is unaffected by any other as far as the running of the statute is concerned.<sup>7</sup> The administrator of deceased partner who paid a partnership note before it became outlawed has been held to have a claim for contribution although the original debt had become outlawed.<sup>8</sup>

A state statute of limitations is suspended by the bankruptcy

99—In re Resler, 1 N. B. N. 280, 95 Fed. 804, 2 A. B. R. 602; In re Lorillard, 107 Fed. 677, 5 A. B. R. 62.

1—In re Ray, 1 N. B. R. 203, 2 Ben. 53, Fed. Cas. No. 11589; In re Shepard, 1 N. B. R. 115, Fed. Cas. No. 12753; see also In re Levy, 95 Fed. 812, 2 A. B. R. 21; aff'g 1 N. B. N. 287.

2—In re Lipman, 1 N. B. N. 310, 94 Fed. 353, 2 A. B. R. 46.

3—In re Putman, 193 Fed. 464, 27 A. B. R. 923; In re Resler, 1 N. B. N. 280, 95 Fed. 804, 2 A. B. R. 166, 602; In re Lipman, 1 N. B. N. 310, 94 Fed. 353, 2 A. B. R. 46; In re Farmer, 116 Fed. 763, 9 A. B. R. 19; In re Graves, 9 Fed. 816; see also In re Doty, 16 N. B. R. 202, Fed. Cas. No. 4017; In re Noesen, 12 N. B. R. 422, 6 Biss. 443, Fed. Cas.

No. 10288; In re Cornwall, 6 N. B. R. 305, 9 Blatch. 114, 126, 137, 138, Fed. Cas. No. 3250; In re Kingsley, 1 N. B. R. 52, 66, 1 Lowell 216, Fed. Cas. No. 7819; In re Hardin, 1 N. B. R. 97, 1 Hask. 163, Fed. Cas. No. 6048; In re Reed, 11 N. B. R. 94, 6 Biss. 250, Fed. Cas. No. 11635; contra, In re Ray, 1 N. B. R. 203, Fed. Cas. No. 11589; In re Shepard, 1 N. B. R. 115, Fed. Cas. No. 12753.

4—In re Resler, *supra*.

5—In re Hardin, *supra*.

6—In re Schumpert, 8 N. B. R. 415, Fed. Cas. No. 12491.

7—In re Wooten, 118 Fed. 670, 9 A. B. R. 247.

8—In re Panghorn, 185 Fed. 673, 26 A. B. R. 40.

proceedings, and, if the debt is not barred when the petition is filed, it is provable, though at the time of proof it would otherwise be barred,<sup>9</sup> and such suspension continues as long as there is a fund to distribute,<sup>10</sup> though it has been held that it is no ground for relief from the bar of the statute that the creditor was led to believe by an erroneous decision of a court that his claim was not enforceable and therefore did not present it until such decision was overruled after the bar had attached.<sup>11</sup>

An acknowledgment of the debt before the bar, if otherwise sufficient to take it out of the statute, will make the debt provable.<sup>12</sup> A payment upon an outlawed debt, or the giving of a bond or mortgage to secure the same, though made by the bankrupt prior to his adjudication under such circumstances as to constitute a preference operates to renew the debt so as to enable the creditor to prove his claim,<sup>13</sup> and if, within four months of the filing of the petition and one day before the claim is barred judgment is obtained thereon, this establishes the debt and stops the running of the statute.<sup>14</sup> However, a claim is not revived or made provable because a debtor includes it in his schedule of debts;<sup>15</sup> nor because of an acknowledgment of the debt by the bankrupt after the filing of the petition in bankruptcy.<sup>16</sup>

The decision by a bankruptcy court that a claim is barred by the statute renders the question *res adjudicata* between the parties.<sup>17</sup>

Where, as in California, a judgment may be enforced by execution after the statutory period and if execution has been issued before the commencement of the bankruptcy proceedings, the

9—In *re McKinney*, 15 Fed. 912; In *re Graves*, 9 Fed. 816; In *re Eldridge*, 12 N. B. R. 540, 2 Hughes 256, Fed. Cas. No. 4331; In *re Wright*, 6 Biss. 317, Fed. Cas. No. 18068; Contra, *Nicholas v. Murray*, 18 N. B. R. 469, 5 Sawy. 320, Fed. Cas. No. 10223.

10—In *re Maybin*, 15 N. B. R. 468, Fed. Cas. No. 9337.

11—In *re State Ins. Co.*, 15 Fed. 736.

12—In *re Reed*, supra.

13—In *re Stendts*, 1 N. B. N. 509; contra, In *re Banks*, 207 Fed. 662, 31 A. B. R. 270.

14—In *re McBride*, 2 N. B. N. R. 340,

99 Fed. 686, 3 A. B. R. 729; see also In *re Woodard*, 1 N. B. N. 385, 95 Fed. 260, 2 A. B. R. 339.

15—In *re Resler*, supra; In *re Hardin*, supra; In *re Kingsley*, supra; In *re Wooten*, 118 Fed. 670, 9 A. B. R. 247; Contra, In *re Hertzog*, 18 N. B. R. 526, Fed. Cas. No. 6433; contra, In *re Currier*, 192 Fed. 695, 27 A. B. R. 597.

16—In *re Zorn & Co.*, 193 Fed. 299, 27 A. B. R. 433.

17—In *re Hargadine-McKittrick Dry Goods Co. v. Hudson*, 111 Fed. 361, 6 A. B. R. 657.

claim based upon a judgment is provable though the statutory period has elapsed.<sup>18</sup>

See Discharges, post, § 1562.

### § 550. Claim of mortgagee.

A claim for the deficiency upon the sale of mortgaged property between the amount due under the mortgage and the amount realized on the sale of the property, applicable to the mortgage debt, is provable;<sup>19</sup> but, where a mortgagee sells the mortgaged premises at auction for a small sum without notice to the trustee and without leave of the court, neither the balance nor any sum whatever is provable.<sup>20</sup>

Where a mortgage is given to indemnify the mortgagee for his advances and he lends his acceptances to the mortgagor, and after the bankruptcy of the latter buys up the paper at a discount, only what he actually paid to take up his acceptance is provable.<sup>21</sup>

If a mortgage is given on goods sold to secure the purchase money, with the understanding that the proceeds are to be applied on the mortgage, but are not, the proceeds of the unsold goods should go to the vendor, who should surrender the mortgage and prove his claim for the difference as unsecured.<sup>22</sup> A creditor will not be permitted to obtain a preference indirectly through a mortgage held by a third person to whom the creditor has given an indemnity bond, and the mortgagee will not be permitted to enforce the mortgage until he has exhausted his remedy on the bond.<sup>23</sup>

### § 551. Mutual debts and credits.

A creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate, so long as his own debt remains unpaid.<sup>24</sup>

See Debts Founded on Contracts, ante, section 521, and Set-off and Counterclaims, post, chapter XVII.

18—In re Rebman, 150 Fed. 759, 17 A. B. R. 767.

19—In re Veitch, 101 Fed. 251, 4 A. B. R. 112; In re Ruchle, 2 N. B. R. 175, Fed. Cas. No. 12113.

20—In re Miller, 19 N. B. R. 78, Fed. Cas. No. 9555.

21—Ex p. Ames, 7 N. B. R. 230, 1 Lowell 561, Fed. Cas. No. 323.

22—Overman v. Quick, 17 N. B. R. 235, 8 Biss. 134, Fed. Cas. No. 10624.

23—In re Beerman, 112 Fed. 663, 7 A. B. R. 434.

24—In re Gerson, 105 Fed. 893, 5 A. B. R. 850.

## § 552. Partnership cases.

### § 553. — Individual debts not allowable out of firm assets.

Since the law contemplates that partnership assets shall be in good faith applied first to the payment of partnership debts, any scheme resorted to by a person in contemplation of bankruptcy for the purpose of charging partnership assets with the individual liabilities of the partners, is violative of the law and should not be permitted,<sup>25</sup> as where the firm's indorsement is placed upon the individual notes of its members to certain relatives,<sup>26</sup> or a note is given in an individual transaction, though signed in the firm name,<sup>27</sup> or is merely signed in the name of the individual giving it,<sup>28</sup> or an accommodation note is indorsed by one member without the knowledge or consent of the others,<sup>29</sup> or a firm note is issued to a partner for his share of the capital stock and by him transferred to his wife by whom the capital was advanced,<sup>30</sup> or notes are signed by both members, which do not purport to be obligations of the firm.<sup>31</sup> Although real estate stands in the name of a member, if it be in fact firm property, the unsecured individual creditors of such member have no claim upon the proceeds.<sup>32</sup>

### § 554. — Firm debts.

While a partner cannot bind the firm by giving a note to pay his individual debt unless authorized to do so by his partner,<sup>33</sup> notes drawn by one partner in the firm name in the course of partnership business without mala fides, or actual knowledge by the holder of want of authority or intended misapplication, may be allowed out of the firm estate;<sup>34</sup> the same is true where

25—In re Bates, 100 Fed. 263, 4 A. B. R. 56; In re Leigh Lumber Co., 101 Fed. 216, 4 A. B. R. 221; In re Denning, 8 A. B. R. 133.

26—In re Jones, 2 N. B. N. R. 193, 100 Fed. 781, 4 A. B. R. 141; but see Ex p. Russell, 16 N. B. R. 476, Fed. Cas. No. 12148.

27—In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4948.

28—In re Dobson, 2 N. B. N. R. 514.

29—In re Irving, 17 N. B. R. 22, Fed. Cas. No. 7074.

30—In re Frost, 3 N. B. R. 180, Fed. Cas. No. 5135.

31—Strause et al. v. Hooper et al., 105 Fed. 590, 5 A. B. R. 225; In re Jones, 116 Fed. 431, 8 A. B. R. 626.

32—In re Groetzinger, 127 Fed. 814, 11 A. B. R. 723, aff'g 110 Fed. 366, 61 A. B. R. 399.

33—First Nat. Bank of Miles City v. State Nat. Bank of Miles City, 131 Fed. 422, 12 A. B. R. 429.

34—Bush v. Crawford, 7 N. B. R. 299, Fed. Cas. No. 2224; overruling In re



one holds a note on which the firm is an accommodation indorser, though collateral security is held therefor;<sup>35</sup> or a note given by each of the members of a firm individually, the consideration of which went into the firm's business;<sup>36</sup> or where with knowledge of the existence of a dormant partner, the paper of the active members is discounted, or money loaned them, although the money was borrowed for the partnership.<sup>37</sup> Where all the members of a firm have signed, instead of the firm name, their respective names to a written obligation, whether the indebtedness is individual or that of the firm depends upon whether it was given for a firm obligation, whether the consideration went to the firm, whether it is joint or several, or joint and several, and whether others besides the members of the firm are on it.<sup>38</sup>

Whether a claim is against a firm and hence provable in bankruptcy against it, or a claim against the individuals, or some one of them, composing such firm, is to be determined on general principles and the bankrupt law makes no special provision on the subject. If a firm obligation be taken for the debt of a partner, the creditor must show that the partner is entitled to give it and he may then prove against the joint assets, and the firm assets must be applied without reference to any disproportion of the individual partners' interests, as between themselves,<sup>39</sup> so with the amount paid for firm debts purchased by friends for two partners, the third partner not contributing, even though the third partner objects.<sup>40</sup> That the obligation is

Dunkle, 7 N. B. R. 107, Fed. Cas. No. 4161. Union Nat. Bank of Kansas City v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426, 17 A. B. R. 841, rev'g 143 Fed. 553, 16 A. B. R. 318.

Notes of a firm given to the surety on the bond of a partner who had misappropriated government funds and used the same for partnership purposes held based on sufficient consideration. In re Speer Bros., 144 Fed. 910, 16 A. B. R. 524.

35—In re Dunkerson, 12 N. B. R. 413, 4 Biss. 253, Fed. Cas. No. 4157; Ex p. Whiting, 14 N. B. R. 307, 2 Lowell 472, Fed. Cas. No. 17573.

36—In re Thomas, 17 N. B. R. 54, 8 Biss. 139, Fed. Cas. No. 13886; see in

Herrick, 13 N. B. R. 312, Fed. Cas. No. 6420.

37—Amly v. Lye, 15 East 7; Ex p. Emly, 1 Rose 61.

38—In re Webb, 2 B. R. 183, Fed. Cas. No. 17313; In re Bucyrus Mach. Co., 5 N. B. R. 303, Fed. Cas. No. 2100; In re Miller, Fed. Cas. No. 9550; In re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6420; In re Roddin, 6 Biss. 377, Fed. Cas. No. 11989; In re Holbrook, 2 Lowell, 259, Fed. Cas. No. 6588; In re Thomas, 17 N. B. R. 54, 8 Biss. 139, Fed. Cas. No. 13886.

39—In re Lowe, 11 N. B. R. 221, Fed. Cas. No. 8564.

40—In re Lathrop, 5 N. B. R. 43, 5 Ben. 199, Fed. Cas. No. 8104; see In re Carmichael, 96 Fed. 594, 2 A. B. R. 815.

that of the firm may be proved notwithstanding the failure to enter the transaction at large on the firm's books.<sup>41</sup> On the other hand, the fact that the amount due a creditor is entered upon the firm books and that payments have been made to him by means of checks of the firm is not conclusive as to the character of the debt.<sup>42</sup>

One does not become a firm creditor by reason of holding a right of action for the misrepresentation of a firm's condition by one of its members;<sup>43</sup> or by purchasing the partner's interest in a firm pending their adjudication as bankrupts individually and as a firm;<sup>44</sup> or where by the partnership contract it is agreed that the firm should assume the individual debts if it becomes bankrupt, the creditor failing to consent to the conversion of liabilities before bankruptcy;<sup>45</sup> nor can a firm, all of whose members are partners in another firm, prove its debts against the latter firm.<sup>46</sup> Claims of legatees of a deceased partner who directed by will that his capital be left with the partnership after his death and interest be paid thereon have been allowed.<sup>47</sup>

### § 555. — Joint and individual debts.

Where there are separate and distinct contracts of the firm and a copartner to pay a debt contracted by the firm, the claim may be proved against both estates. The additional several contract of a partner is not, however, implied from the firm transaction, but must be created by a distinct act of the copartner.<sup>48</sup>

The holder of a note given by a firm and also by an individual member of the firm is entitled to dividend from both estates.<sup>49</sup> And it has been held that a creditor holding a firm note indorsed by one of its members may resort to either estate.<sup>50</sup> If one

41—In re Stevens, 104 Fed. 323; In re Warren, 2 Ware 322, Fed. Cas. No. 17191.

42—Hibberd v. McGill, 129 Fed. 590, 12 A. B. R. 101.

43—In re Schuchart, 15 N. B. R. 161, 8 Ben. 585, Fed. Cas. No. 12483.

44—Osborne v. McBride, 16 N. B. R. 22, 3 Sawy. 590, Fed. Cas. No. 10593.

45—In re Isaacs, 6 N. B. R. 92, 3 Sawy. 35, Fed. Cas. No. 7093.

46—In re Savage, 16 N. B. R. 368, Fed. Cas. No. 12381.

47—In re Lough & Burrows, 182 Fed. 961, 25 A. B. R. 597.

48—Reynolds v. New York Trust Co., 188 Fed. 611, 39 L. R. A. (N. S.) 391, 26 A. B. R. 698.

49—Emery v. Bank, 7 N. B. R. 217, 3 Cliff. 507, Fed. Cas. No. 4446; In re Long, 9 N. B. R. 237, 7 Ben. 141, Fed. Cas. No. 8476; In re Bigelow, 2 N. B. R. 121, 3 Ben. 146, Fed. Cas. No. 1397.

50—Buckingham v. First Nat. Bank, 131 Fed. 192, 12 A. B. R. 465; Stephen-

partner indorses firm paper and pledges securities belonging to himself, after the firm's bankruptcy, the holder of the notes may sell the security and yet receive from the joint fund a dividend on the notes.<sup>51</sup> If the holders of a note indorsed by a firm and one partner accept a percentage from the makers, their dividends from the partnership and individual partner's estates are confined to the difference between the face of the note and the percentage received.<sup>52</sup> A former partner may be held liable on a firm note, where, after retirement, he permits his name to be used, although notice of his withdrawal is published, and the firm exchanges notes with a third party, who sells for value before maturity, the firm becoming bankrupt.<sup>53</sup>

A claim based upon a misappropriation for the benefit of the firm, may be filed against either the individual or partnership assets,<sup>54</sup> and an individual debt of a partner which is assumed by the partnership upon the formation thereof is provable against the estate of the partnership.<sup>55</sup>

The claim of the wife of a partner for money loaned the partnership is allowable against both the individual estate of the partners and the partnership estate.<sup>56</sup>

Where an execution lien has been obtained in good faith more than four months before bankruptcy on the property of one of the individual members of the firm under a judgment against the firm, it has been held that the statutory lien will not yield to the equity of the separate creditors of that partner,<sup>57</sup> but such partner has a lien on the firm real estate until the debts are paid to indemnify him in the event of his having to pay them.<sup>58</sup>

son v. Jackson, 9 N. B. R. 255, 2 Hughes 204, Fed. Cas. No. 13374.

51—In re Foot, 12 N. B. R. 337, 8 Ben. 228, Fed. Cas. No. 4906.

52—In re Howard, 4 N. B. R. 185, Fed. Cas. No. 6750.

53—In re Kreuger, 5 N. B. R. 439, 2 Lowell 66, Fed. Cas. No. 7941; In re Morse, 13 N. B. R. 376, Fed. Cas. No. 9854.

54—In re Coe, 169 Fed. 1002, 22 A. B. R. 384, aff'd 183 Fed. 745, 26 A. B. R. 352; In re Jordan, 19 N. B. R. 465; In re

Tesson, 9 N. B. R. 378, Fed. Cas. No. 13844; In re Baxter, 18 N. B. R. 62, Fed. Cas. No. 1119.

55—Dacovich v. Schley, 134 Fed. 72, 13 A. B. R. 752.

56—James v. Gray, 131 Fed. 401, 1 L. R. A. (N. S.) 321, 12 A. B. R. 573.

57—In re Sandusky, 17 N. B. R. 542, Fed. Cas. No. 12308; In re Lewis, 8 N. B. R. 546, 2 Hughes 320, Fed. Cas. No. 8313.

58—Thrall v. Crampton, 16 N. B. R. 261, 9 Ben. 218, Fed. Cas. No. 14008.

### § 556. — Firm debts provable against individual estate.

One who has a claim upon which both the partnership and an individual partner are liable may prove his claim against the individual estate of the partner, to the extent it is unpaid by the partnership estate.<sup>59</sup> A promise by one partner to pay all the firm debts is enforceable by the firm creditors, though they were not cognizant of the promise when made, and though the consideration did not move from them,<sup>60</sup> and if an agreement to pay the firm's debts is with the consent of creditors, firm creditors are entitled to share *pari passu* with the individual creditors.<sup>61</sup> Sureties on a partnership note who pay the same are entitled to prove the claim against the individual estates of the partners who agree to assume the debt, though such agreement is not reduced to writing.<sup>62</sup>

If one partner files a voluntary petition, seeking a discharge from both individual and firm debts, and is adjudged bankrupt, but no adjudication is made against the firm, the firm creditors may prove their debts and subject bankrupt's interest in the firm property to the payment thereof.<sup>63</sup> If the firm is not brought into bankruptcy and there are no firm assets, it has been held that a partnership creditor may share with the individual creditors in the estate of a bankrupt individual partner.<sup>64</sup>

A firm creditor may prove against a partner's separate estate such partner's individual notes, received and credited by him on a firm note held by him;<sup>65</sup> or, if he holds individual property as security for partnership debts he may prove his whole debt against the joint estate and the deficiency after disposing of the security against an individual partner's separate estate.<sup>66</sup> A bond binding several members of a firm jointly and severally may be proved against the individual estate of such member of the firm,<sup>67</sup> and a purchaser of individual notes of a bankrupt to the firm of which he is a partner, given as collateral for a

59—*In re McCoy*, 150 Fed. 106, 17 A. B. R. 760; *New York Inst. for Deaf & Dumb v. Crockett*, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233.

60—*In re Collier*, 12 N. B. R. 266, Fed. Cas. No. 3002.

61—*In re Long*, 9 N. B. R. 227, 7 Ben. 141, Fed. Cas. No. 8476; see *In re Keller*, 109 Fed. 118, 6 A. B. R. 334.

62—*Kelsey v. Munson*, 198 Fed. 841, 28 A. B. R. 520.

63—*In re Laughlin*, 96 Fed. 589.

64—*In re Green*, 116 Fed. 118, 8 A. B. R. 553.

65—*In re Stevens*, 104 Fed. 323.

66—*In re May*, 17 N. B. R. 192, Fed. Cas. No. 9327.

67—*In re Bigelow*, 2 N. B. R. 121, 3 Ben. 146, Fed. Cas. No. 1397.

firm obligation may prove a claim based thereon, against the individual estate of the partner.<sup>68</sup>

If there is a dormant partner, the firm creditors, having no notice of him, may prove against the separate estate of the ostensible partner,<sup>69</sup> and in the case of a merely nominal partner, the same course may be taken;<sup>70</sup> and, by proving as separate debts, the separate creditors of the ostensible partner are entitled to payment from the surplus of the joint estate before the separate creditors of the dormant partner.

A tort by a firm of which the bankrupt is a member is not in itself a sufficient basis for an implied or quasi contract of the bankrupt individually.<sup>71</sup>

Two notes executed in the names of the individual partners respectively, the loan as to one note being made to one partner, and as to the other note being made to the other partner, and not to the firm, have been held individual debts of the partners, it appearing that the proceeds passed to the partners and not to the firm, though immediately thereafter the partners checked the amount to their credit to the firm.<sup>72</sup>

### § 557. — Firm debts not provable against individual estates.

The following firm debts have been held not to be provable against a partner's separate estate: where a judgment against a bankrupt firm was paid out of real property belonging to a partner who was not served with process;<sup>73</sup> or a partner seeking payment before all the partnership debts have been paid, where he sells his interest to his partner, taking his notes therefor, and the partner became bankrupt, leaving some of the notes unpaid;<sup>74</sup> or creditors of an old insolvent firm, to the prejudice of the creditors whose claims arose in connection with a new business, in which he is adjudged bankrupt upon the petition of the new creditors;<sup>75</sup> or firm creditors who received a dividend in dissolution proceedings in a state court, but decline to sur-

68—In re White, 183 Fed. 310, 25 A. B. R. 541.

69—Ex p. Hodgkinson, 19 Ves. 291; Ex p. Norfolk, Id. 455; Ex p. Law, 3 Dea. 541.

70—Ex p. Reid, 2 Rose 84.

71—Reynolds v. New York Trust Co., 188 Fed. 911, 26 A. B. R. 698.

72—In re Weisenberg & Co., 131 Fed. 517, 12 A. B. R. 417.

73—In re Hinds, 3 N. B. R. 91, Fed. Cas. No. 6516.

74—In re Jewett, 1 N. B. R. 131, Fed. Cas. No. 7309.

75—In re Bates, 2 N. B. R. 208.

render the same, before proving for the balance on the subsequent adjudication of a member of the firm;<sup>76</sup> or the firm trustee against the separate estate of a partner who withdraws firm money for his private purposes, the withdrawal not being fraudulent as against his partners, even if the firm estate was known to be insolvent at the time;<sup>77</sup> or a claim of one firm of which the bankrupt is a partner, against another firm of which he is a partner cannot be proved against him;<sup>78</sup> or where a creditor gets judgment against the solvent partner, he cannot waive his rights under such judgment and resort to the bankrupt partner's separate estate.<sup>79</sup>

Costs incurred in an action under a state insolvency law against a firm, although a preferred claim thereunder, are not entitled to priority of payment out of the individual estate of one of the partners,<sup>80</sup> nor joint and several notes given by partners for partnership liabilities,<sup>81</sup> nor a note made payable to a firm and subsequently endorsed by a member in the firm name.<sup>82</sup>

### § 558. — Effect of proving firm debt against individual estate.

A firm creditor does not lose his right against the firm or the assets of the firm by proving his debt against a single partner;<sup>83</sup> but if a firm creditor has received payment out of an individual partner's property, such partner's creditors will be subrogated to his rights.<sup>84</sup> The acceptance of a composition offered by a partner is no bar to a claim against the estate of the other partner arising out of a conversion for which all partners are jointly and severally liable.<sup>85</sup>

### § 559. — Claims of partners.

If a partner has an enforceable claim against his partner, not connected with the partnership, or if a balance has been struck

76—*In re Mills*, 95 Fed. 269, 2 A. B. R. 667.

77—*In re May*, 19 N. B. R. 101, Fed. Cas. No. 9328.

78—*In re Lloyd*, 15 N. B. R. 257, Fed. Cas. No. 8429.

79—*In re Polidori*, 2 N. B. R. 922.

80—*In re Daniels*, 110 Fed. 745, 6 A. B. R. 699.

81—*In re Mosier*, 112 Fed. 138, 7 A. B. R. 268.

82—*Lamoille County Nat. Bank v. Stevens Estate*, 107 Fed. 245, 6 A. B. R. 164.

83—*Hudgins v. Lane*, 11 N. B. R. 462, 2 Hughes 361, Fed. Cas. No. 6827.

84—*In re May*, 17 N. B. R. 192, Fed. Cas. No. 9327; *In re Foote*, 12 N. B. R. 337, 8 Ben. 228, Fed. Cas. No. 4906.

85—*In re Coe*, 183 Fed. 745, 26 A. B. R. 352.

and acknowledged, he may prove his claim against his partner's estate, but can receive no dividend until all joint debts are paid.<sup>86</sup>

A solvent partner may not claim against the individual estate of another partner in competition with other creditors, but this rule does not prevent the creditor of a bankrupt estate who, after the debt is incurred, becomes a general partner, from proving against the individual estate of his partner to the diminution of the fund available for the partnership creditors.<sup>87</sup>

Notes of one partner given to the other for his share in the partnership constitute an individual debt and are not provable against the partnership;<sup>88</sup> nor can such notes be proved in bankruptcy against the purchasing partner if the transaction occurred pending the insolvency of the firm.<sup>89</sup>

A partner's contribution to the firm capital is not provable,<sup>90</sup> but if a partner purchases judgments against his firm, in favor of certain of its creditors, he becomes a creditor of his partners for their respective shares of the money so advanced, and may prove a claim for such share against a partner's individual estate.<sup>91</sup>

A partner who has had to pay all the firm debts can prove against his bankrupt partner his proportion of such debts,<sup>92</sup> so a former partner, or a joint covenanter with bankrupts, who is liable for joint debts and pays them, may prove the amount against the assets of his former partners or of his cocontractors.<sup>93</sup> But the claim of a solvent partner against his copartner, the bankrupt, because of the insufficiency of the partnership assets to liquidate partnership debts and the consequent necessary resort to the property of the solvent partner for that purpose is not a provable claim, where the partnership became insolvent after the filing of the petition.<sup>94</sup> Although a partner, afterward becoming bankrupt, had assumed the partnership debts, a solvent partner cannot share in the joint assets, if any

86—Ex p. Richardson, 3 Dea. & Ch. 244; Ex p. Briggs, Id. 367.

87—In re Strawbridge, 25 A. B. R. 355.

88—Mock v. Stoddard, 177 Fed. 611, 24 A. B. R. 403.

89—In re Denning, 114 Fed. 219, 8 A. B. R. 133.

90—In re W. J. Floyd & Co., 156 Fed. 206, 19 A. B. R. 438.

91—In re Carmichael, 96 Fed. 594, 2 A. B. R. 815.

92—In re Hirth, 189 Fed. 926, 26 A. B. R. 666; In re Stevens, 104 Fed. 323; In re Stephens, 6 N. B. R. 533, 3 Biss. 187, Fed. Cas. No. 13365.

93—Ex p. Lake, 16 N. B. R. 497, 2 Lowell 544, Fed. Cas. No. 7991.

94—In re Walker, 176 Fed. 455, 23 A. B. R. 805.

of the partnership debts are outstanding, since if he did so he would compete with his own creditors; nor can he prove against the separate assets, since the surplus therefrom increases the joint assets; but, if he has paid the joint debts, he is entitled to prove against the separate estate. A bankrupt partner, though liable to the joint creditors for the whole debt, is entitled to the benefit of the payment by the solvent partner of his liability.<sup>95</sup>

Where a partnership is dissolved by consent, one partner buying the assets and assuming all the debts and liabilities of the firm, from which he agrees to save the other harmless, the relation of the former partners becomes that of principal and surety; and, if the retiring partner is called upon to pay a debt of the firm, after the continuing partner is adjudicated a bankrupt, he may prove the amount so paid against the bankrupt's estate, making such proof in the name of the creditor, or, if the creditor has already proved the debt, be subrogated to such creditor's rights.<sup>96</sup>

To charge a person as a silent partner, and thus debar him from his claims as a creditor, an actual and definite agreement, binding on all parties, must be proved.<sup>97</sup>

### § 560. — Marshalling of assets.

See post, chapter XXXII.

### § 561. Patents and royalties.

Under a contract providing for a royalty for the use of a patent, a claimant is entitled to reasonable compensation for the period during which the patent was used.<sup>98</sup>

### § 562. Secured claims.

The claim of a creditor who has collateral therefor is provable without applying such collateral;<sup>99</sup> and so is a mortgagee's claim though he has obtained leave to foreclose in a state court, provided he does not take a deficiency judgment, and he has not

95—In re Jay Cooke, 12 N. B. R. 30, Fed. Cas. No. 3170.

96—In re Dillon, 100 Fed. 627; In re Pease, 13 N. B. R. 168, Fed. Cas. No. 10881.

97—In re Clark, 111 Fed. 893, 7 A. B. R. 96; In re Harris, 108 Fed. 517.

98—In re Bevier Wood Pavement Co., 156 Fed. 583, 19 A. B. R. 462.

99—Lewis v. United States, 14 N. B. R. 64, 92 U. S. (2 Otto) 618, 23 L. ed. 513.



prosecuted such suit to judgment;<sup>1</sup> as is also the claim of a plaintiff in a suit pending when the petition is filed.<sup>2</sup>

See also Proof of Secured Claims, post, section 629.

### § 563. Liability of bankrupt as stockholder or director.

The liability of the stockholders of a corporation for its debts is not only a debt created by statute, but is also founded upon an implied contract and provable in bankruptcy if the circumstances are such that the claimant could have maintained a suit to enforce the stockholder's liability. It is a collateral security for the benefit of the creditors and not a penalty for the misbehavior of the directors or stockholders, but rather in the nature of a contract of suretyship for corporate debts.<sup>3</sup> The amount previously ascertained to be due for an assessment is provable against a bankrupt stockholder where the charter of a corporation provides for the forfeiture of stock upon which an assessment remains unpaid.<sup>4</sup> A receiver appointed by a state court to enforce the bankrupt's liability as a stockholder may prove a claim based upon such liability as a representative of the creditors of the corporation.<sup>5</sup>

The statutory liability of directors of corporation for money embezzled by its officers is a provable debt.<sup>6</sup>

### § 564. Liability of bankrupt corporation to holder of its stocks and bonds.

A stockholder of a bankrupt corporation cannot after bankruptcy of the latter rescind his contract of subscription and prove a claim for the amount paid by him on his contract, though his contract reserves such right.<sup>7</sup>

A claim for damages for an anticipatory breach of the bankrupt's contract to purchase or redeem stock on a fixed date after bankruptcy is provable, if the trustee does not within a reason-

1—In re Linforth, 87 Fed. 386.

2—Bucknam v. Dunn, 16 N. B. R. 470, 2 Hask. 215, Fed. Cas. No. 2096.

3—In re Rouse, 1 A. B. R. 393; James v. Atl. Delaine Co., 11 N. B. R. 390, Fed. Cas. No. 7179; In re Walker, 164 Fed. 680, 21 A. B. R. 132; In re Putman, 193 Fed. 464, 27 A. B. R. 923; Dight v. Chapman, 44 Ore. 265, 12 A. B. R. 743.

4—Gibson v. Lewis, 11 N. B. R. 247, Fed. Cas. No. 5393.

5—Dight v. Chapman, 44 Ore. 265, 12 A. B. R. 743.

6—In re Brown, 164 Fed. 673, 21 A. B. R. 123.

7—Allen v. Commercial Nat. Bank, 191 Fed. 97, 27 A. B. R. 33.

able time elect to keep the contract alive,<sup>8</sup> notwithstanding the stock is of no value.<sup>9</sup> The owner of a going concern who sold his entire stock in trade to a corporation taking in payment thereof stock of the corporation which was held in trust for him by the directors of the corporation has been held not to be a creditor of the corporation.<sup>10</sup>

Bonds of the bankrupt may be made the basis of a provable claim provided their issue was not *ultra vires*.<sup>11</sup> And claims based on bonds, the holders of which were induced to purchase them through fraud are not merged in a deficiency judgment recovered by the trustee of the bondholders who foreclosed the mortgage securing the bonds.<sup>12</sup> A bond which recites that principal and interest are payable only out of a fund to be created but of the surplus earnings of the bankrupt company, can not give rise to a provable debt in the absence of surplus earnings, there being no fixed liability.<sup>13</sup>

### § 565. Trade certificates.

Trade certificates issued by a bankrupt corporation evidencing an indebtedness due by the bankrupt to the claimant and guaranteeing the payment of interest at a specified rate on the amount borrowed, constitute an express promise to pay though payable in merchandise and not negotiable.<sup>14</sup>

### § 566. Debts due the United States or a state.

#### § 567. — In general.

The United States may prove its claim in the bankruptcy proceedings,<sup>15</sup> but as it is in nowise bound by a bankruptcy act in the absence of a specific provision to that effect<sup>16</sup> it is under no obligation to do so, but is considered as standing in the

8—In re Pettingill & Co., 137 Fed. 143, 14 A. B. R. 728.

9—In re Neff, 157 Fed. 57, 28 L. R. A. (N. S.) 349, 19 A. B. R. 23.

10—Drozda v. Galbraith, 195 Fed. 926, 27 A. B. R. 882.

11—In re Waterloo Organ Co., 134 Fed. 345, 13 A. B. R. 477.

12—Mackay v. Randolph Macon Coal Co., 178 Fed. 881, 24 A. B. R. 719.

13—Synnott v. Tombstone Consol.

Mines Co., Ltd., 208 Fed. 251, 31 A. B. R. 421.

14—In re Spot Cash Hooper Co., 188 Fed. 861, 26 A. B. R. 546.

15—Bousfield & Poole Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1704.

16—Lewis v. U. S., 92 U. S. (2 Otto) 619, 23 L. ed. 513; U. S. v. Herron, 20 Wall. 251, 22 L. ed. 275; Harrison v. Sterry, 5 C. R. 289.

category of creditors who are not affected by the proceedings except as otherwise provided.<sup>17</sup> It is the trustee's duty, however, to settle first the claims of the United States, and a failure so to do makes him personally liable.<sup>18</sup>

### § 568. — Fines, bonuses, penalties and forfeitures.

The provability of claims of this nature is treated in a prior paragraph.<sup>19</sup>

### § 569. — Taxes.

The filing of the petition in bankruptcy does not stop the running of legal interest on taxes unpaid, and interest will be allowed thereon at the penal rate up to the time of payment.<sup>20</sup> The statutory penalty for the non-payment of taxes is a provable debt where, under the laws of the state, such penalty is treated as interest.<sup>21</sup> Where a tax is regularly assessed and levied, and is neglected by the bankrupt up to a time when under the state law no review or defense to the legality thereof can be had, the question of statutory legality from the standpoint of regularity cannot be raised in the bankruptcy court, but if the property upon which the tax was levied does not actually exist, the claim may be disallowed.<sup>22</sup>

It has been held that a state need not prove its claim in bankruptcy in order to recover taxes due it on bankrupt's property, nor could the federal law compel the proof of such claim nor sale of the property so subject, free from the tax lien.<sup>23</sup>

### § 570. Unliquidated claims.

Section 63b of the act provides that: "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."<sup>24</sup>

17—In re Stoevers, 127 Fed. 394, 11 A. B. R. 345; United States v. Barnes, 31 Fed. 705.

18—United States Rev. Stat., §§ 3466, 3467.

19—See *ante*, § 533.

20—In re Schuyler & Co., 21 A. B. R. 428.

21—In re Scheidt Bros., 177 Fed. 599, 23 A. B. R. 778.

22—In re Otto Freund Arnold Yeast Co., 178 Fed. 305, 24 A. B. R. 458.

23—Stokes v. State of Ga., 9 N. B. R. 191.

24—Analogous provision of act of 1867. "Sec. 19. . . . In all cases of contingent debts and contingent liabilities contracted by the bankrupt and not herein otherwise provided for, the creditor . . . may at any time apply to

This subdivision does not add to the debts provable under subdivision a, but merely provides for the liquidation of such as are unliquidated;<sup>25</sup> and hence does not authorize the liquidation of claims arising *ex delicto*, unless they are of such a nature that the claimant may waive the tort and recover in quasi contract.<sup>26</sup> A claim may be liquidated by agreement between the bankrupt, the trustee and the claimant,<sup>27</sup> or by directing a hearing before the referee in charge,<sup>28</sup> or by the court itself making the computation, where the facts are admitted and uncomplicated,<sup>29</sup> or by directing a plenary suit to be brought in any court having jurisdiction, or by permitting an action pending in any court to proceed to judgment,<sup>30</sup> but until liquidated the holder does not become a creditor.<sup>31</sup> The rendition of a judgment against the bankrupt upon appeal more than a year after his adjudication in bankruptcy is a liquidation of the claim of the surety

the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. . . . If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.”

25—*In re Roth & Appel*, 181 Fed. 667, 31 L. R. A. (N. S.) 270, 24 A. B. R. 588, *aff'g* 174 Fed. 64, 22 A. B. R. 504.

26—*Brown & Adams v. United Button Co.*, 149 Fed. 48, 8 L. R. A. (N. S.) 961, 17 A. B. R. 565, *aff'g* 140 Fed. 495, 15 A. B. R. 390; *In re Hirschman*, 2 N. B. N. R. 1123, 104 Fed. 69, 4 A. B. R. 716; *In re Yates*, 114 Fed. 365, 8 A. B. R. 69.

It has been held that an action for damages for an assault and battery should be reduced to judgment, where it would be provable. This seems to be contrary to the law. *Beers v. Hanlin*, 99 Fed. 695, 3 A. B. R. 745.

27—Claim for damages is sufficiently liquidated if the bankrupt, the trustee and the claimant all agree as to the amount due, if any. *In re Mertens & Co.*, 147 Fed. 177, 16 A. B. R. 825.

28—*In re Hirth*, 189 Fed. 926, 26 A. B. R. 666; *In re Buchan's Soap Corp.*, 169 Fed. 1017, 22 A. B. R. 382.

An adjudication by the referee after a consideration of all the evidence is a proper liquidation of a claim for unliquidated damages, the parties having submitted themselves to the referee. *In re Duquesne Incandescent Light Co.*, 176 Fed. 785, 24 A. B. R. 419.

29—*In re Rouse*, 1 A. B. R. 393; *In re Marshall Paper Co.*, 95 Fed. 419, 1 N. B. N. 407, 2 A. B. R. 653.

30—*Mitchell Storebuilding Co. v. Carroll*, 193 Fed. 616, 27 A. B. R. 894; *In re Hilton*, 104 Fed. 981, 4 A. B. R. 774.

Claim of holder of bond secured by mortgage held to become liquidated by foreclosure of the mortgage after the filing of the petition in bankruptcy, and the entry of a deficiency judgment. *In re Fitzgerald*, 191 Fed. 95, 26 A. B. R. 773; *In re Buchan's Soap Co.*, 169 Fed. 1017, 22 A. B. R. 382.

31—*In re Big Meadows Gas Co.*, 113 Fed. 974, 7 A. B. R. 697.

on his appeal bond, who may thereafter prove his claim for costs paid by him.<sup>32</sup>

Where some of the elements of a single claim are confessedly unliquidated, the claim as a whole is an unliquidated one.<sup>33</sup> A claim for stockholder's liability<sup>34</sup> should be liquidated, as should a claim for salary to accrue of a person under annual employment, discharged before the expiration of his term.<sup>35</sup> A creditor who has been permitted to rescind a sale on account of fraud on the part of the bankrupt in the purchase and has secured a return of the unsold goods from the trustee, may have his claim for the proceeds of the goods sold liquidated under the court's direction, and prove the same as a debt against the estate.<sup>36</sup>

Unliquidated damages growing out of a contract when assessed are provable claims,<sup>37</sup> and such assessment may be by judgment of a state court,<sup>38</sup> and would include a claim for breach of covenant of warranty upon eviction,<sup>39</sup> or of title where there is an unrelinquished dower right and the person entitled survives and asserts the same,<sup>40</sup> or the like.

A claim cannot be liquidated and proved for rent to accrue under a lease after the filing of a petition in bankruptcy;<sup>41</sup> or as a penalty,<sup>42</sup> or for damages for breach,<sup>43</sup> or a right of action for misrepresentation of a firm's condition, afterward bankrupt,<sup>44</sup> or a claim for damages for an injury caused by the negligence of a special receiver or assignee while operating a rail-

32—In re Lyons Beet Sugar Refining Co., 192 Fed. 445, 27 A. B. R. 610.

33—In re Big Meadows Gas Co., 113 Fed. 974, 7 A. B. R. 697.

34—In re Rouse, 1 A. B. R. 393; In re Marshall Paper Co., 1 N. B. N. 407; 2 A. B. R. 656, 95 Fed. 419.

35—In re Silverman Bros., 2 N. B. N. 760, 101 Fed. 219, 4 A. B. R. 83, s. c. 1 N. B. N. 286, 2 A. B. R. 515; In re Hilton, 3 N. B. N. R. 105; see also Ex p. Pollard, 17 N. B. R. 228, 2 Lowell 411, Fed. Cas. No. 11252.

36—In re Hirschman, 2 N. B. N. R. 1123, 104 Fed. 69; In re Heinsfurter, 1 N. B. N. 504, 3 A. B. R. 113, 97 Fed. 198; see In re Wilcox & Wright, 1 N. B. N. 188, 1 A. B. R. 544.

37—In re Osage Valley & S. Kan. R. R. Co., 9 N. B. R. 281, Fed. Cas. No. 10592;

Brandenburg—28

In re Clough, 2 N. B. R. 59, 2 Ben. 508, Fed. Cas. No. 2905.

See *ante*, § 521.

38—In re Rundle & Jones, 2 N. B. R. 49, Fed. Cas. No. 12138.

39—Williams v. Harkins, 15 N. B. R. 34; In re Morales et al., 105 Fed. 761, 5 A. B. R. 425.

40—Riggin v. Maguire, 8 N. B. R. 484, 15 Wall. 549, 21 L. ed. 232.

41—In re Collignon, 2 N. B. N. R. 660, 4 A. B. R. 250. See *ante*, § 546.

42—In re Rhoads, 2 N. B. N. R. 179. See *ante*, § 546.

43—In re Arnstein, 101 Fed. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106. See *ante*, § 546.

44—In re Schuchardt & Wells, 15 N. B. R. 161, 8 Ben. 585, Fed. Cas. No. 12483.

road,<sup>45</sup> since they are debts not affected by a discharge. A claim for unliquidated damages founded upon tort is not provable,<sup>46</sup> but the fact that the debts are contingent, or that it is difficult to assess damages for a breach of contract is not a valid objection to the proof of a claim.<sup>47</sup>

A claim originally contingent which becomes capable of liquidation within the year after the adjudication may be proved.<sup>48</sup>

A claim for unliquidated damages arising out of a breach of a contract of sale is provable, though the goods are not tendered, the breach having been occasioned by the filing of the petition in bankruptcy.<sup>49</sup>

A claim for damages for breach of warranty, in the absence of a contract, expressed or implied, fixing any amount of damages, has been held not to be founded on a contract within the provisions of section 63a (4) of the law, so as to make it the basis of an adjudication in bankruptcy, but is such an unliquidated claim, as after an adjudication may be liquidated as directed by the court under subdivision b of this section.<sup>50</sup>

### § 571. Usurious contracts.

Notes given for the excess over legal interest are not provable;<sup>51</sup> notwithstanding that by the laws of the state the defense of usury is personal and cannot be interposed by a stranger to the contract,<sup>52</sup> and, where a borrower gives his note for the loan, with legal interest, and pays for the accommodation, such contract is affected with usury, and if the *lex loci* provides for the forfeiture of the debt, it is not provable.<sup>53</sup> While the holder of

45—*Metz v. R. R. Co.*, 12 N. B. R. 559.

46—*In re New York Tunnel Co.*, 159 Fed. 688, 20 A. B. R. 25; *In re Fred Dorr*, 21 A. B. R. 752.

47—*Ex p. Pollard*, 17 N. B. R. 228, 2 Lowell 411, Fed. Cas. No. 11252.

48—*In re Dunlap Carpet Co.*, 163 Fed. 541, 20 A. B. R. 882. But see *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. ed. 591, 21 A. B. R. 484.

49—*In re Duquesne Incandescent Light Co.*, 176 Fed. 785, 24 A. B. R. 419.

50—*In re Morales*, 105 Fed. 761, 5 A. B. R. 425.

51—*Shaffer v. Fritchery*, 4 N. B. R. 179, Fed. Cas. No. 12697; *In re Moore*, 1 N. B. R. 123; *In re Worth*, 130 Fed.

927, 12 A. B. R. 566; *In re Kellogg*, 121 Fed. 333, 10 A. B. R. 7, aff'g 113 Fed. 120, 7 A. B. R. 623; *In re Samuel Wilde's Sons*, 133 Fed. 562, 13 A. B. R. 217.

Agreement whereby money was loaned to bankrupt at the highest legal rate and under which he assigned book accounts as security held not usurious though lender was allowed an additional per centage for the collection of the accounts assigned and their application to the payment of the loan. *In re Mesibovsky*, 200 Fed. 562, 29 A. B. R. 235.

52—*In re Stern*, 144 Fed. 956, 16 A. B. R. 510.

53—*In re Pittock*, 8 N. B. R. 78, 2 Sawy. 416, Fed. Cas. No. 11189.

a usurious note cannot recover upon the usurious contract, yet where the loan was induced by the fraud of the bankrupt he may be allowed to amend his proof of claim and recover as for money had and received.<sup>54</sup> The burden is upon the trustee or objecting creditors to prove that the contract upon which a claim is based is usurious.<sup>55</sup>

54—*In re Robinson*, 136 Fed. 994, 14 A. B. R. 626.

55—*In re Wilde's Sons*, 133 Fed. 562, 13 A. B. R. 217.

## CHAPTER XVII

### SET-OFFS AND COUNTERCLAIMS

- § 572. Mutual debts and credits—General rules.
- § 573. Claims between estate and creditor—In general.
- § 574. Claim must be provable.
- § 575. — In general.
- § 576. — Claims barred by limitations.
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- § 581. Joint and separate debts.
- § 582. Set-off between banker and depositor.
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- § 584. Secured and preferred creditors.
- § 585. Set-off against usurious note.
- § 586. Foreign attachment.
- § 587. Waiver of set-off.
- § 588. Estoppel to plead set-off.
- § 589. Time and place of set-off.

#### § 572. Mutual debts and credits—General rules.

Section 68a of the act provides that "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."<sup>1</sup> This section did not create the right of set-off, but recognized its existence and provided a method by which it could be enforced after bankruptcy. The right is given by the commercial law of each of the states and is protected by the Bankruptcy Act if the petition is filed before the right is exercised.<sup>2</sup>

1—Analogous provisions of act of 1867.  
"Sec. 20. . . . That, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only

shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate."

2—*Studley v. Boylston Bank*, 229 U. S. 523, 57 L. ed. 1313, 30 A. B. R. 161, aff'g 200 Fed. 249, 29 A. B. R. 649.



"Debt" as used in the section refers to such claim or demand as is provable in bankruptcy,<sup>3</sup> though not due at the time of the filing of the petition,<sup>4</sup> while "mutual debts" are claims or demands of that nature, due and owing by the bankrupt to the creditor on the one hand and by the creditor to the bankrupt on the other. It is not believed the language of the act in reference to "mutual debts" was intended to qualify or restrict the general meaning of the expression, with its attendant incidents and legal requirements. It obviously does not refer to a debt due by one to another and payment on account of such debt,<sup>5</sup> for in the absence of the statute, a trustee in bankruptcy may show, in opposition to the allowance of a claim, that it has been paid, or that payment has been made on account, which reduces its amount. In such a case, it is the balance merely which is the debt. But where the creditor owes a debt to the bankrupt, and the bankrupt owes such creditor a debt on account of some different, independent matter, not arising out of the same transaction, such debts are "mutual debts" within the act and may be set off one against the other, and "the balance only shall be allowed or paid."<sup>6</sup>

What is meant by "mutual credits" is not clear, however, unless it means substantially the same as "mutual debts," when the credit must ultimately terminate in a debt, because mutual credits necessarily imply mutual debts to the extent of such mutual credits, for a credit cannot exist in favor of one against another unless such other owes the creditor the amount of the credit.<sup>7</sup> It obviously cannot mean merely a payment on account, whether such payment be in cash, or its equivalent, for the balance only is the debt. Moreover, if it did mean a payment on account, it would follow in all cases wherein the trustee seeks to recover back preferences, consisting of payments received in violation of the act, that the recipient could set off the amount

3—*Germania Savings Bank v. Loeb*, 188 Fed. 285, 26 A. B. R. 238.

4—*In re Phillip Semmer Glass Co.*, *Lim.*, 11 A. B. R. 665; *Steinhardt v. National Park Bank of New York*, 120 App. Div. (N. Y.) 255, 19 A. B. R. 72, rev'g 52 Misc. (N. Y.) 464, 18 A. B. R. 86.

5—*In re Ryan*, 105 Fed. 760, 5 A. B. R. 396.

6—*In re Christensen*, 101 Fed. 802, 2 N. B. N. R. 1094, 4 A. B. R. 202; *In re Thompson*, 2 N. B. N. R. 1016; *contra*, *In re Ryan*, 2 N. B. N. R. 693.

7—*Libby v. Hopkins*, 104 U. S. (14 Otto) 303, 26 L. ed. 769.

of the original debt due from the bankrupt and, in that manner, in every case, defeat the recovery of the preference.<sup>8</sup>

So that, while in the first clause of this section "mutual credits" are referred to; in the next clause they are treated as if "mutual debts" and "mutual credits" meant the same thing, the law providing "and one debt may be set off against the other," without repeating in that connection the word "credits." But the set-off is allowable only in cases of "debt," that is to say, where the amount due from the one to the other is a specific liquidated sum of money, and not, for instance, an unliquidated claim for damages arising out of a breach of contract.<sup>9</sup>

In this connection an interesting discussion of this question appears in the leading English case of *Rose v. Hart*,<sup>10</sup> wherein the court said: "Something more is certainly meant here by mutual credits than the words mutual debts import; and yet, upon the final settlement, it is enacted merely that one debt shall be set off against another. We think this shows that the legislature meant such credits only as must in their nature terminate in debts, as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute."

### § 573. Claims between estate and creditor—In general.

The set-offs allowed are of mutual debts or mutual credits between the estate of a bankrupt and the creditor, and would

8—In re Christensen, 101 Fed. 802, 2 N. B. N. R. 1094, 4 A. B. R. 202.

9—*Bell v. Carey*, 8 C. B. 87; but see *In re Harper*, 175 Fed. 412, 23 A. B. R. 918, holding that any debt, liquidated or unliquidated, owing to the bankrupt,

from a creditor of his, whether for damages, or on contract, express or implied, which passes to the trustee, may be used to reduce the claim of such creditor or to extinguish it altogether.

10—8 Taunt. 499.

include a liability that has accrued to a trustee as such which had not accrued to the bankrupt when the claim and liability are mutual.<sup>11</sup> Where no trustee has been appointed and a composition is made, the bankrupt has the same right of set-off as the trustee would have had if one had been appointed.<sup>12</sup>

A creditor who voluntarily releases securities held by him in order that the bankrupt may sell and transfer the property is chargeable with the amount lost to the creditors by reason thereof.<sup>13</sup>

### § 574. Claim must be provable.

### § 575. — In general.

In order that a claim may be used as a set-off it must be one that is provable in bankruptcy,<sup>14</sup> but it need not necessarily be one that has been, or may yet be, proved in the bankruptcy proceeding.<sup>15</sup>

The provability of a claim must be determined as of the date of the filing of the petition in bankruptcy, and matters arising thereafter cannot be made the subject of set-off;<sup>16</sup> though it has been held that a debt due before the adjudication and one not due until afterwards, but both being due at the time of the attempted set-off, may be set off against each other.<sup>17</sup>

A surety paying his principal's debt either before or after his bankruptcy, may set off the amount so paid against his debt to the bankrupt, provided the debt was provable.<sup>18</sup> Unliqui-

11—*In re Crystal Spring Bottling Co.*, 104 Fed. 265, 4 A. B. R. 55; *Moran v. Bogart*, 14 N. B. R. 293.

12—*Ex parte Howard Nat. Bk.*, 16 N. B. R. 420, 2 Lowell 487, Fed. Cas. No. 6764.

13—*In re Stoddard Bros. Lumber Co.*, 169 Fed. 190, 22 A. B. R. 435, aff'd 177 Fed. 611, 24 A. B. R. 403.

14—Sec. 68b, Act of 1898; *Germania Savings Bank v. Loeb*, 26 A. B. R. 238; *In re Becher Bros.*, 139 Fed. 366, 15 A. B. R. 288; *In re Howe Mfg. Co.*, 193 Fed. 524, 27 A. B. R. 477; *In re Birmingham*, 94 Fed. 796, 1 N. B. N. 351, 2 A. B. R. 223; *Morgan v. Wordell*, 8 A. B. R. 167.

Need not necessarily be due at the time of the filing of the petition. *In re Phillip Semmer Glass Co. Lim.*, 11 A. B. R. 665.

15—*Steinhardt v. National Park Bank*, 19 A. B. R. 72; *Norfolk & W. R. Co. v. Graham*, 145 Fed. 809, 16 A. B. R. 610.

16—*In re Michaelis & Lindeman*, 196 Fed. 718, 27 A. B. R. 299.

17—*Norfolk & W. R. Co. v. Graham*, 145 Fed. 809, 16 A. B. R. 610; *In re City Bk.*, 6 N. B. R. 71, Fed. Cas. No. 2742; *Marks v. Barker*, Fed. Cas. No. 9096; *Catlin v. Foster*, 3 N. B. R. 134, 1 Sawy. 37, Fed. Cas. No. 2519; *Drake v. Rollo*, 3 Biss. 273, Fed. Cas. No. 4066.

18—*In re Dillon*, 100 Fed. 627, 4 A. B. R. 63.

dated damages, when liquidated as directed by the court,<sup>19</sup> may be used as a set-off; or the holder of an insurance policy may set off the amount due thereon against the claim for the company's money deposited with him.<sup>20</sup>

### § 576. — Claims barred by limitations.

A claim barred by the statute of limitations of the state in which the petition is filed is not provable and hence cannot be used as a set-off, but the same rule would not necessarily apply to claims not filed within the time fixed by the bankruptcy act, since a claim may have been provable, notwithstanding it was never proved.<sup>21</sup>

### § 577. — Taxable costs.

Taxable costs being provable under the present act,<sup>22</sup> may be allowed as set-offs.

### § 578. Debts and credits must be in same right.

The debts and credits must be due in the same capacity;<sup>23</sup> thus an expectancy of the bankrupt under the will of a creditor dying after the adjudication cannot be used as a set-off of the bankrupt's indebtedness to the testator,<sup>24</sup> nor is the amount expended by the bankrupt in the education and support of his children available as a set-off against a debt owing them as guardian;<sup>25</sup> nor can a debt due an executor as such be set off against a debt due from him personally, nor the claim of a stockholder against a corporation against his unpaid stock subscription or vice versa;<sup>26</sup> nor can a bank collect money due bankrupt

19—Sec. 63b, Act of 1898.

20—*Scammon v. Kimball*, 13 N. B. R. 445, 92 U. S. (2 Otto) 362, 23 L. ed. 483.

21—See *Steinhardt v. National Park Bank of New York*, 120 App. Div. (N. Y.) 255, 19 A. B. R. 72, rev'g 52 Misc. (N. Y.) 464, 18 A. B. R. 86.

The fact that a claim has not been proved in the bankruptcy proceeding within the time fixed by section 57n is no bar to the use of the claim as a counterclaim or set off in an independent action by the trustee. *Id.* *Norfolk & W. R. Co. v. Graham*, 145 Fed. 809, 16 A. B. R. 610.

22—Sec. 63a, Act of 1898. See *ante*, § 569.

23—*In re Howe Mfg. Co.*, 193 Fed. 524, 27 A. B. R. 477; *In re T. M. Leshner & Son*, 176 Fed. 650, 25 A. B. R. 218; *Wright v. Rogers*, 3 McLean 229, Fed. Cas. No. 18090.

24—*In re Woods*, 133 Fed. 82, 13 A. B. R. 240.

25—*Embry v. Bennett*, 162 Fed. 139, 20 A. B. R. 651.

26—*Kiskadden v. Steinle*, 203 Fed. 375, 29 A. B. R. 346; *In re Howe Mfg. Co.*, 193 Fed. 524, 27 A. B. R. 477; *In re Goodman Shoe Co.*, 96 Fed. 949, 3 A. B. R. 200; *Sawyer v. Hoag*, 9 N. B. R. 145, 17 Wall. 610, 21 L. ed. 731; *Wilbur v. Stockholders*, 18 N. B. R. 178

and set it off against a claim against him;<sup>27</sup> nor can money which is held in trust for the bankrupt by the creditor be used as a set-off;<sup>28</sup> nor can a claim based on promissory note of a member of the bankrupt firm as an individual be set off against a judgment recovered against the claimant on behalf of the firm by the trustee in bankruptcy in a suit for unliquidated damages *ex contractu*.<sup>29</sup> However, a creditor may set off against a debt due him by a bankrupt the value of goods delivered by the latter, to one of the creditor's workmen on the latter's credit, because in that case it is the debt of the person to whom the credit was extended.<sup>30</sup>

Damages growing out of a failure of the trustee or receiver in bankruptcy to complete a contract of the bankrupt are properly claims against the bankrupt, and may be set off against a claim of the bankrupt set up by his trustee,<sup>31</sup> but they cannot be set off against a claim for services or materials supplied by the trustee.<sup>32</sup>

### § 579. Claims must not be purchased in view of bankruptcy.

The act of 1867 forbade the allowance of set-offs only in case of the purchase or transfer of a claim after the petition was filed. The present act forbids the allowance of a set-off or counter-claim if purchased or transferred after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge of bankrupt's insolvency or commission of an act of bankruptcy;<sup>33</sup> but there seems to be

Fed. Cas. No. 17636; *Jenkins v. Armour*, 14 N. B. R. 276, 6 Biss. 312, Fed. Cas. No. 7260; *Scammon v. Kimbell*, 13 N. B. R. 445, 92 U. S. (2 Otto) 362, 23 L. ed. 483; *Sanger v. Upton*, 91 U. S. (1 Otto) 56, 23 L. ed. 220; *Morgan v. Allen*, 103 U. S. (13 Otto) 498, 26 L. ed. 498.

27—*Traders Bk. v. Campbell*, 6 N. B. R. 353, 14 Wall. 87, 20 L. ed. 832.

28—*Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 13 A. B. R. 447, rev'g 129 Fed. 728, 12 A. B. R. 111.

29—*In re T. M. Leshner & Son*, 176 Fed. 650, 25 A. B. R. 218.

30—*Rice v. Grafton Mills*, 13 N. B. R. 209.

31—*Howard v. Magazine & Book Co.*, 147 App. Div. (N. Y.) 335, 27 A. B. R. 296.

32—*Howard v. Magazine & Book Co.*, 147 App. Div. (N. Y.) 335, 27 A. B. R. 296.

33—Sec. 68b, Act of 1898. *Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co.*, 229 U. S. 435, 57 L. ed. 1268, 30 A. B. R. 624; *In re Tacoma Shoe & Leather Co.*, 3 N. B. R. 9; *In re Howe Mfg. Co.*, 193 Fed. 524, 27 A. B. R. 477; *Mason v. Nat. Herkimer County Bank*, 172 Fed. 529, 22 A. B. R. 733, rev'g 163 Fed. 920, 21 A. B. R. 98; *In re Shults*, 135 Fed. 623, 14 A. B. R. 378; *Stich v. Berman*, 49 Misc.

no prohibition against such use of claims purchased more than four months before the bankruptcy, whether with or without knowledge or notice of bankrupt's insolvency.<sup>34</sup>

Creditors cannot purchase worthless claims, or such as are worth but a percentage of their face value, and use them as set-offs or counter-claims to pay what they owe the estate; nor can a debtor to the bankrupt's estate set off against his debt the bankrupt's notes bought on speculation as to probable dividends;<sup>35</sup> nor a protested draft after the commencement of the bankruptcy proceedings;<sup>36</sup> nor claims bought up by the debtor to set off against the bankrupt's deposit,<sup>37</sup> but the satisfaction by a bank, without diminution of the estate of the bankrupt depositor, of possible claims of others, who, in the event of the depositor's default, would have been entitled to the deposits, is not within the prohibition of the act.<sup>38</sup>

### § 580. Claims need not be of same nature.

While a claim for unliquidated damages arising out of a tort is not available as a set-off to a claim founded upon contract,<sup>39</sup> the debts and credits may be of different kinds, as money or securities deposited in a bank may be set off against notes or a protested draft due the bank by the debtor;<sup>40</sup> or the amount due for personal services may be set off against a mortgage;<sup>41</sup> or money on hand by an employee against salary due where he was in the habit of receiving and paying out money for his employer;<sup>42</sup> or the claim of the trustee in bankruptcy against

(N. Y.) 104, 15 A. B. R. 466; *In re Shults*, 132 Fed. 573, 13 A. B. R. 84; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 13 A. B. R. 447, rev'g 129 Fed. 728, 12 A. B. R. 111.

Where the effect of allowing a credit would be to give the creditor a preference the same will not be allowed. *In re White*, 177 Fed. 194, 24 A. B. R. 197.

34—*Hovey v. Home Ins. Co.*, 10 N. B. R. 224, Fed. Cas. No. 6743.

35—*Hunt v. Holmes*, 16 N. B. R. 101, Fed. Cas. No. 6890.

36—*Bashore v. Rhoads*, 16 N. B. R. 72.

37—*In re Perkins*, 8 N. B. R. 56, 5 Biss. 254, Fed. Cas. No. 10982.

38—*Continental & Commercial Trust &*

*Savings Bank v. Chicago Title & Trust Co.*, 229 U. S. 434, 57 L. ed. 1268, 30 A. B. R. 624.

39—*In re Becher Bros.*, 139 Fed. 366, 15 A. B. R. 228.

40—*In re Kalter*, 2 N. B. N. R. 264; *Ex parte Howard Nat. Bk.*, 16 N. B. R. 420, 2 Lowell 487, Fed. Cas. No. 6764; *City of Harrisburg v. Sherlock*, 16 N. B. R. 62; *In re Petrie*, 7 N. B. R. 332, 5 Ben. 110, Fed. Cas. No. 11040; *In re Peebles*, 13 N. B. R. 149, 2 Hughes 394, Fed. Cas. No. 10902.

41—*Von Sachs v. Kretz*, 19 N. B. R. 63.

42—*Ex p. Pollard*, 17 N. B. R. 228, 2 Lowell 411, Fed. Cas. No. 11252.

a common law assignee;<sup>43</sup> or a counter-claim for false representations in inducing a contract of sale against a claim based on such contract.<sup>44</sup>

### § 581. Joint and separate debts.

The Supreme Court,<sup>45</sup> in citing with approval Justice Story in his treatise on Equity Jurisprudence, said: "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity, which will justify even such an interposition. Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt created by such misapplication against the joint debt. So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal, and, upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account for which the other was a security. Indeed, it may be generally stated that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt."<sup>46</sup>

Where a bankrupt and another have accounts one against the other, and both are on a note held by a bank which is paid in full after the filing of a petition by that other, he can set off against the amount due from him to the bankrupt the amount due from bankrupt on the account, but not bankrupt's share of the note.<sup>47</sup>

43—*Catlin v. Foster*, 3 N. B. R. 134, 1 Sawy. 37, Fed. Cas. No. 2519.

44—*In re Harper*, 175 Fed. 412, 23 A. B. R. 918.

45—*Gray v. Rolo*, 18 Wall. 629, 21 L. ed. 927.

46—See *In re Crystal Spring Bottling Co.*, 104 Fed. 265, 4 A. B. R. 55; *In re Shults*, 132 Fed. 573, 13 A. B. R. 84.

47—*In re Bingham*, 94 Fed. 796, 1 N. B. N. 351, 2 A. B. R. 223.

### § 582. Set-off between banker and depositor.

The general rule of set-off applies between a banker and his customers, so that in case of mutual debts and credits, whether matured or not, they may be set off by the banker as against the liabilities of a bank depositor,<sup>48</sup> or by the depositor against the liabilities of a bankrupt bank.<sup>49</sup>

The right to a set-off attaches only to the deposit as it existed when the petition in bankruptcy was filed, and money deposited after the filing of the petition cannot be set off against an indebtedness existing before the filing of the petition.<sup>50</sup>

A deposit made on the day of the filing of the petition cannot be considered in adjusting the mutual credits between the bankrupt and the bank, since the law does not recognize fractions of a day, and title to the deposit is therefor in the trustee.<sup>51</sup>

While the mere fact that the deposit was made within four months of bankruptcy,<sup>52</sup> or that a portion of the deposits were made after the bank had knowledge of the debtor's insolvency<sup>53</sup> is not conclusive against the right of set-off, yet, if the deposit was made under such circumstances as to constitute it a preference, the right does not exist.<sup>54</sup> So, the privilege of set-off does

48—*Toof v. City Nat. Bank*, 206 Fed. 250, 30 A. B. R. 79; *In re Percy Ford Co.*, 199 Fed. 334, 28 A. B. R. 919; *Germania Savings Bank & Trust Co. v. Loeb*, 188 Fed. 285, 26 A. B. R. 238; *Whitaker v. Crowder State Bank*, 26 Okla. 786, 25 A. B. R. 876; *Booth v. Prete*, 81 Conn. 636, 22 A. B. R. 579; *Steinhardt v. Nat. Park Bank of New York*, 120 App. Div. (N. Y.) 255, 19 A. B. R. 72, rev'g 52 Misc. (N. Y.) 464, 18 A. B. R. 86; *In re Medaris-Vine Carriage Co.*, 15 Ohio Fed. Dec. 467, 17 A. B. R. 897; *West v. Bank of Lahoma*, 16 Okla. 328, 16 A. B. R. 733; *Tomlinson v. Bank of Lexington*, 145 Fed. 824, 16 A. B. R. 632; *Frank v. Mercantile Nat. Bank*, 182 N. Y. 264, 14 A. B. R. 125; *In re Semmer Glass Co.*, 135 Fed. 77, 14 A. B. R. 25, appeal dismissed 203 U. S. 141, 51 L. ed. 128; *In re Scherzer*, 130 Fed. 631, 12 A. B. R. 451; *In re Semmer Glass Co., Ltd.*, 11 A. B. R. 665. *In re Little*, 110 Fed. 621, 6 A. B. R. 681; *In re Stege*, 116 Fed. 342, 8 A. B. R. 515; *In re Kalter*, 2 N. B. N. R.

264; *Traders Bk. v. Campbell*, 14 Wall. 87, 20 L. ed. 832, 6 N. B. R. 353; *In re Farnsworth*, 14 N. B. R. 148; *In re Madison*, 9 N. B. R. 184; *Libby v. Hopkins*, 104 U. S. (14 Otto) 303, 26 L. ed. 769; *In re Meyer*, 107 Fed. 86, 5 A. B. R. 593; *In re Elsasser*, 7 A. B. R. 215.

49—*In re Shults*, 132 Fed. 573, 13 A. B. R. 84.

50—*Toof v. City Nat. Bank*, 206 Fed. 250, 30 A. B. R. 79; *In re Michaelis & Lindeman*, 196 Fed. 718, 27 A. B. R. 299.

51—*Moore v. Third Nat. Bank of Philadelphia*, 41 Pa. Super. Ct. 497, 24 A. B. R. 568.

52—*New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 11 A. B. R. 42; *In re Hill Co.*, 130 Fed. 315, 12 A. B. R. 221.

53—*Germania Savings & Trust Co. v. Loeb*, 188 Fed. 285, 26 A. B. R. 238.

54—*Mechanics' & Metals Nat. Bank v. Ernst*, 231 U. S. 60, 58 L. ed. 121, 31 A. B. R. 302, aff'g 201 Fed. 664, 29 A. B. R. 289; *In re Wright-Dana Hardware*



not exist where a deposit is not made for general purposes, but for the purpose of creating a fund to be used in set-off, the application of the deposit pursuant to such an arrangement being preferential.<sup>55</sup>

The right to a set-off against a depositor's demand note is not lost by accepting the bankrupt's check against the same account.<sup>56</sup>

A set-off cannot be allowed against a special deposit agreed not to be subject to general set-off,<sup>57</sup> nor can deposits held by a bank as trustee be set off.<sup>58</sup>

Where the deposit of the bankrupt is set off against his liability to a bank, his trustee in bankruptcy may participate in any collateral held by the bank to the extent that such deposit discharged the bankrupt's liability to the bank.<sup>59</sup>

### § 583. Set-off by a married woman.

There is no reason why the claim of a married woman may not be used as a set-off as well as that of any individual. Hence, if under the law of the state she is authorized to enter into contracts, any claim that she may have against the debtor, if provable, may be used as a set-off. This is true although the debt may have been contracted during coverture without her having complied with the requirements of the statute.<sup>60</sup> But neither reasonable gifts from the husband nor an insurance policy on bankrupt's life for the benefit of his wife and children can be set off against a claim of a wife for money which she had received and deposited with her husband for safe keeping.<sup>61</sup>

### § 584. Secured and preferred creditors.

The courts of the United States have generally followed the liberal construction of the English courts in the matter of mutual

Co., 212 Fed. 397, 31 A. B. R. 816, modifying 207 Fed. 636, 31 A. B. R. 192.

55—In re Starkweather & Albert, 206 Fed. 797, 30 A. B. R. 743.

56—Toof v. City Nat. Bank, 206 Fed. 250, 30 A. B. R. 79.

57—Farmers' & Merchants' State Bank of Waco, Tex., v. Park, 209 Fed. 613, 31 A. B. R. 696.

58—Germania Savings Bank & Trust

Co. v. Loeb, 188 Fed. 285, 26 A. B. R. 238.

59—Merchants' Nat. Bank v. Sexton, 228 U. S. 634, 57 L. ed. 998, 30 A. B. R. 278.

60—In re Slichter, 2 N. B. R. 107, Fed. Cas. No. 12943.

61—In re Bigelow, 2 N. B. R. 170, 2 Ben. 198, Fed. Cas. No. 1398.

credits in bankruptcy and insolvency.<sup>62</sup> The result of them is that a creditor, who, at the time of the bankruptcy, has in hand goods or chattels of the bankrupt as collateral with a power of sale, or chuses in action with power of collection, may sell the goods or collect the claims and set them off against the debt of the bankrupt, although the power to sell or collect was revocable by the bankrupt before his bankruptcy, or he may retain the surplus by way of set-off on another claim which he holds against the bankrupt.<sup>63</sup> In other words, the very fact of bankruptcy, in such cases, gives what is in the nature of a lien which did not exist before.<sup>64</sup>

When shares of stock are conveyed as collateral security, the law implies a promise to return them on the payment of the debt. In cases where there has been either an express or implied promise by the agent or other person having the property, that he will faithfully account for it and pay over its proceeds, such promise would not prevent a set-off in bankruptcy. The weight of authority is that a promise of this sort does not bar a set-off, either under the ordinary statutes, or under the law, unless the property has been entrusted to the agent for a particular purpose inconsistent with such an application of the surplus, so that this would be a fraud or breach of promise.<sup>65</sup>

Where the receiver takes possession of property on which a claimant holds a valid mortgage, the mortgagee can only be charged with such portion of the expense of caring for the property as would necessarily have been incurred by him during the process of foreclosing his mortgage.<sup>66</sup>

A creditor holding both a secured and an unsecured note of the bankrupt who after bankruptcy sells the security for an

62—*Rose v. Hart*, 2 Smith, Lead. Cases; *McLaren v. Pennington*, Paige, 102; *Receivers, etc., v. Paterson Gas L. Co.*, 23 N. J. 283; *Aldrich v. Campbell*, 70 Mass. 284; *Clarke v. Hawkins*, 5 R. I. 219; *Medomac Bank v. Curtis*, 24 Me. 36; *Phelps v. Rice*, 51 Mass. 128; *Myers v. Davis*, 22 N. Y. 489; *Morrison's Assig. v. Bright*, 20 Mo. 298.

63—*Ex p. Whiting*, 14 N. B. R. 307, 2 Lowell 472, Fed. Cas. No. 17573.

64—*Rose v. Hart*, 8 Taunt. 499; *In re*

*Dow*, 14 N. B. R. 307, 2 Low. 472, Fed. Cas. No. 17573; *In re McKay*, 13 Fed. Cas. No. 443; *In re Tacoma Shoe & Leather Co.*, 3 N. B. N. R. 9.

65—*Marks v. Barber*, 1 Wash. 178; *Eland v. Karr*, 1 East. 175; *Mayer v. Nias*, 8 Moore 275; *Cornforth v. Rivett*, 2 M. & S. 510; *Groom v. West*, 8 A. & E. 758.

66—*In re Davis*, 155 Fed. 671, 19 A. B. R. 98.

amount in excess of his secured claim may apply the excess as a set-off on the unsecured claim.<sup>67</sup>

If a creditor has received a preference on account, he cannot use the balance of his claim as a set-off.<sup>68</sup>

### § 585. Set-off against usurious note.

The trustee has the same right as the bankrupt would have under the state laws to set off usurious interest against a claim based on a usurious note.<sup>69</sup>

### § 586. Foreign attachment.

Where a creditor obtains a preference by an attachment of property as that of the bankrupt under the law of a country which does not recognize the American bankruptcy, any benefit obtained from the attachment operates as a payment pro tanto of the claim and should reduce the dividends payable on the claim to that extent, inasmuch as the creditor should be required to surrender the preference before participating in the dividends.<sup>70</sup>

### § 587. Waiver of set-off.

Where, by reason of the silence or the conduct of the party claiming a right of set-off, the debtor or other creditors have taken such action as would make the enforcement of the set-off inequitable;<sup>71</sup> or the creditor deliberately proves his full claim without setting off the amount due from the bankrupt,<sup>72</sup> the right will be lost. In the absence of fraud, however, where either through ignorance or mistake, proof has been made for the full claim, the court will permit the creditor either to amend or withdraw his proof.<sup>73</sup> And this has been permitted, notwithstanding the fact that through the mistake of the cashier of a bank the amount on deposit was transferred to the account of bankrupt's trustee, without deducting the value of bankrupt's

67—In re Searles, 200 Fed. 893, 29 A. B. R. 635.

68—Mechanics' & Metals Nat. Bank v. Ernst, 231 U. S. 60, 58 L. ed. 121, 31 A. B. R. 302, aff'g 201 Fed. 664, 29 A. B. R. 289; In re Dillon, 100 Fed. 627, 4 A. B. R. 63.

69—In re Martin, 27 A. B. R. 151.

70—In re Knight, Yancey & Co., 190 Fed. 893, 26 A. B. R. 787.

71—Higgs v. Tea Co., L. R. 4, Ex. 387.

72—Hunt v. Holmes, 16 N. B. R. 101, Fed. Cas. No. 6890; Brown v. Bk., 6 Bush (Ky.) 198.

73—Bemis v. Smith, 10 Met. 194.

note,<sup>74</sup> the rights of the parties not otherwise being affected, and no other steps being taken.

**§ 588. — Estoppel to plead set-off.**

The doctrine of estoppel has also been applied to set-offs.<sup>75</sup>

**§ 589. Time and place of set-off.**

The right of set-off may be availed of even after expiration of the year allowed for filing claims, and this, regardless of the fact that the claimant has failed to prove his claim within that time.<sup>76</sup> If a creditor's debt against a bankrupt is less than the bankrupt's debt against him, the time for set-off is when the creditor is sued, and the place the forum in which the suit is brought.<sup>77</sup>

74—Union Nat. Bk. v. McKey, 2 N. B. N. R. 913; Standard Oil Co. v. Hawkins, 74 Fed. 395, 33 L. R. A. 739.

75—Creditors are estopped from claiming as an off-set against the claim of a stockholder for advances, the difference between an alleged overvaluation of property turned over by the claimant in payment for his stock and its true value.

In re Charles Town L. & P. Co., 199 Fed. 846, 29 A. B. R. 721.

76—Steinhardt v. National Park Bank of New York, 120 App. Div. (N. Y.) 255, 19 A. B. R. 72, rev'g 52 Misc. (N. Y.) 464, 18 A. B. R. 86.

77—In re T. M. Lescher & Son, 176 Fed. 650, 25 A. B. R. 218.

## CHAPTER XVIII

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- § 674. Effect of failure of proof.

### § 592. Proof and allowance distinguished.

The proof and allowance of claims are distinct, the former being the sworn statement by which a creditor presents his claim, the latter the judicial action by which it is established in the proceeding and permitted to participate in the distribution. Claims may be allowed conditionally or temporarily for such purposes as participating in the choice of a trustee or where some question may remain to be determined before they

would be allowed for the purpose of distribution.<sup>1</sup> The creditor's statement under oath, in writing, as to the proof of his claim, if it contains the matter pointed out in section 57, is at once the claimant's pleading and his evidence, and makes for him a *prima facie* case,<sup>2</sup> and is a part of the proceeding in bankruptcy.<sup>3</sup> A debt is to be considered as proved when it is duly authenticated and sent to the referee or clerk.<sup>4</sup>

### § 593. Right to prove claim and necessity therefor.

A claim must be proved before it can be allowed, notwithstanding it is based on a judgment.<sup>5</sup>

Whether a debt is provable depends upon the nature of the liability, and not upon whether there are assets, or there is any prospect of assets applicable to it.<sup>6</sup> Thus where a creditor holds the individual notes of a partner he may prove and have them allowed in the firm proceedings, though their payment will be postponed until the partnership debts have been paid.<sup>7</sup>

### § 594. By whom proof made.

#### § 595. — Agent, officer, partner or attorney.

While, generally speaking, only the holder and owner of a claim should make proof,<sup>8</sup> the law contemplates that it may be made by an agent, attorney or proxy,<sup>9</sup> upon good and sufficient reasons. Under the former act it might be made by an agent in case the owner was not within the United States,<sup>10</sup> though the mere absence from the state was insufficient.<sup>11</sup> Thus a mere agent holding negotiable paper was not permitted to make proof when the owner was in a situation to do so himself, but if not, then the agent might prove in the name and for the benefit of the real owner.<sup>12</sup> The agent might prove where he was cog-

1—In re Wise, 2 N. B. N. R. 151.

2—In re Sumner, 2 N. B. N. R. 681, 101 Fed. 224, 4 A. B. R. 123.

3—Wiswall v. Campbell, 15 N. B. R. 421, 93 U. S. (3 Otto) 347, 23 L. ed. 923.

4—Ex p. Harris, 16 N. B. R. 432, Fed. Cas. No. 6109.

5—In re Rosenberg, 144 Fed. 442, 16 A. B. R. 465.

6—In re Bates, 100 Fed. 263, 4 A. B. R. 56.

7—In re Dobson, 2 N. B. N. R. 514.

8—In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4932.

9—Sec. 1 (9), Act of 1898; G. O. XXI (1).

10—In re Whyte, 9 N. B. R. 267, Fed. Cas. No. 17606.

11—In re Jackson, 14 N. B. R. 449, Fed. Cas. No. 7123, 7 Biss. 280.

12—In re Saunders, 13 N. B. R. 164, Fed. Cas. No. 12371, 2 Low, 444.

nizant of all the facts, the creditor having no personal knowledge;<sup>13</sup> though it has been held that the agent's oath that he is better acquainted with the facts than his principal would not necessarily render the agent's deposition alone admissible as proof.<sup>14</sup>

The formal proof of claim may be made out by the attorney for the trustee.<sup>15</sup>

When the deposition is made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the firm; when made by an agent the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition must be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer,<sup>16</sup> and if verified by the manager instead of the treasurer, it is objectionable, though amendable.<sup>17</sup>

A corporation may make proof of its claim by agent or attorney in fact, when there is sufficient reason why it should not be made by the officer designated in General Order XXI.<sup>18</sup>

### § 596. — Assignee or receiver.

A claim assigned before bankruptcy should be presented in the name of the assignor, and supported either by his deposition or that of his agent.<sup>19</sup> A receiver of a creditor's property,<sup>20</sup> or one who has purchased claims against bankrupt in an endeavor to settle the matter out of court,<sup>21</sup> or one who holds a note as trustee for another,<sup>22</sup> or who holds an account for goods assigned before bankruptcy,<sup>23</sup> may make proof of the claim so held. The

13—In re Watrous, 14 N. B. R. 258, Fed. Cas. No. 17270.

14—In re Whyte, 9 N. B. R. 267, Fed. Cas. No. 17606.

15—In re McKenna, 137 Fed. 611, 15 A. B. R. 4.

16—G. O. XXI (1).

Where the directors of the bankrupt corporation had indorsed its notes and contributed to their payment, appointing one of their number as their trustee for the purpose, such director held entitled to file proof of claim as trustee for the

other directors. In re Salvator Brewing Co., 188 Fed. 522, 26 A. B. R. 21.

17—In re Rude, 2 N. B. R. 498.

18—In re Reboulin Fils & Co., 19 A. B. R. 215.

19—In re McCarthy Portable Elevator Co., 205 Fed. 986, 30 A. B. R. 247.

20—In re Mills, 17 N. B. R. 472, Fed. Cas. No. 9612.

21—In re Pease, 6 N. B. R. 73, Fed. Cas. No. 10880.

22—Ex p. Dreyfus, 13 N. B. R. 43, 2 Lowell 305, Fed. Cas. No. 8043.

23—In re Fortune, 3 N. B. R. 83.



form by which a claim against a bankrupt was transferred is immaterial, and cannot affect the right of the transferee to prove the claim, where it is sufficient to estop the original holder from asserting a right to it.<sup>24</sup>

Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, he must immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within such further time as is allowed by the referee, he must make an order subrogating the assignee to the original claimant. If objection be made, he should proceed to hear and determine the matter.<sup>25</sup>

**§ 597. — Indorsers, sureties and persons secondarily liable.**

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."<sup>26</sup> A surety or an indorser cannot prove his claim in his own name, whether the note of the bankrupt is due or not, and whether he has paid anything thereon or not. The holder of the note proves the claim, and if he neglects to do so, the indorser can prove in the holder's name, but not in his own name.<sup>27</sup>

General Order XXI provides that a person contingently liable for the bankrupt should prove his claim in the name of the creditor, when known, and when unknown, in the name of the party contingently liable, but no dividend will be paid upon such claim except upon satisfactory proof that it will diminish pro tanto the original debt.<sup>28</sup> A party is entitled to be subrogated to the rights of the creditor, without any agreement to that effect, where he has been compelled to pay the debt of a bankrupt to protect himself;<sup>29</sup> hence it has been held that sureties and

24—*In re Miner*, 117 Fed. 953, 9 A. B. R. 100; s. c. 114 Fed. 998, 8 A. B. R. 248.

25—G. O. XXI (3).

26—Sec. 57i Act of 1898. *Sessler v. Paducah Distilleries Co.*, 168 Fed. 44, 21 A. B. R. 723; *In re Beaver Knitting Mills*, 154 Fed. 320, 18 A. B. R. 528.

27—*In re Manhattan Brush Mfg. Co.*, 209 Fed. 997, 31 A. B. R. 747.

28—G. O. XXI (4); *In re Dillon*, 100 Fed. 627, 4 A. B. R. 63; *In re Christensen*, 2 N. B. N. R. 1094.

29—*Whithead v. Pillsbury*, 13 N. B. R. 241, Fed. Cas. 17572.

indorsers are authorized to prove the debt for which they are liable, when not proven by the creditor, or without first paying it,<sup>30</sup> and such debts being provable are released by the discharge.<sup>31</sup>

This right of subrogation arises from the equities of the subsequent transactions and not from the original contract of suretyship,<sup>32</sup> but the subrogation of the surety to the rights of the creditor neither enlarges nor reduces them.<sup>33</sup> The right of subrogation does not arise from contract. One surety is entitled to subrogation as against his co-surety even when they are not bound by the same instrument and are ignorant of each other's existence.<sup>34</sup>

The fact that the claim was not paid by a surety until after the date of the adjudication, will not prevent its proof and allowance as a claim against the bankrupt;<sup>35</sup> but if for any reason the creditor could not have proved the claim, as because he had received a preference, it cannot be proved by the person contingently liable. A creditor is entitled to prove his full claim in preference to the person contingently liable, who has discharged a part of his indebtedness.<sup>36</sup> On the failure of the holder of a promissory note transferred to him by indorsement to prove his claim therefor on the bankruptcy of the maker, the surety must himself move in the matter or require the holder to act on furnishing him with suitable indemnity against risk and expense.<sup>37</sup> Accommodation makers, indorsers or sureties upon the obligations of an insolvent debtor are not discharged from liability to pay them because of the innocent acceptance by the creditor of preferences from the debtor, which he sur-

30—*Phillips v. Dreher Shoe Co.*, 112 Fed. 404, 7 A. B. R. 326.

31—*In re Perkins*, 10 N. B. R. 529, Fed. Cas. No. 10983.

32—*Courier Journal Job Printing Co. v. Schaefer-Meyer Co.*, 101 Fed. 699, 4 A. B. R. 183.

33—*In re Bingham*, 1 N. B. N. 351, 94 Fed. 796, 2 A. B. R. 233; *In re Schmechel Cloak & Suit Co.*, 104 Fed. 64, 3 N. B. N. R. 110.

34—*In re Nickerson*, 8 A. B. R. 707, 116 Fed. 1003.

35—*In re Christensen*, *supra*.

36—*In re Dillon*, *supra*; *In re Schmechel Cloak & Suit Co.*, 3 N. B. N. R. 110, 104 Fed. 64; *In re Heyman*, 95 Fed. 800, 2 A. B. R. 651, citing *In re Ellerhorst*, 5 N. B. R. 144, Fed. Cas. No. 4381; *In re Hollister*, 3 Fed. 452; *Stewart v. Armstrong*, 56 Fed. 171; *In re Souther*, 2 Low. 322, Fed. Cas. No. 13184; *Bk. v. Pierce*, 137 N. Y. 444; see *Downing v. Bk.*, 11 N. B. R. 372, Fed. Cas. No. 4046.

37—*Nat. Bk. of So. Reading v. Sawyer*, 3 N. B. N. R. 266, 6 A. B. R. 154.

renders and may notwithstanding such preferred creditors prove their claims.<sup>38</sup>

Provability of claims of indorsers is fully treated elsewhere.<sup>39</sup>

### § 598. — Pledgor.

The payee in a note of the bankrupt is entitled to prove it though he has pledged the same as collateral security for his own note.<sup>40</sup>

### § 599. — Proof previously filed by another.

The fact that another person has previously come forward as a creditor upon the same account does not affect a claimant's right to offer proof of its debt.<sup>41</sup>

### § 600. Filing proof of claim.

### § 601. — Necessity of filing.

A creditor who retains possession of the proof of his claim and does not file it, has not proven his claim.<sup>42</sup>

### § 602. — Filing instrument upon which claim founded.

Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, must be filed with the proof of claim.<sup>43</sup> The failure to file with the proof of notes the originals, is a sufficient bar to their allowance, and the filing of a list giving the date, amount, date of maturity and the names of the makers, will not answer in lieu thereof.<sup>44</sup> The holder of

38—*Swarts v. Fourth Nat. Bank of St. Louis*, 117 Fed. 1.

39—See *ante*, § 519.

40—*Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 24 L. R. A. (N. S.) 184, 20 A. B. R. 40.

41—*In re Dunlap Carpet Co.*, 171 Fed. 532, 22 A. B. R. 788.

42—*In re Sheppard*, 1 N. B. R. 115, Fed. Cas. No. 12753.

43—Sec. 57b, Act of 1898. Analogous provision of Act of 1867. "Sec. 24. . . . A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left

in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon."

Notes should be filed with the proof of claim based thereon. *In re Goldstein*, 199 Fed. 665, 29 A. B. R. 301.

44—*In re McCauley*, 2 N. B. R. 1085.

an indorsed note who does not himself prove it on the bankruptcy of the maker is not required to tender it to the indorser, in order that he may file it as required by the act, but the better practice is to obtain the note by furnishing indemnity to the holder, when it may be filed with proof of the claim, or have the holder prove the claim and file the note upon suitable indemnity against risk, loss or expense.<sup>45</sup>

If the instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction must be filed under oath with the claim.<sup>46</sup>

After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.<sup>47</sup> A creditor may withdraw the written instrument after the claim has been passed upon, if a copy is left on file, but the trustee has the right to demand the production of the original when the dividends are paid, that they may be properly indorsed.<sup>48</sup>

### § 603. — Place of filing.

The proof of debt should be filed with the clerk of court unless the petition has been referred, in which event it should be filed with the referee in charge of the case, and if any proofs have been received by the trustee, they must be delivered to said referee.<sup>49</sup>

### § 604. — Duty of court to receive proofs.

The court has no discretion as to receiving and filing a proof which appears on its face to have been taken by a proper officer and to be correct in form and substance.<sup>50</sup>

### § 605. — Effect of filing.

By the receipt and filing of the proof of debt, the court obtains jurisdiction of the claim and of the creditor presenting it, and then only does its revising power over such proof commence, the

45—Nat. Bk. of So. Reading v. Sawyer, 3 N. B. N. R. 266, 6 A. B. R. 154.

46—Sec. 57b, Act of 1898.

47—Sec. 57b, Act of 1898.

48—In re Emison, 2 N. B. R. 179, Fed. Cas. No. 4459.

49—Act of 1898 § 57c. G. O. XX.; In re Ankeny, 1 N. B. N. 482.

50—In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9463.

receiving and filing concluding nothing, but the court retaining full power to revise and correct, or reject altogether.<sup>51</sup>

### § 606. Time for making proof.

Section 57n of the act provides that, "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

This provision is an absolute prohibition against proof and allowance of claims when presented after the expiration of one year,<sup>52</sup> and, instead of being an enlargement of a creditor's rights, operates as a restriction, and does not authorize the withholding of dividends when ready, on proved and allowed claims; nor the delay of the final settlement and closing of an estate, when ready to be closed, nor the withholding from other creditors of money due them to give a negligent creditor further opportunity for the proof and allowance of his claim.<sup>53</sup> It has been held, however, that a claimant has the entire year within which to file his claim, and is in no way estopped by his failure to file the claim until within a short time of the expiration of the year.<sup>54</sup>

In computing the year the day of adjudication is excluded.<sup>55</sup>

The fact that a creditor failed to make his claim within the time limit through mistake or accident,<sup>56</sup> or that he received no notice of the pendency of the bankruptcy proceedings,<sup>57</sup> or was

51—*In re Merrick*, 7 N. B. R. 459, Fed. Cas. No. 9463.

52—*In re Knosco*, 208 Fed. 201, 31 A. B. R. 238; *In re Daniel*, 29 A. B. R. 284; *In re Meyer*, 181 Fed. 904, 25 A. B. R. 44; *Bray v. Cobb*, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788; *In re Shaffer*, 3 N. B. N. R. 54, 104 Fed. 982; *In re Hilton*, 3 N. B. N. R. 105.

53—*In re Stein*, 1 N. B. N. 339, 1 A. B. R. 662, 94 Fed. 124.

Creditor may prove his claim at any time within year, but if he fails to prove

his claim until after a final dividend has been declared he cannot participate in the distribution. *In re Coulter*, 206 Fed. 906, 30 A. B. R. 75.

54—*In re Dunlap Carpet Co.*, 206 Fed. 726, 30 A. B. R. 664.

55—*In re Co-operative Knitting Mills*, 202 Fed. 1016, 30 A. B. R. 181.

56—*In re Sanderson*, 160 Fed. 278, 20 A. B. R. 396.

57—*In re Muskoka Lumber Co.*, 127 Fed. 886, 11 A. B. R. 761.

not scheduled as a creditor,<sup>58</sup> or that he was misled by a statement in the bankrupt's schedules as the value of a particular asset<sup>59</sup> does not entitle him to file his proof of claim after the year, though it is held that where claimants fail to file their claims because no assets are scheduled by the bankrupt, they may upon reopening of the estate upon the ground of newly administered assets be allowed a year from the time of the order reopening the estate to file their claims.<sup>60</sup> A referee's refusal to reopen a case to allow a creditor who has been guilty of laches in presenting his claim, will be upheld unless there is manifest error.<sup>61</sup> In case of an appeal from the order of adjudication and the dismissal of such appeal, the period of limitation is to be computed from the date of such dismissal.<sup>62</sup>

The provision must be limited to claims as to which the filing of proof is necessary, and where the creditor is in a position to file the necessary proof with the referee, or to elect not to do so,<sup>63</sup> and does not apply to claims filed by the United States,<sup>64</sup> or to claims of a city for taxes,<sup>65</sup> or to claim for services as general assignee under an assignment for creditors.<sup>66</sup>

Section 57n requires something more than the mere making of proof according to section 57a to be done within the year. The filing or presentation in some form in the bankruptcy proceedings is also necessary to prevent a claim from being barred by the provisions of that section.<sup>67</sup> However, the presentation and delivery of proofs of claim to the trustee in bankruptcy before the expiration of the year after adjudication is a sufficient compliance with the statute though the claims are not actually filed with the referee until after that time.<sup>68</sup> This construction

58—In re Lane, 125 Fed. 772, 11 A. B. R. 136.

59—In re Peck, 168 Fed. 48, 21 A. B. R. 707, aff'g 161 Fed. 762, 20 A. B. R. 629.

60—In re Pierson, 174 Fed. 160, 23 A. B. R. 58.

61—In re Wood, 95 Fed. 946, 2 A. B. R. 695, 1 N. B. N. 430.

62—In re Lee, 171 Fed. 266, 22 A. B. R. 820.

63—In re Strobel, 163 Fed. 787, 20 A. B. R. 884,

64—In re Stoeve, 127 Fed. 394, 11 A. B. R. 345.

65—In re Flatau & Stern, 21 A. B. R. 352.

66—In re Levitt, 126 Fed. 889, 11 A. B. R. 411.

67—In re French, 181 Fed. 583, 25 A. B. R. 77.

68—Oreutt Co. v. Green, 204 U. S. 96, 51 L. ed. 390, 17 A. B. R. 72, rev'g 137 Fed. 517, 13 A. B. R. 512; In re Fair-lamb Co., 199 Fed. 278, 28 A. B. R. 515. But see In re Pettingill & Co., 137 Fed. 840, 14 A. B. R. 763.

of the act, however, will not permit the trustee to file with himself his proof of his own claim, and a delivery of such claim to his attorney or employee cannot make such delivery stand in the place of a delivery to the referee.<sup>69</sup>

It is not necessary, where claims are liquidated by litigation, that the suit or liquidation be commenced within one year after the adjudication,<sup>70</sup> or that final judgment in the litigation be rendered within thirty days of the expiration of the year, either before or after,<sup>71</sup> in order that the claimant may thereafter prove his claim, nor need the litigation in terms relate to the amounts due the claimant, it being sufficient that the question litigated necessarily involved the determination of the net amount for which the claim should finally be allowed.<sup>72</sup> Negotiations between the trustee and the claimant to offset a judgment in favor of one against a judgment in favor of the other cannot avail to suspend the exception of section 57n "if they are liquidated by litigation."<sup>73</sup>

Litigation to determine the validity of a lien or preference is a liquidation within the meaning of section 57n, and, where such litigation is determined adversely to the creditor, he may thereafter prove a claim at any time within sixty days after the rendition of the judgment though a year has expired since the adjudication.<sup>74</sup> An agreement entered into pending a litigation between the trustee and a creditor, as to the value of the security

69—In re Lathrop, Haskins & Co., 197 Fed. 164, 28 A. B. R. 756; Orcutt Co. v. Green, 204 U. S. 96, 51 L. ed. 390, 17 A. B. R. 72, rev'g 137 Fed. 517, 13 A. B. R. 512.

70—In re Clark, 176 Fed. 955, 24 A. B. R. 388.

71—In re Noel, 150 Fed. 89, 18 A. B. R. 10, rev'g 144 Fed. 439, 16 A. B. R. 457; contra, In re Kemper, 142 Fed. 210, 15 A. B. R. 675.

72—In re Keyes, 160 Fed. 763, 20 A. B. R. 183.

73—In re Clover Creamery Ass'n, 176 Fed. 907, 23 A. B. R. 884.

74—In re Cahill, 30 A. B. R. 794; In re Noel, 150 Fed. 89, 18 A. B. R. 10, rev'g 144 Fed. 439, 16 A. B. R. 457; In re Fagan, 140 Fed. 758, 15 A. B. R. 520; In re Salvator Brewing Co., 193 Fed.

989, 28 A. B. R. 56; aff'g 188 Fed. 522, 26 A. B. R. 21; In re Salvator Brewing Co., 188 Fed. 522, 26 A. B. R. 21; In re Clark, 176 Fed. 955, 24 A. B. R. 388; In re Lange Co., 170 Fed. 114, 22 A. B. R. 414; In re Coventry Furniture Co., 171 Fed. 673, 22 A. B. R. 623; In re Baker Notion Co., 180 Fed. 922, 24 A. B. R. 808; In re Clark, 176 Fed. 955, 24 A. B. R. 388; see also, Page v. Rogers, 211 U. S. 575, 53 L. ed. 332, 21 A. B. R. 496, rev'g 140 Fed. 596, 15 A. B. R. 502; In re Standard Tel. & Elec. Co., 186 Fed. 586, 26 A. B. R. 601. But see In re Rhoades, 3 N. B. N. R. 112, 105 Fed. 231; In re Leibowitz, 108 Fed. 617, 6 A. B. R. 268; In re Baird, 154 Fed. 215, 18 A. B. R. 655, overruling; In re Baird & Co., 18 A. B. R. 228.

held by the creditor is also considered a liquidation by litigation within the meaning of the section<sup>75</sup> but not litigation between third parties.<sup>76</sup>

Where a state law prescribes a limited time in which to file a lien claim, such limitation is the *lex fori* of the state courts, but is not binding upon the courts of bankruptcy, in which the limitation for filing all claims is one year; and, if a lien is perfected with the exception of filing it in court, it will hold, if filed within such time, provided other rights do not intervene through lack of notice of the lien.<sup>77</sup> Section 63 of the law permitting provable debts reduced to judgments after the filing of the petition and before the discharge, to be proved does not enlarge the time for proving such debts beyond the year to which proof is limited by this section.<sup>78</sup>

A clear statement of a claim in writing duly verified and filed with the referee, if made within a year, is sufficient to take a claim out of the statutory limitation, even though it may be allowed or liquidated, afterwards.<sup>79</sup>

### § 607. Manner of making proof.

### § 608. — In general.

No creditor is entitled to participate in the distribution of the bankrupt estate, unless his claim or debt has been proved in the manner and within the time required by law.<sup>80</sup> Section 57a provides that "Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and if so, what securities are held therefor, and whether any, and if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."<sup>81</sup>

75—First Nat. Bank of Atlanta, Tex., v. Cameron, 209 Fed. 611, 31 A. B. R. 209, 695.

76—In re Daniel, 29 A. B. R. 284.

77—In re Rude, 2 N. B. N. R. 498; In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 891; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 Fed. 592, 3 A. B. R. 437; contra, Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104; In re Brunquest, 14 N. B. R. 529, 7 Biss. 208, Fed. Cas. No. 2055.

78—In re Leibowitz, 108 Fed. 617, 6 A. B. R. 268.

79—In re Mertens & Co., 147 Fed. 177, 16 A. B. R. 825.

80—In re Goble Boat Co., 190 Fed. 92, 27 A. B. R. 48; In re Meyer, 181 Fed. 904, 25 A. B. R. 44.

81—Analogous provision of Act of 1867. "Sec. 22. . . . That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district



All the formalities of ordinary pleading do not apply to the making of proof.<sup>82</sup> The statute and general forms should, however, be followed, wherever possible.<sup>83</sup> The deposition must be correctly entitled in the court and in the cause, but an omission in this regard is not fatal.<sup>84</sup> It should give in full at least one Christian name of the affiant and of the bankrupt, in addition to the surname,<sup>85</sup> and the address of the party making proof. A material fact which cannot be conclusively implied from the statements of the proof of a claim, must be found upon a trial thereof.<sup>86</sup>

### § 609. — Statement of consideration.

The proof of claim must set forth the consideration,<sup>87</sup> fully and explicitly giving sufficient facts to enable the trustee and creditors to determine the justice and legality of the claim.<sup>88</sup> A

where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial district where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation before the proper register or commissioner setting forth the demand, the consideration thereof (Here follows requirement as to contents of oath.) . . . Such oath or solemn affirmation shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge; or if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive

further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer.”

82—*Spencer v. Lowe*, 198 Fed. 961, 29 A. B. R. 876; *Kelsey v. Munson*, 198 Fed. 841, 28 A. B. R. 520; *In re Mertens & Co.*, 147 Fed. 177, 16 A. B. R. 825; *In re Carter*, 138 Fed. 846, 15 A. B. R. 126.

83—*In re Dunn Hdwe. & Furn. Co.*, 132 Fed. 719, 13 A. B. R. 147.

84—*In re Blue Ridge Packing Co.*, 125 Fed. 619, 11 A. B. R. 36.

85—*In re Valentine*, 12 N. B. R. 389, 4 Biss. 417, Fed. Cas. No. 16812.

86—*In re Stevens*, 107 Fed. 243, 5 A. B. R. 806.

87—Act of 1898, Sec. 57a; *In re Stevens*, 104 Fed. 325, 5 A. B. R. 11.

88—*Spencer v. Lowe*, 198 Fed. 961, 29 A. B. R. 876; *In re United Wireless Tel. Co.*, 201 Fed. 445, 29 A. B. R. 848; *Orr v. Park*, 183 Fed. 683, 25 A. B. R. 544.

Proof of claim which merely sets forth that the bankrupt owed claimant a certain sum of money, which sum was to have been paid by the issuance and delivery to him of preferred stock held too indefinite. *In re United Wireless Tel. Co.*, 201 Fed. 445, 29 A. B. R. 848.

general statement that there was a consideration is not sufficient.<sup>89</sup> The statement of the consideration ought to be such as, if true, not to put the trustee or creditors upon proof, or require oral explanation from the claimants.<sup>90</sup> Where the consideration for a note presented for proof is set forth in the creditor's deposition as goods, wares, merchandise, etc., there should be stated the kind of goods, the quantity, the price, the date of the transaction and time of delivery, if delivered at one time, or, if delivered continuously through a period of time, that period should be stated.<sup>91</sup> A statement that the claim is for merchandise sold when in fact it is for a balance of a running account is not a fatal defect when in fact the merchandise sold constitutes the major part of the consideration.<sup>92</sup>

### § 610. — Assigned claims.

A claim which has been assigned before proof must be supported by deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims.<sup>93</sup> A claim presented by one who has assigned the same prior to the bankruptcy proceedings may be amended, even after the expiration of the year, so as to be in the name of the real owner, and supported by his deposition.<sup>94</sup>

### § 611. — Open accounts.

As in other cases, a proof of claim based upon open account should be specific in the statement of the consideration, and the account should be itemized,<sup>95</sup> the proof must state when the

Proof of claim of officer of bankrupt corporation alleging that the claimant was in the employ of the bankrupt "from on or about November 1, 1903, to on or about November 1, 1906" and that the amount of \$1,117.94 was due him for salary when he left the bankrupt's employ without alleging character of employment held too indefinite. *Id.*

89—In re Coventry Evans Furniture Co., 166 Fed. 516, 22 A. B. R. 272.

90—In re Creasinger, 17 A. B. R. 538.

91—In re Elder, 3 N. B. R. 165, 1 Sawy. 73, Fed. Cas. No. 4326.

Proof simply stated to be for "ser-

vices, mds., &c., "bal. of wages," "for goods sold and delivered," and the like are insufficient. In re Morris, 154 Fed. 211, 18 A. B. R. 828.

92—In re Watertown Paper Co., 169 Fed. 252, 22 A. B. R. 190.

93—In re Mills, 17 N. B. R. 472, Fed. Cas. No. 9612.

94—In re McCarthy Portable Elevator Co., 205 Fed. 985, 30 A. B. R. 247.

95—In re Scott, 1 N. B. N. 402, 1 A. B. R. 553, 93 Fed. 418; In re Chasoff, 3 N. B. N. R. 1; In re Blue Ridge Packing Co., 125 Fed. 619, 11 A. B. R. 36; In re Creasinger, 17 A. B. R. 538.

debt became or will become due; and if it consists of items maturing at different dates, the average date due, in default of which it will not be necessary to compute interest upon it. All such depositions must contain an averment that no note has been received for such account, nor any judgment rendered thereon.<sup>96</sup>

### § 612. — Priority claims.

The proof of claim must state facts, if any, which show the claim entitled to preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or a "preferred claim."<sup>97</sup>

### § 613. — Instruments in writing.

A general allegation of the consideration for claims founded upon instruments in writing is insufficient, but it should extend to the particulars, though it need not be beyond what relates to the claim as it accrued to the claimant.<sup>98</sup> If on notes some of which are payable so many days after date, and others so many days after discount, the proof should show the date of the discounts, and the amount advanced as consideration for each.<sup>99</sup> In the case of the holder of bankrupt's paper, he must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper.<sup>1</sup> It is not sufficient to say that the bankrupt is indebted to the claimant in a certain sum, and that the consideration for the debt is a written promise to pay it reciting "for value received."<sup>2</sup>

The proof on a note upon which the bankrupt is indorser should explicitly state the action taken to fix his liability.<sup>3</sup>

96—G. O. XXI (1); In re Goble Boat Co., 190 Fed. 92, 27 A. B. R. 48.

97—In re Dunni, 181 Fed. 701, 25 A. B. R. 103. But see In re Jones, 151 Fed. 108, 18 A. B. R. 206, holding that priority need not be claimed in the petition for the proof of claim, but may be asserted at any time, in connection with or before the payment of dividends.

98—In re Stevens, 107 Fed. 243, 5 A. B. R. 806.

99—In re Stevens, 104 Fed. 325, 5 A. B. R. 11.

1—In re Howard, Cole & Co., 6 N. B. R. 372, Fed. Cas. No. 6751.

2—In re Coventry Evans Furniture Co., 166 Fed. 516, 22 A. B. R. 272.

3—In re Stevens, 104 Fed. 325, 5 A. B. R. 11.

### § 614. Verification of proof of claim.

A claim is not entitled to allowance unless verified.<sup>4</sup> The oath thereto may be administered by a referee, United States commissioner, notary public, or other officer authorized to administer oaths in proceedings before the United States courts or under the laws of the states, and diplomatic and consular officers in a foreign country.<sup>5</sup> If made abroad it must be in accordance with the requirements of the federal laws.<sup>6</sup>

The attorney of a creditor may take the oath of his client as a notary,<sup>7</sup> though the contrary was held under the act of 1867.<sup>8</sup> A notary public, before whom proof is made, must authenticate the same by his official seal as well as his signature.<sup>9</sup>

The vital facts to support a proof of claim should be made to appear by positive averments, founded on deponent's knowledge, and not upon information and belief,<sup>10</sup> but informalities in the proofs are not material where the creditor, as a witness, has sworn positively of his own knowledge.<sup>11</sup> In the case of any defect in the verification, it may be amended.<sup>12</sup>

### § 615. Amendment of proof.

### § 616. — In general.

A judge or referee may in his discretion allow a proof of debt<sup>13</sup> or the verification of a claim to be amended, and, in case

4—In re United Wireless Tel. Co., 201 Fed. 445, 29 A. B. R. 848.

5—Sec. 20, Act of 1898; G. O. XXI (5); In re Sugenhimer, 1 N. B. N. 59, 1 A. B. R. 425, 91 Fed. 744; In re Pan-coast, 129 Fed. 643, 12 A. B. R. 275.

6—Robert v. Lynch, 16 N. B. R. 38, Fed. Cas. No. 8635.

7—In re Kimball, 2 N. B. N. R. 46, 4 A. B. R. 144, 100 Fed. 777; McDonald v. Willis, 143 Mass. 542.

8—In re Nebe, 1 N. B. R. 289, Fed. Cas. No. 10073; In re Keyser, 9 Ben. 224, Fed. Cas. No. 7748; see also In re Brum-elkamp, 1 N. B. N. 360, 95 Fed. 814, 2 A. B. R. 318.

9—In re Nebe, *supra*; but see In re Strauss, 2 N. B. R. 18, Fed. Cas. No. 13532; In re Haley, 2 N. B. R. 13, Fed. Cas. No. 5918.

10—In re United Wireless Tel. Co., 201 Fed. 445, 29 A. B. R. 848.

11—McKinsey v. Harding, 4 N. B. R. 10, Fed. Cas. No. 8866.

12—In re Stevens, 107 Fed. 243, 5 A. B. R. 806; In re Medina Quarry Co., 179 Fed. 929, 24 A. B. R. 769.

13—In re Salvator Brewing Co., 193 Fed. 989, 28 A. B. R. 56; In re Stevens, 107 Fed. 243, 5 A. B. R. 806.

Evidence given on the hearing in relation to the validity of an assignment of securities held by several indorsees of the bankrupt's notes to one of their number held to amount substantially to a proof of the claim, and same held amenable by annexing to it the formal proofs. In re Salvator Brewing Co., 188 Fed. 522, 26 A. B. R. 21.

of inadvertence, mistake or ignorance, whether of fact or law, will generally exercise that power, in the absence of fraud, when justice seems to require that the amendment be made and when all parties can be placed in the same situation they would have occupied if the error had not occurred.<sup>14</sup>

In the administration of the law, its fundamental principle of equal distribution among the creditors, would seem to forbid the exercise of this discretion in the interest of one creditor to the prejudice of others, as where a claim is proved as unsecured, and subsequently an endeavor is made to set up the claim as an equitable lien when there is no perfected security in the creditor's favor, but only a contingent and inchoate lien in the effort to secure a preference by litigation.<sup>15</sup> So, an amendment whereby the claimant claims as a contractor upon an agreement made directly with the bankrupt, instead of claiming to be entitled to a lien as a subcontractor will not be allowed to the prejudice of other creditors.<sup>16</sup>

Where proof is made on an old promissory note, an amendment should not be permitted to show that a new note was given, for which the old note was part consideration, but such new note should be proved independently.<sup>17</sup>

If the proof is insufficient and is not amended upon leave, it will be expunged.<sup>18</sup> However, a claim of which a part only is sustained by the proof need not be amended and resworn before it can be allowed<sup>19</sup> and the fact that the account annexed, and made part of the proof, fails as to certain items because of the illegality of the transaction out of which they arose, does not require an amendment where the other items set out a valid claim.<sup>20</sup>

14—*In re Fairlamb Co.*, 199 Fed. 278, 28 A. B. R. 515; *Streeter v. Lowe*, 184 Fed. 263, 25 A. B. R. 774; *In re Myers*, 99 Fed. 691; *In re Wilder*, 2 N. B. N. R. 629, 101 Fed. 104, 3 A. B. R. 761; *In re Parkes*, 10 N. B. R. 82; *Fed. Cas. No. 10754*; *In re Friedman*, 1 N. B. N. 208, 1 A. B. R. 510; *In re Clark & Beninger*, 5 N. B. R. 255, *Fed. Cas. No. 2806*; *In re Jaycox & Green*, 8 N. B. R. 241, *Fed. Cas. No. 7242*; *In re McConnell*, 9 N. B. R. 387, *Fed. Cas. No. 8712*.

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15—*In re Wilder*, 2 N. B. N. R. 629, 101 Fed. 104, 3 A. B. R. 761; see *In re Lesser*, 99 Fed. 913, 3 A. B. R. 758.

16—*In re Miner's Brewing Co.*, 162 Fed. 327, 20 A. B. R. 717.

17—*In re Montgomery*, 3 N. B. R. 109, *Fed. Cas. No. 9731*.

18—*In re Scott*, 1 N. B. N. 402, 93 Fed. 418, 1 A. B. R. 553.

19—*In re Goldstein*, 199 Fed. 665, 29 A. B. R. 301.

20—*Streeter v. Lowe*, 184 Fed. 263, 25 A. B. R. 774.

The sufficiency of the amended proof is to be determined on its face, irrespective of prior proofs, except as to whether it is substantially the same claim.<sup>21</sup>

**§ 617. — Period during which amendment may be allowed.**

The right of amendment extends to all matters forming a part of the proof and will generally be permitted so long as proof of a debt may be made,<sup>22</sup> provided the claim has not been settled or dividend received on account, in which event the holder would probably be estopped unless good and sufficient reasons are shown. It has been held, however, that the amendment may be permitted, even after the expiration of the time for proving claims, if there be enough on the original proof by which to amend,<sup>23</sup> but not if a new cause of action is set up thereby.<sup>24</sup>

The scheduling of a creditor by the bankrupt, or the appearance of his name on the list of creditors filed in pursuance to a local rule is not such a statement of the claim as to permit of its being filed by a so-called amendment after the expiration of the year.<sup>25</sup> An amendment transferring a claim from the individual estate of a partner to the firm estate has been allowed after the expiration of the year,<sup>26</sup> but it has been held that where the original claim is upon a firm note, the creditor cannot amend after the expiration of the year so as to add a claim as against a

21—In re Stevens et al., 107 Fed. 243, 5 A. B. R. 806.

22—In re Moebius, 116 Fed. 47, 8 A. B. R. 590; In re Stevens et al., 107 Fed. 243, 5 A. B. R. 806.

23—In re Hamilton Automobile Co., 209 Fed. 596, 31 A. B. R. 205; Brown v. O'Connell, 200 Fed. 229, 29 A. B. R. 653; In re Daniel, 29 A. B. R. 284; In re Basha & Son, 200 Fed. 951, 29 A. B. R. 225; Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179, 10 A. B. R. 135, aff'g 115 Fed. 937, 8 A. B. R. 382; In re Kessler & Co., 184 Fed. 51, 25 A. B. R. 512, rev'g 176 Fed. 647, 23 A. B. R. 901; In re Horne & Co., 23 A. B. R. 590; In re Faulkner, 161 Fed. 900, 20 A. B. R. 542; In re Creasinger, 17 A. B. R. 538; Buckingham v. Estes, 128 Fed. 584, 12 A. B. R. 182; In re Roebér, 127 Fed. 122, 11 A. B. R. 464.

An amendment may be made even after the year, if the claim proved presents that which the amendment seeks to make effective. In re McCarthy Portable Elevator Co., 205 Fed. 986, 30 A. B. R. 247.

Where the trustee under a mortgage made proof before the referee which was sufficient to enable him to insist upon the lien of the mortgage, the presentation of the bonds secured by such mortgage could be considered as a claim, although informal, which might be amended after the expiration of the year. In re Standard Tel. & Elec. Co., 186 Fed. 586, 26 A. B. R. 601.

24—In re Watkinson, 143 Fed. 602, 16 A. B. R. 245.

25—In re Basha & Son, 27 A. B. R. 435.

26—In re Horne & Co., 23 A. B. R. 590.

partner based upon his indorsement of the note.<sup>27</sup> An amendment increasing the amount of the claim will not be permitted after the expiration of the year,<sup>28</sup> nor an amendment setting up a payment upon the debt due from the bankrupt where the effect of allowing same will be to prevent the claim from being outlawed.<sup>29</sup>

A creditor, after examination before the referee touching his claim, has been allowed to file supplemental proof corresponding with the facts shown by his testimony.<sup>30</sup>

### § 618. Surrender of preferences.

#### § 619. — What must be surrendered.

A creditor who holds a voidable preference may file formal proof thereof but cannot obtain allowance without its surrender.<sup>31</sup> By the amendment of February 5, 1903, section 57g of the act was made to read as follows:

“The claims of creditors who have received preferences, voidable under section 60, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.”<sup>32</sup>

This amendment changes the law in such material respects as to render many of the earlier decisions under the law as it now exists almost valueless as authority. The amendment requires that as a condition precedent to the proof of a claim, there must be first surrendered (1) a preference voidable under section 60b. As a preference is defined by section 60a as occur-

27—In re McCallum & McCallum, 127 Fed. 768, 11 A. B. R. 447.

28—In re Mowery, 22 A. B. R. 239.

29—In re Girvin, 160 Fed. 197, 20 A. B. R. 490.

30—In re Montgomery, 3 N. B. R. 108, Fed. Cas. No. 9729.

31—Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 17 A. B. R. 609.

32—Prior to the amendment the section read: “The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.”

Analogous provision of Act of 1867. “Sec. 23. . . . Any person who, after approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.”

ring where an insolvent within four months of bankruptcy procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, with the result that such creditor shall receive a greater proportion of his debt than other creditors, such transfer, whether of property or money, or the amount recovered by such judgment must be surrendered prior to proving the claim, if the person receiving the same or to be benefited thereby had reasonable cause to believe that a preference would thereby be effected.<sup>33</sup> (2) The law also provides that there shall be surrendered all conveyances, transfers, assignments or incumbrances on the bankrupt's property, within four months of the filing of the petition, with the intent and purpose on the bankrupt's part to hinder, delay or defraud creditors, or any of them, or if made by the bankrupt while insolvent within the same period, and which conveyances, transfers or incumbrances are null and void as against the creditors of the debtor by the laws of the state.

It will be observed, therefore, that a surrender of a preference is only necessary where the elements necessary to render it voidable under section 60, subdivision b, are present,<sup>34</sup> which under the amendment of 1910 include reasonable cause to believe a preference would be effected,<sup>35</sup> or where the transfer by the debtor was with the intent and purpose to hinder, delay or defraud creditors, or was voidable as against creditors under the laws of the state.<sup>36</sup>

The mere preferential transfer of a worthless claim does not come within the meaning of 57g requiring surrender.<sup>37</sup>

33—Section 60a and 60b determine what preferences are to be surrendered. *Little v. Holley Brooks Hdwr. Co.*, 133 Fed. 874, 13 A. B. R. 422.

34—In *re Greenberger*, 203 Fed. 583, 30 A. B. R. 117; In *re Carlile*, 199 Fed. 612, 29 A. B. R. 373; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 13 A. B. R. 447, rev'g 129 Fed. 728, 12 A. B. R. 111.

Attachment within four months of bankruptcy under the law of a foreign country not recognizing the Bankruptcy

Act held not a voidable preference which should be surrendered. *Boden & Haac v. Lovell*, 203 Fed. 234, 30 A. B. R. 353.

35—See In *re Mayo Contracting Co.*, 157 Fed. 469, 19 A. B. R. 551; In *re Andrews*, 144 Fed. 922, 16 A. B. R. 387; aff'g 135 Fed. 599, 14 A. B. R. 247; In *re Bloch*, 142 Fed. 674, 15 A. B. R. 748; decided prior to amendment of 1910.

36—In *re Clark*, 176 Fed. 955, 24 A. B. R. 388.

37—In *re Hamilton Automobile Co.*, 209 Fed. 596, 31 A. B. R. 205.



The surrender of a preference is not necessary unless the creditor claims for the excess of the security held by him.<sup>38</sup>

A preferential mortgage on both exempt and non-exempt property need not be released so far as the exempt property is concerned as a condition to the proof of claim on the debt secured by it, but must be surrendered so far as the assets of the bankrupt are a fund for creditors.<sup>39</sup>

The disqualifications of a claim because of a preference inheres in and follows every part of the claim, whether retained by the creditor or transferred to another. So, where a creditor cannot prove his claim without first surrendering a preference under section 57g, a guarantor who has paid the remainder of the debt since the adjudication is subject to the same condition, and can prove the claim only on returning to the estate the amount of such preference.<sup>40</sup> However, if a bank in good faith discounts for a customer the note of a third party, indorsed by the customer, the bank may prove the debt against the estate of the maker, although the indorser had received preferences which he would have been required to surrender before he could prove the claim.<sup>41</sup>

A surety who has paid his principal's debt after the latter's bankruptcy is not required to surrender preferential payments received by the creditor as a condition to the proving of his claim which arises from the payment made by him and through subrogation.<sup>42</sup>

### § 620. — Surrender of preference given within four months.

While prior to the amendment of 1903, the statute specified no time limit within which preferences given to a creditor must be surrendered before proof could be made of the balance of the claim, by analogy to other provisions, the courts generally read into the law the period of four months prior to the filing of the petition,<sup>43</sup> though it was also held that this period applied only

38—In re Keystone Press, 203 Fed. 710, 29 A. B. R. 715.

39—In re Bailey, 176 Fed. 990, 24 A. B. R. 201.

40—In re Schmechel Cloak & Suit Co., 104 Fed. 64, 3 N. B. N. R. 110.

41—In re Wyley et al., 116 Fed. 38.

42—In re New, 116 Fed. 116, 8 A. B. R. 566.

43—In re Beswick, 2 N. B. N. R. 808; In re Fixen, 2 N. B. N. R. 885, 102 Fed. 295, 50 L. R. A. 605, 4 A. B. R. 10; In re Sloan, 102 Fed. 116, 4 A. B. R. 356; In re Arndt, 104 Fed. 234, 3 N. B. N. R. 101; In re Castle, 2 N. B. N. R. 985; In re Wise, 2 N. B. N. R. 151; In re Jourdan, 2 N. B. N. R. 581; In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 933; In re

in case the creditor had knowledge or reasonable cause to believe that an interdicted act had been committed, but if he had no knowledge the day of cleavage was the day the petition was filed;<sup>44</sup> also that such payment must be surrendered, although received more than four months prior to bankruptcy.<sup>45</sup> By the amendment referred to, the four months' period prior to the filing of the petition has been specified.

### § 621. — Surrender prior to amendment of 1903.

There is perhaps no provision of the law that was the subject of greater discussion or of such diversity of opinion as section "57g" as it appeared prior to the amendment. As originally enacted it provided "that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." This section was the subject of consideration by the supreme court of the United States in the famous case of *Carson, Pirie, Scott & Co. v. The Chicago Title & Trust Co.*,<sup>46</sup> and by a decision of five to four that court held that payments made by an insolvent debtor to a creditor is the usual course of business, must be first surrendered as a condition of proving the balance of the debt or other claims of the creditor, notwithstanding the fact that the debtor had no intention of giving a preference and the creditor was without reasonable cause to believe that a preference was thereby intended. In answer to the contention that the term "transfer of any of his property," as used in section 60a, to which reference was necessarily made for a solution of what constituted a preference, the court held that the word "transfer" included not only the sale of property, but also every other mode of disposing or parting with property. The word was used in its most comprehensive sense, all technicality and narrowness of meaning being precluded, and accordingly included the transfer of money as well as of property.

The amendment enables a creditor to retain a preferential payment or transfer where there is lacking a reasonable cause

Harry Dickinson, 7 A. B. R. 679; contra, *In re Jones*, 110 Fed. 736, 4 A. B. R. 563; *In re Abraham Steers Lumber Co.*, 110 Fed. 738, 6 A. B. R. 315.

<sup>44</sup>—*In re Hall*, 2 N. B. N. R. 1126, 4 A. B. R. 671.

<sup>45</sup>—*In re Jones*, 2 N. B. N. R. 961, aff'd 962, 4 A. B. R. 563.

<sup>46</sup>—182 U. S. 438, 45 L. ed. 1171, 5 A. B. R. 814.

to believe that a preference would be effected or that the purpose was to hinder, delay or defraud creditors. Accordingly, this makes valueless those decisions which were rendered prior to the amendment, which held that payments received in the usual course of business, although the creditor had no reasonable cause to believe that a preference was intended, must nevertheless be surrendered prior to proving a claim for the balance; the surrender being necessary whether either or both the debtor and the creditor intended a preference and were innocent in the transaction.<sup>47</sup>

The amendment also renders inapplicable the decisions which held that a creditor could not avoid the operation of this provision requiring the surrender of preferences by showing that he received it in the ordinary course of business, and that he had no knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was intended,<sup>48</sup> or that the

47—In re Fixen & Co., 2 N. B. N. R. 885, 102 Fed. 295, 50 L. R. A. 605, 4 A. B. R. 10; In re Jourdan, 2 N. B. N. R. 581; In re Hoffman, 2 N. B. N. R. 554; In re Knost & Wilhelmy, 1 N. B. N. 403, 2 A. B. R. 471, Fed. 409; In re Scott, 1 N. B. N. 226; In re Fort Wayne Elec. Corp., 2 N. B. N. R. 434, 99 Fed. 400; s. c. below 3 A. B. R. 186, 96 Fed. 803; In re Wise, 2 N. B. N. R. 151; In re Kohn, 2 N. B. N. R. 367; In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 Fed. 923; In re Nathan, 2 N. B. N. R. 613; In re Christensen, 2 N. B. N. R. 695; In re Eagles & Crisp, 2 N. B. N. R. 462, 99 Fed. 695, 3 A. B. R. 733; In re Richard, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506; In re Klingaman, 101 Fed. 691, 4 A. B. R. 254; In re Rogers Milling Co., 102 Fed. 687, 2 N. B. N. R. 973, 4 A. B. R. 540; In re Schmechel Cloak & Suit Co., 104 Fed. 64, 3 N. B. N. R. 110; In re Teslow, 2 N. B. N. R. 1024, 104 Fed. 229; In re Arndt, 104 Fed. 234, 3 N. B. N. R. 101; In re Siegel Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Thompson, 2 N. B. N. R. 1016; In re Beiber, 2 N. B. N. R. 943; Reed v. Phinney, 2 N. B. N. R. 1007; In re Castle, 2 N. B. N. R. 985; In re Jones, 2 N. B.

N. R. 961, 4 A. B. R. 563; In re Beswick, 2 N. B. N. R. 808; In re Durham, 2 N. B. N. R. 1101; In re Sloan, 102 Fed. 116, 4 A. B. R. 356; In re Thompson, 2 N. B. N. R. 1016; contra, In re Piper, 2 N. B. N. R. 7; Blakely v. Bk., 1 N. B. N. 411, 2 A. B. R. 460, 95 Fed. 267; In re Ryan, 2 N. B. N. R. 693; In re Locke, 1 N. B. R. 123, 1 Lowell, 293; In re Hall, 2 N. B. N. R. 1126, 4 A. B. R. 671; In re Smoke, 2 N. B. N. R. 831, aff'd 2 N. B. N. R. 996, 4 A. B. R. 434, 104 Fed. 289; In re Alexander, 2 N. B. N. R. 997, 102 Fed. 464, 4 A. B. R. 376; In re Keller, 109 Fed. 306, 6 A. B. R. 487; In re Oliver, 109 Fed. 784, 6 A. B. R. 626; In re Keller, 109 Fed. 118, 6 A. B. R. 334.

48—In re Fixen, 2 N. B. N. R. 885, 102 Fed. 295, 50 L. R. A. 605, 4 A. B. R. 10; In re Sloan, 102 Fed. 116, 4 A. B. R. 356; In re Arndt, 104 Fed. R. 234, 3 N. B. N. R. 101; In re Keller, 109 Fed. 118, 6 A. B. R. 334; In re Seckler, 106 Fed. 484, 5 A. B. R. 579; In re Waterbury Furniture Co., 114 Fed. 255, 8 A. B. R. 79; Mills v. Lewis, 110 Fed. 512, 6 A. B. R. 612; In re Lyon, 114 Fed. 326, 7 A. B. R. 412; In re Kellar, 110 Fed. 348, 6 A. B. R. 661; In re Bashline, 109 Fed. 965, 6 A. B. R. 194; In re Abraham

payment claimed as a preference was made upon a different debt than the one presented for allowance;<sup>49</sup> as the payment of one of several notes;<sup>50</sup> that the payment was in full discharge of specific bills, while the creditor held an open account against the bankrupt,<sup>51</sup> or where vendors secure return of a portion of the goods sold by them under an agreement that the property was pledged and hypothecated to the vendors as collateral security for the payment of the price with authority to take possession and dispose of the goods at their discretion;<sup>52</sup> a lien given within four months as security for an antecedent debt;<sup>53</sup> a loan repaid,<sup>54</sup> or that payment was made for the purpose of obtaining more goods on credit;<sup>55</sup> or where transactions are claimed to be for cash, but collections therefor are not made for some days subsequent to delivery of the goods;<sup>56</sup> or where a deed of trust<sup>57</sup> or mortgage is given to secure an antecedent debt;<sup>58</sup> or goods are replevined on the ground that the sale was rescinded because of bankrupt's fraud;<sup>59</sup> or that the claim was one entitled to priority of payment.<sup>60</sup>

### § 622. — To whom surrendered.

The surrender of a preference must be to the trustee and not to the bankrupt or any other person.<sup>61</sup>

Steers Lumber Co., 112 Fed. 406, 7 A. B. R. 332; *In re Dickinson*, 7 A. B. R. 679; *Carson, Pirie, Scott v. Trust Co.*, 182 U. S. 438, 45 L. ed. 1171, 5 A. B. R. 814; *In re Dickson*, 111 Fed. 726, 7 A. B. R. 186; but see *In re Ratliff*, 107 Fed. 80, 5 A. B. R. 713.

49—*In re Beswick*, 2 N. B. N. R. 808; *In re Rogers Milling Co.*, 102 Fed. 687, 2 N. B. N. R. 973, 4 A. B. R. 540; *contra*, *In re Hoffman*, 2 N. B. N. R. 554; *In re Wise*, 2 N. B. N. R. 151.

50—*Reed v. Phinney*, 2 N. B. N. R. 1007; *In re Conhaim*, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249; see *In re Myers*, 2 N. B. N. R. 765; *In re Castle*, 2 N. B. N. R. 985.

51—*In re Siegel Hillman Dry Goods Co.*, 2 N. B. N. R. 933; *In re Teslow*, 2 N. B. N. R. 1024, *aff'd* 104 Fed. 229.

52—*In re Klingaman*, 101 Fed. 691, 4 A. B. R. 254.

53—*In re Belding*, 116 Fed. 1016, 8 A. B. R. 718.

54—*In re Flick*, 105 Fed. 503, 5 A. B. R. 465; *In re Cotton*, 115 Fed. 158.

55—*In re Arndt*, 104 Fed. 234, 3 N. B. N. R. 101.

56—*In re Durham*, 2 N. B. N. R. 1101.

57—*In re Wright Lumber Co.*, 114 Fed. 1011, 8 A. B. R. 345.

58—*In re Leeman*, 1 N. B. N. 331, 2 A. B. R. 52.

59—*In re Heinsfurter*, 1 N. B. N. 504, 3 A. B. R. 113, 97 Fed. 198.

60—*In re Jones*, 2 N. B. N. R. 961, 4 A. B. R. 563; *In re Kohn*, 2 N. B. N. R. 367; but see *In re Magnus*, 3 N. B. N. R. 68; *In re Flick*, 3 N. B. N. R. 71.

61—*In re Bailey*, 176 Fed. 990, 24 A. B. R. 201.

### § 623. — Surrender after discharge of trustee.

The fact that the trustee is discharged and a composition is confirmed after the presentment of a claim but before its allowance does not absolve the claimant from surrendering a preference as a condition precedent to the allowance of his claim.<sup>62</sup>

### § 624. — Involuntary surrender of preference.

Under the act of 1867,<sup>63</sup> a creditor might surrender a preference and prove his claim, though if the surrender was not voluntarily made he was prohibited from proving his claim.<sup>64</sup> Under the present law a creditor who has received a preference

62—*In re Feinberg & Sons*, 187 Fed. 283, 26 A. B. R. 587.

63—Under sections 23 and 39 of the Act of 1867, it was held that a creditor, having reasonable cause to believe, or knowing by his agent at the time, that the debtor was insolvent, or that a fraud was intended, who, within four months of the bankruptcy proceedings, obtained a preference, could not prove his claim, and, in addition, was liable to lose his preference. (*In re Princeton*, 1 N. B. R. 178, 2 Biss. 116, Fed. Cas. No. 11433; *Bingham v. Richmond & Gibbs*, 6 N. B. R. 127, Fed. Cas. No. 1415; *Phelps v. Sterns*, *Id.* v. *Dudley*, 4 N. B. R. 7, Fed. Cas. No. 11080; *In re Kingsbury*, 3 N. B. R. 84, Fed. Cas. No. 7816; *In re Davidson*, 3 N. B. R. 106, 4 Ben. 10, Fed. Cas. No. 3599; *In re Walton*, 4 N. B. R. 154, Fed. Cas. No. 17130; *In re Stein*, 16 N. B. R. 569, Fed. Cas. No. 13352; *In re Coleman*, 2 N. B. R. 172, 7 Blatch. 192, Fed. Cas. No. 2979; *In re Cramer*, 13 N. B. R. 225, Fed. Cas. No. 3345; *In re Kaufman*, 19 N. B. R. 283, Fed. Cas. No. 7627); but this prohibition only applied where the creditor refused upon demand to surrender his preference and compelled the assignee to recover the same by suit. (*In re Hunt*, 5 N. B. R. 433, Fed. Cas. No. 6882); and a creditor who resisted suit could not prove his claim, where he was defeated in the action, though he paid the judgment recovered against him therein, such payment not being a surrender (*In re Rich-*

*ter's est.*, 4 N. B. R. 67, Fed. Cas. No. 11803; *In re Cramer*, 13 N. B. R. 225, Fed. Cas. No. 3345; *In re Tonkin*, 4 N. B. R. 13, Fed. Cas. No. 14094; *In re Lee*, 14 N. B. R. 89, Fed. Cas. No. 8179; *contra*, *In re Newcomber*, 18 N. B. R. 85, Fed. Cas. No. 10148).

64—*Surrender under Act of 1867.*—Where a preference was knowingly received by a creditor he was debarred from proving the debt thereby sought to be secured unless, previous to suit brought by the assignee to set aside the preference, he surrendered the same (*In re Leland*, 9 N. B. R. 209, 7 Ben. 156, Fed. Cas. No. 8230; *In re Scott*, 4 N. B. R. 139, Fed. Cas. No. 12518; *In re Montgomery*, 3 N. B. R. 97, Fed. Cas. No. 9728; *In re Hunt*, 5 N. B. R. 433, Fed. Cas. No. 6882; *contra*, *In re Currier*, 13 N. B. R. 68, 2 Lowell, 436, Fed. Cas. No. 3492); and a full surrender was a complete condonation of the offense (*In re Stephens*, 6 N. B. R. 533, Fed. Cas. No. 13365; *In re Leland*, *supra*; *In re Saunders*, 13 N. B. R. 164, 2 Low. 444, Fed. Cas. No. 12371); but a repayment of a preference to the debtor did not take the place of a surrender to the assignee (*In re Currier*, *supra*). It was also held that a preference would not bar the proof of a claim unless it was given and received by the parties to the debt (*In re Comstock & Co.*, 12 N. B. R. 110, 3 Sawy. 320, Fed. Cas. No. 3079).

with knowledge of the debtor's insolvency and that he was being preferred may prove his claim after the preferential payment has been recovered through resort to the courts<sup>65</sup> and is entitled to a reasonable time thereafter within which to surrender the preference and have his claim allowed,<sup>66</sup> even though a year had elapsed since the adjudication.<sup>67</sup>

A claim filed within sixty days after judgment in favor of the trustee in an action of replevin commenced by the claimant, and before the surrender to the trustee of the property replevined is not subject to objection that the claimant's preference was not first surrendered, it being presumed that the claimant gave a proper replevin bond which would stand in place of the property replevined.<sup>68</sup>

### § 625. — All debts affected by non-surrender.

The act of 1867 (section 23) expressly provided that a creditor receiving a preference "shall not prove the debt or claim on account of which the preference was given." These words were omitted in the act of 1898 from which it would seem that a creditor who has received a preference will not be allowed to prove any claim or debt, without first surrendering all preferences he has received.<sup>69</sup>

Prior to the amendment of 1903 it was held in a number of instances that a creditor holding distinct debts might prove them and have his claim allowed upon one upon which no payment had been received, without surrendering what he had received upon the other,<sup>70</sup> though it was also held that if a

65—*Barber v. Coit*, 144 Fed. 381, 16 A. B. R. 419; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. ed. 790, 13 A. B. R. 552; and see *In re Baker*, 2 N. B. R. 195; *In re Richard*, 94 Fed. 633, 2 A. B. R. 506; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 597, 17 A. B. R. 675; *In re Baker Notion Co.*, 24 A. B. R. 808; *In re Clark*, 176 Fed. 955, 24 A. B. R. 388; *Page v. Rogers*, 211 U. S. 575, 53 L. ed. 332, 21 A. B. R. 496, rev'g 140 Fed. 596, 15 A. B. R. 502; contra, *In re Beiber*, 2 N. B. N. R. 943; *In re Owings*, 109 Fed. 623, 6 A. B. R. 454; *In re Keller*, 6 A. B. R. 334; *Strobel & Wilkins v. Knost*, 3 A. B. R. 631; *In re*

*Schmeckel Cloak & Suit Co.*, 104 Fed. 64, 4 A. B. R. 719; *In re Greth*, 112 Fed. 978, 7 A. B. R. 598.

66—*In re Oppenheimer*, 140 Fed. 51, 15 A. B. R. 267.

67—See *ante*, § 606.

68—*In re Venstrom*, 205 Fed. 325, 30 A. B. R. 569.

69—*Dunn v. Gans*, 129 Fed. 750, 12 A. B. R. 316.

70—*In re Dickinson*, 7 A. B. R. 679; *In re Wise*, 2 N. B. N. R. 151; *In re Bullock*, 8 A. B. R. 646; *In re Abraham Steers Lumber Co.*, 6 A. B. R. 315, aff'd 7 id. 332; *In re Weissner*, 8 A. B. R. 177; *In re Seay*, 7 A. B. R. 700; *In re Cham-*

creditor had several claims of the same class upon one of which he received a payment, the same would have to be surrendered before any of his claims could be allowed.<sup>71</sup>

### § 626. — Surrender in case of new credit.

The set-off authorized by section 60c in case new credit is given, is not restricted to the case in which the trustee brings an action against the creditor under subdivision b of the same section, to avoid the preference and recover the amount thereof, but is also applicable to the surrender required of a creditor who attempts to prove his claim for the balance of his account.<sup>72</sup>

Where a creditor has a claim upon an open account for goods sold and delivered to the bankrupt during the period of four months prior to the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, payments made thereon do not constitute preferences which the creditor must surrender before proving his claim.<sup>73</sup>

### § 627. — Effect of surrender.

Upon the surrender of his preference, the taint of fraud implied in the creditor's acceptance of it, is removed and he is immediately restored to all his rights,<sup>74</sup> and he may thereafter prove his claim.<sup>75</sup>

A claim which has been disallowed because of the non-surrender, by the claimant, of an alleged preference, may be subse-

pion, 7 A. B. R. 560; contra, *In re Meyer*, 8 A. B. R. 598.

71—*Swartz v. Fourth Nat. Bank*, 117 Fed. 1.

72—*Dickson v. Wyman*, 7 A. B. R. 186, 111 Fed. 726; 55 L. R. A. 349, *In re Topliff*, 114 Fed. 323, 8 A. B. R. 141; *C. S. Morey Mercantile Co. v. Scheffer*, 114 Fed. 447, 7 A. B. R. 670; *Gans v. Ellison*, 114 Fed. 734, 8 A. B. R. 153; *McKey v. Lee*, 5 A. B. R. 267, 45 C. A. A. 127, 105 Fed. 923; *In re Seckler*, 106 Fed. 484, 5 A. B. R. 579; *Peterson v. Nash Brothers*, 7 A. B. R. 181, 112 Fed. 311, 55 L. R. A. 344; *Kahn v. Cone Export & Commission Co.*, 115 Fed. 290; contra, *In re Abraham Steers Lumber Co.*, 110 Fed. 738, 6 A. B. R. 315; aff'd 7 id. 332, 112

Fed. 406; also *In re Christensen*, 2 N. B. N. R. 695, aff'd 101 Fed. 802; *In re Thompson*, 2 N. B. N. R. 1016; *In re Jordan*, 2 N. B. N. R. 581; *In re Ryan*, 2 N. B. N. R. 693; *In re Beswick*, 2 N. B. N. R. 808; *In re Hoffman*, 2 N. B. N. R. 554; *In re Siegel-Hillman Dry Goods Co.*, 2 N. B. N. R. 933; see also *Carson, Pirie, Scott & Co. v. Trust Co.*, 182 U. S. 438, 45 L. ed. 1171, 5 A. B. R. 814.

73—*Wild & Co. v. Provident Life Trust Co.*, 214 U. S. 292, 53 L. ed. 1003, 22 A. B. R. 109, rev'g 153 Fed. 562, 18 A. B. R. 506.

74—*In re Nathan*, 2 N. B. N. R. 611.

75—*In re Wright-Dana Hdw. Co.*, 212 Fed. 397, 31 A. B. R. 816.

quently reconsidered and allowed upon a surrender of such alleged preference.<sup>76</sup>

### § 628. Proof of claim of one bankrupt estate against another.

The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.<sup>77</sup>

Where an undischarged bankrupt, after notice of protest, took up a promissory note on which he was indorser and which fell due after the filing of the petition in bankruptcy, he can prove his claim against the estate of the maker, also in bankruptcy, on the ground that it was after acquired property, and not affected by the claims of his creditors.<sup>78</sup> In the case of a controversy between the trustees of two estates as to the ownership of property, the court of bankruptcy has jurisdiction to pass upon the matter.<sup>79</sup>

### § 629. Secured claims.

### § 630. — What are secured claims.

To be secured, a creditor must either hold security against the property of the bankrupt, or be secured by the individual obligation of another who holds such security.<sup>1</sup> An obligee in the bankrupt's bond for a deed who seeks to recover payments on his contract will be deemed a secured claimant where under the laws of the state he is entitled to an equitable lien by virtue of the payments made by him.<sup>2</sup>

A personal claim of indebtedness against a bankrupt does not constitute a secured claim upon property of the estate in the hands of one making such claim;<sup>3</sup> or the claim on a bond where

76—In re Hamilton Automobile Co., 209 Fed. 596, 31 A. B. R. 205.

77—Sec. 57m Act of 1898.

78—In re Smith, 1 N. B. N. 136, 1 A. B. R. 37.

79—In re Rosenberg, 116 Fed. 402.

1—Gorman v. Wright, 136 Fed. 164, 14 A. B. R. 135; rev'g 132 Fed. 274, 13 A. B. R. 91; see also In re Keep Shirt Co., 200 Fed. 80, 28 A. B. R. 765.

Security need not be on property of bankrupt. In re Grive, 153 Fed. 597, 18 A. B. R. 737.

2—In re Peasley, 137 Fed. 190, 14 A. B. R. 496.

3—Sedgwick v. Casey, 4 N. B. R. 161, 4 Ben. 562, Fed. Cas. No. 12610; In re Krogman, 5 N. B. R. 116, Fed. Cas. No. 7936.



the sureties are indemnified by a mortgage;<sup>4</sup> or the claim of a consignor whose property is sold prior to the bankruptcy and the proceeds mingled with the general assets;<sup>5</sup> or a bailor who allows the bailee to mix the property with his own so that it cannot be distinguished;<sup>6</sup> or a creditor holding a mortgage on exempt property;<sup>7</sup> or a creditor who seizes property by attachment issued from a state court, within four months of the bankruptcy proceedings;<sup>8</sup> or where persons place money in the hands of another to be invested in trust for their benefit which he fails to do, the property not remaining in specie;<sup>9</sup> or a depositor whose specie deposit has been appropriated by the deposittee.<sup>10</sup>

The owner of a note holding debenture bonds issued by the bankrupt, which are simply promises to pay money and are not secured by any mortgage or other security is not a secured creditor<sup>11</sup> but a creditor who upon expiration of a lease held by him as security renews the same in his own name, will be regarded as holding the lease as security, though the debtor acquiesced in his taking it in his own name.<sup>12</sup> Advances made on the faith of a security presently to be given should be allowed as a secured claim, notwithstanding changes in the condition of the borrower pending the consummation of the agreement, by the actual delivery of the security.<sup>13</sup>

### § 631. — Right to prove claim and manner of proof.

The proof must show whether the claim is secured or unsecured.<sup>14</sup> A secured creditor may file proof of claim at his

4—In re Lloyd, 15 N. B. R. 257, Fed. Cas. No. 8429.

5—In re Coan and Ten Broeke Car Mfg. Co., 12 N. B. R. 203, 6 Biss. 315, Fed. Cas. No. 2915; Ex p. Flanagan, 12 N. B. R. 230, 2 Hughes 264, Fed. Cas. No. 4855.

6—Adams v. Myers, 8 N. B. R. 214, 1 Sawy. 306, Fed. Cas. No. 62.

7—In re Bailey, 176 Fed. 990, 24 A. B. R. 201; contra, In re Meredith, 144 Fed. 230, 16 A. B. R. 331.

8—In re Broich, 15 N. B. R. 11, 7 Biss. 303, Fed. Cas. No. 1921.

9—In re Faneway, 4 N. B. R. 26; Unge-  
witter v. Von Sachs, 3 N. B. R. 178, 4  
Ben. 167, Fed. Cas. No. 14343.

10—In re King, 9 N. B. R. 140; In  
re Hosie, 7 N. B. R. 601, Fed. Cas. No.  
6711.

Lessee who deposited \$5,000 as security  
for rent held only entitled to prove his  
claim as a general creditor. In re Ban-  
ner, 149 Fed. 936, 18 A. B. R. 61.

11—In re Matthews, 188 Fed. 445, 26  
A. B. R. 19.

12—Fitch v. Richardson, 147 Fed. 197,  
16 A. B. R. 835.

13—Sparhawk v. Richards, 12 N. B. R.  
74, Fed. Cas. No. 13205.

14—Cunningham v. Cady, 13 N. B. R.  
525, Fed. Cas. No. 5480.

option,<sup>15</sup> but unless a secured creditor surrenders his security and proves his debt as unsecured<sup>16</sup> he is required to make proof of the whole debt<sup>17</sup> as in the case of an unsecured debt, except that a statement of all securities should be included in the proof. The referee has power to pass upon the question whether a claim is secured or unsecured, but his determination will in no wise divest the claimant of his title to property so secured.<sup>18</sup>

A creditor holding a secured claim has three alternatives with reference to the proof of his claim. First.<sup>19</sup> He may prove for the full amount of his claim, specifying the securities held for the debt,<sup>20</sup> in which event he will participate in the dividends to the extent that his claim is greater than the value of the security,<sup>21</sup> and such act will in no wise be deemed an abandonment of the security.<sup>22</sup> The value of the securities is determined by converting them into money as provided,<sup>23</sup> their value to be credited upon such claims and the dividend paid only on the unpaid balance.<sup>24</sup> It is not necessary if he has recovered a judgment after the adjudication of the debtor to vacate it before he can prove the claim on which such judgment is based, provided the claim be otherwise valid and properly provable.<sup>25</sup>

Second. While the act contemplates that a secured creditor shall prove his claim, he may, notwithstanding, decline to make proof, and he does not thereby waive or lose his lien upon the property pledged, or the right to interest on the debt.<sup>26</sup> In such

15—Ward v. First Nat. Bank, 202 Fed. 609, 29 A. B. R. 312.

16—Sec. 57e, Act of 1898.

17—Official Form 32, § 1752, *post*.

18—In re Harrison, 2 N. B. N. R. 541; In re Jackson Brick & Tile Co., 189 Fed. 636, 26 A. B. R. 915; In re Quinn, 165 Fed. 144, 21 A. B. R. 264.

19—In re Bridgman, 1 N. B. R. 59, Fed. Cas. No. 1866.

20—Official Form No. 32, § 1752, *post*.

21—In re Cale, 182 Fed. 439, 25 A. B. R. 367; In re Little, 110 Fed. 621, 6 A. B. R. 681; In re Rhoads, 2 N. B. N. R. 178; Stewart v. Isador, 1 N. B. R. 129; In re Stewart, 1 N. B. R. 42, Fed. Cas. No. 13418; In re Winn, 1 N. B. R. 131, Fed. Cas. No. 17876; In re Baldwin, 19 N. B. R. 52, Fed. Cas. No. 796,

22—Kohout v. Chaloupka, 69 Neb. 677, 11 A. B. R. 265; In re Bolton, 1 N. B. R. 83, 2 Ben. 189, Fed. Cas. No. 1614.

23—Sec. 57h, Act of 1898.

24—In re Morrison, 10 N. B. R. 105, Fed. Cas. No. 9839; In re Winn, 1 N. B. R. 131, Fed. Cas. No. 17876.

25—In re Stevens, 4 N. B. R. 122, Fed. Cas. No. 13391.

26—In re Stevens, 173 Fed. 842, 23 A. B. R. 239; In re Paramore, 156 Fed. 208, 19 A. B. R. 126.

A secured creditor may petition for an order directing the trustee to pay over money held by him, without proving his claim. Ward v. First Nat. Bank, 202 Fed. 609, 29 A. B. R. 312.

case, however, before enforcing his lien, authority should first be obtained of the court of bankruptcy.<sup>27</sup>

Third. The creditor may either directly or indirectly waive his security and prove his claim as unsecured. Thus, one having a lien upon bankrupt's estate by judgment, execution, attachment, creditor's suit, or otherwise, who proves the claim without disclosing the lien, cannot subsequently enforce it,<sup>28</sup> except perhaps against exempt property<sup>29</sup> but will be deemed to have surrendered his security,<sup>30</sup> which may ripen into a conclusive extinguishment.<sup>31</sup> Where a judgment creditor proves his claim in bankruptcy, but finding no assets to pay it, his lien will be deemed to have been waived and he cannot enforce payment by means of a *fi. fa.*<sup>32</sup> So where a party who took a bill of sale as security deliberately proved his debt, which assumes that he is the absolute owner of the goods, and persisted in such false claim in an action by the trustee to recover the goods, and attempted to support it by his own oath, he was held to be estopped from claiming them as security.<sup>33</sup>

A creditor whose claim consists of notes and drafts for which he has no security, and a debt secured by mortgages, may be admitted as a creditor for that part of his claim only which is unsecured, and the indebtedness for which he has security must rest in abeyance, until the value of the security is ascertained.<sup>34</sup> The referee should, in a proper case, authorize the trustee to allow in reduction of a claim, the reasonable value of land belonging to the estate on which the claimant has security, and in that event, should order the land conveyed to the claimant.<sup>35</sup>

27—*In re Sink*, 2 N. B. N. R. 645; *In re Frick*, 1 N. B. N. 214, 1 A. B. R. 719; *In re Brown*, 104 Fed. 762. See *post*, § 1058.

28—*White v. Crawford*, 9 Fed. 371; *In re Bear*, 5 Fed. 53, *aff'd* 7 Fed. 583.

29—*In re Loden*, 184 Fed. 965, 25 A. B. R. 917.

30—*In re Spring*, 2 N. B. N. R. 509; *In re Moyer*, 97 Fed. 324; *Stewart v. Isador*, 1 N. B. R. 129; *In re Granger*, 8 N. B. R. 30, Fed. Cas. No. 5684; *In re McConnell*, 9 N. B. R. 387, Fed. Cas. No. 8712; *In re Jaycox et al.*, 8 N. B. R. 241, Fed. Cas. No. 7242; *In re Walker*, 2 N.

B. N. R. 1014; *In re Bloss*, 4 N. B. R. 37, Fed. Cas. No. 1562; *In re Brand*, 3 N. B. R. 85, Fed. Cas. No. 1809; *Franklin Co. Nat. Bk.*, 138 Mass. 515; *In re Anson*, 101 Fed. 698, 2 N. B. N. R. 567, 4 A. B. R. 231.

31—*In re Parkes*, 10 N. B. R. 82, Fed. Cas. No. 10754.

32—*Heard v. Jones*, 15 N. B. R. 402.

33—*Willis v. Carpenter*, 14 N. B. R. 521, Fed. Cas. No. 17770.

34—*In re Hanna*, 7 N. B. R. 502, 5 Ben. 5, Fed. Cas. No. 6027.

35—*In re Smith*, 1 N. B. N. 404, A. B. R. 648.

Where a bankrupt's mortgaged property is sold free of the incumbrance, the mortgagee has only to plead and prove his debt and security as in an ordinary suit.<sup>36</sup>

### § 632. — Allowance for voting purposes.

See ante, chapter XIV, section 447.

### § 633. — Double proof.

A creditor holding two obligations of the bankrupt based upon the same consideration one being given as security for the other cannot prove both.<sup>37</sup>

### § 634. — Security on property of third person.

If the security is of a third person, the creditor can prove for the whole debt and enforce the security against such third person at the same time, provided he does not take from both sources more than the full amount of the debt.<sup>38</sup> So, if a creditor receives partial payment of his debt from an accommodation maker, an indorser or a surety, he may prove his claim and have it allowed against the estate of the bankrupt for the full amount owing by the bankrupt upon the obligation; but if the dividends on the claim from the estate, plus the amount paid by the surety, aggregate more than the entire amount of the obligation and interest, he holds the surplus in trust for the

36—In re Goldsmith, 118 Fed. 763.

37—First National Bank of Beaumont v. Eason, 149 Fed. 204, 17 A. B. R. 593.

A creditor who holds as security for a note of the bankrupt certain treasury bonds of the bankrupt not imposing a lien or charge upon its property, but merely importing an obligation to pay, will not be allowed to prove on both instruments. *Matthews, Inc., v. Knickerbocker Trust Co.*, 192 Fed. 557, 27 A. B. R. 629.

38—In re Noyes Bros., 127 Fed. 286, 11 A. B. R. 506; *Haas-Baruck & Co. v. Puertoondo*, 138 Fed. 949, 15 A. B. R. 130; In re Lange Co., 170 Fed. 114, 22 A. B. R. 414; In re Cram, 1 N. B. R. 133, 1 Hask. 189, Fed. Cas. No. 3343; In re Forsythe et al., 7 N. B. R. 174, Fed. Cas. No. 4948; In re Babcock, Fed. Cas. No. 696;

In re Headley, 2 N. B. N. R. 250, 97 Fed. 765, 3 A. B. R. 272; In re Anderson, 12 N. B. R. 502, 7 Biss. 233, Fed. Cas. No. 350. But see In re Graves, 182 Fed. 443, 25 A. B. R. 372; In re Graves, 163 Fed. 358, 20 A. B. R. 818; In re Bigelow, 1 N. B. R. 186, 2 Ben. 480, Fed. Cas. No. 1396.

Claim against bankrupt indorser may be proved without surrendering property pledged by maker as security. In re Thompson, 208 Fed. 207, 31 A. B. R. 236.

39—In re Manhattan Brush Mfg. Co., 209 Fed. 997, 31 A. B. R. 747; *Swartz v. Fourth Nat. Bank*, 8 A. B. R. 673; In re Ellerhorst, Fed. Cas. No. 4381; In re Bingham, 94 Fed. 796, 2 A. B. R. 223; In re Heymann, 95 Fed. 800, 2 A. B. R. 651; In re Beaver Knitting Mills, 154 Fed. 320, 18 A. B. R. 528.

surety.<sup>39</sup> The right to prove the claim in such case is in the creditor, in preference to the surety.<sup>40</sup>

If the security is on the property of a third party and the holder proves as unsecured, he only forfeits his lien in case those interested in the estate would be benefited thereby;<sup>41</sup> or by voluntarily disclaiming any interest under a preferential deed of trust;<sup>42</sup> or where judgment is recovered against two co-defendants, and execution thereon is levied upon the property of one of them, and the other is adjudged bankrupt, the claim may be proved against the bankrupt as unsecured.<sup>43</sup> Where execution had issued and levy made on property sufficient to satisfy the judgment, the creditor not having been estopped thereby from proceeding in bankruptcy it would operate as a waiver;<sup>44</sup> but a mortgage is not extinguished by such waiver, the trustee in bankruptcy being subrogated to the rights of the holder.<sup>45</sup>

A claim against a bankrupt indorser may be proved as unsecured though the note is secured by property of the maker.<sup>46</sup> An indorser would not be released though all the creditor's rights and claim as well at law as in equity to a mortgage given for the purpose of indemnifying the indorser would be.<sup>47</sup>

### § 635. — Application of credits and marshalling of assets.

In the absence of instructions to the contrary the creditor may credit payments made by the bankrupt on an unsecured debt rather than on a secured debt.<sup>48</sup> Creditors who sell their securities after the filing of the petition and find that the proceeds are insufficient to pay the whole amount of their claims, should not be allowed to apply the proceeds first to the interest accrued since the filing of the petition, then to principal, and to prove for the balance.<sup>49</sup>

Where there are two classes of creditors having a common

40—*Swarts v. Siegel*, 8 A. B. R. 689, reversing *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 980, 7 A. B. R. 351.

41—*Bassett v. Baird*, 17 N. B. R. 177.

42—*In re Saunders*, 13 N. B. R. 164,

2 *Lowell* 444, Fed. Cas. No. 12371.

43—*In re Headley*, 2 N. B. R. 250, 3 A. B. R. 272, 97 Fed. 765.

44—*In re Sheehan*, 8 N. B. R. 345, Fed. Cas. No. 12737; *In re Bloss*, 4 N. B. R. 37, Fed. Cas. No. 1562.

45—*Hiscock v. Jaycox*, 12 N. B. R. 507, Fed. Cas. No. 6531.

46—*Gorman v. Wright*, 136 Fed. 164, 14 A. B. R. 135, rev'g 132 Fed. 274, 13 A. B. R. 91.

47—*Bank v. Comstock*, 11 N. B. R. 235.

48—*In re Johnson*, 125 Fed. 838, 11 A. B. R. 138.

49—*Sexton v. Dreyfus*, 219 U. S. 339, 55 L. ed. 244, 25 A. B. R. 363; *In re Kessler*, 180 Fed. 979, 24 A. B. R. 287.

debtor, who has several funds, and one class can resort to all the funds and the other to but part, the former take payment out of the fund to which they can resort exclusively; if the former resort to the fund common to both classes, to the loss of the latter, the latter are subrogated to the extent of such loss to the place of the former.<sup>50</sup> As joint and separate estates are considered distinct, a joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security, or prove his whole claim against both estates and receive a dividend from each, but so as not to receive more than the full amount of his debt from both sources.<sup>51</sup>

### § 636. — Determination of value of securities.

Section 57h of the act provides that "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct."<sup>52</sup> The court is by this subdivision empowered to direct a disposition of the security, or the ascertainment of its value, where the parties have failed to do so by their own agreement, but in the absence of fraud the court cannot interfere, where the creditor disposes of his securities in accordance with his contract.<sup>53</sup> Unless by agreement, it is doubtful whether it could be ascertained by the creditor's sending the security to an auctioneer and having it advertised and sold at public sale.<sup>54</sup> If after such value is agreed upon between the trustee and a creditor, new facts are developed showing such valuation to be erroneous, a new valuation will be ordered. Any surplus over and above the amount necessary to liquidate the debt will be turned over to the trustee.<sup>55</sup> If a creditor claims a lien upon exempt property, the

50—In re Foot, 12 N. B. R. 337, 8 Ben. 228, Fed. Cas. No. 4906; In re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2115.

51—In re Howard, 4 N. B. R. 185, Fed. Cas. No. 6750.

52—Sec. 57h, Act of 1898; In re Coffin, 1 N. B. R. 507, 2 A. B. R. 344; Stewart v. Isador, 1 N. B. R. 129; In re Stewart, 1 N. B. R. 42, Fed. Cas. No. 13418; see In re Grive, 153 Fed. 597, 18 A. B. R.

737; In re Davison, 179 Fed. 750, 24 A. B. R. 460.

53—Hiscock v. Varick Bank of New York, 206 U. S. 28, 51 L. ed. 945, 18 A. B. R. 1, aff'g 144 Fed. 818, 15 A. B. R. 362, rev'g 134 Fed. 101, 14 A. B. R. 226.

54—In re Hunt, 17 N. B. R. 205, Fed. Cas. No. 6884.

55—In re Newland, 9 N. B. R. 62, 7 Ben. 63, Fed. Cas. No. 10171; s. c. 7 N.

value of such property must be ascertained as just stated, and deducted from the amount of the claim, to ascertain the amount provable against the general estate.<sup>56</sup>

It is the duty of a trustee in bankruptcy to investigate securities held by the creditors of the bankrupt to determine their value, how and by what right they are held and whether, or not, anything can be obtained therefrom for the general creditors. When the value is determined, the right and title of such creditors is fixed and the trustee should be ordered to execute a proper transfer and release to such creditors of all the rights, claims and equities of the bankrupt, or his creditors, in said securities.<sup>57</sup>

### § 637. — Sale of securities.

Where it appears that, if mortgaged property is taken and sold by the trustee, an amount over and above the secured debt may be derived for the benefit of the general creditors, the court of bankruptcy may continue the trustee in possession of such property and administer the same.<sup>58</sup> Until a creditor has shown a right to sell securities conceded to be the property of the bankrupt and which he claims to hold as security for the indebtedness of the bankrupt to him, permission to sell them will not be granted;<sup>59</sup> and, if the debtor, though insolvent, acquiesce in a sale of the collateral by a secured creditor, his trustee is bound by such acquiescence, although it is sacrificed; but he is not bound by the bankrupt's ratification of a sale made after the commencement of the proceedings in bankruptcy.<sup>60</sup>

A sale is not essential to ascertain the amount a mortgagee will be allowed to prove.<sup>61</sup>

A creditor holding as security bonds of the bankrupt which, though sold, had never been delivered to the purchasers, may sell the same to apply on its indebtedness,<sup>62</sup> but the owner of a

B. R. 477, 6 Ben. 342, Fed. Cas. No. 10170.

56—In re Little, 110 Fed. 621, 6 A. B. R. 681.

57—In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

58—In re Booth, 1 N. B. N. 476, 96 Fed. 943, 2 A. B. R. 770; The Skylark, 4 Biss. 383, Fed. Cas. No. 12929; Ex P.

Christy, 3 How. 292; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 Fed. 121.

59—In re Bigelow, 1 N. B. R. 186, 2 Ben. 480, Fed. Cas. No. 1396.

60—Sparhawk v. Drexel, 12 N. B. R. 450, Fed. Cas. No. 13204.

61—In re Rose, 193 Fed. 815, 26 A. B. R. 752.

62—Matthews, Inc., v. Knickerbocker Trust Co., 192 Fed. 557, 27 A. B. R. 629.

note who holds as collateral debenture bonds issued by the bankrupt, which are simply promises to pay money and are not secured by any mortgage or other security cannot sell the bonds and thereby create an additional indebtedness. The fact that some of the bonds were sold by such creditor cannot affect the rights of the original parties or of the bankrupt's creditors.<sup>63</sup>

Notice should be given the trustee of a proposed sale of collateral,<sup>64</sup> but a sale of securities is not fraudulent because held without notice, or demand, or advertisement, where power so to do is expressly granted by the pledge, even though the pledgee is the purchaser at the sale.<sup>65</sup>

Inadequacy of the price obtained at a sale of the securities is not such fraud as will warrant the court if directing an ascertainment of the value.<sup>66</sup>

### § 638. — Purchase of security by creditor.

Where secured creditors, on the sale of the assets of the estate, buy in those parcels on which they hold security, subject to their own liens, thus merging the latter, they have received their due from the estate and their claims for any excess should be rejected.<sup>67</sup> A creditor who forecloses a mortgage held by him as security and buys in the premises for a nominal sum cannot prove his claim where the premises are admitted by him to be fully worth the amount of the debt.<sup>68</sup>

### § 639. — Effect of proving claim as secured or unsecured.

One who has claimed to be a secured or preferred creditor may, after the expiration of the year, put in the same claim as unsecured and vice versa.<sup>69</sup>

Proof of a claim as unsecured will be deemed a waiver of any security held by a creditor<sup>70</sup> unless such security is exempt

63—*In re Matthews*, 188 Fed. 445, 26 A. B. R. 19.

64—*Van Kirk v. Vermont Slate Co.*, 140 Fed. 38, 15 A. B. R. 239.

65—*Hiscock v. Varick Bank of New York*, 206 U. S. 28, 51 L. ed. 945, 18 A. B. R. 1, aff'g 144 Fed. 818, 15 A. B. R. 362, rev'g 134 Fed. 101, 14 A. B. R. 226.

66—*Hiscock v. Varick Bank of New York*, 206 U. S. 28, 51 L. ed. 945, 18 A.

B. R. 1, aff'g 144 Fed. 818, 15 A. B. R. 362, rev'g 134 Fed. 101, 14 A. B. R. 226.

67—*In re Pauly*, 1 N. B. N. 405, 2 A. B. R. 333.

68—*In re Davis*, 147 Fed. 556, 23 A. B. R. 446, aff'g 23 A. B. R. 156; *In re Dix*, 176 Fed. 582, 23 A. B. R. 889.

69—*Maxwell v. McDaniels*, 195 Fed. 426, 27 A. B. R. 692.

70—See *ante*, § 631,



property of the bankrupt which does not pass to his trustee.<sup>71</sup> Notwithstanding the foregoing rule, where a creditor without any fraudulent intent, in ignorance of his rights, has proved a secured claim as unsecured, he will be allowed to withdraw his proof or amend by setting up his security,<sup>72</sup> provided no injury has resulted to the unsecured creditors as a result of such proof,<sup>73</sup> and all parties can be placed in statu quo.<sup>74</sup> This will not be allowed, however, where there is no perfected lien or established security, but only a contingent and inchoate lien in the effort to secure a preference by litigation.<sup>75</sup> An attorney cannot schedule his claim for services prior to the petition as an unsecured claim and then claim it as a priority under section 64.<sup>76</sup>

It has been held that the filing of an ordinary claim by one claiming a lien against funds in the hands of the trustee cannot be considered as an election to waive the lien.<sup>77</sup>

## § 640. Allowance and rejection of claims.

### § 641. — Discretion of referee.

The referee is vested<sup>78</sup> with a wide discretion in the allowance and disallowance of claims; and the judge, upon review, will not interfere with his decision upon questions of fact, unless convinced that it is manifestly against the weight of evidence.<sup>79</sup>

A claim that has been duly proved<sup>80</sup> and filed for allowance with the referee<sup>81</sup> must be allowed, unless objections are made by parties in interest, or unless continued by the court for cause on its own motion.<sup>82</sup> If the proof fails to state an essential

71—See *In re Loden*, 184 Fed. 965, 25 A. B. R. 917.

72—Ex. p. Harwood, Fed. Cas. No. 6185; *In re Brand*, *supra*; Ex. p. Lapsley, Fed. Cas. No. 8083.

73—*In re Friedman*, 1 N. B. N. 208, 1 A. B. R. 510; *In re Jaycox et al.*, 8 N. B. R. 241, Fed. Cas. No. 7242; *In re Clark et al.*, 5 N. B. R. 255, Fed. Cas. No. 2806.

74—*In re Parkes*, 10 N. B. R. 82, Fed. Cas. No. 10754.

75—*In re Wilder*, 2 N. B. N. R. 629, 101 Fed. 104, 3 A. B. R. 761.

76—*In re Morris*, 125 Fed. 841, 11 A. B. R. 145.

77—*In re Zitron*, 203 Fed. 79, 30 A. B. R. 172.

78—G. O. XXI.

79—*Orr v. Park*, 183 Fed. 683, 25 A. B. R. 544.

80—Sec. 57a and b, Act of 1898.

81—Sec. 57c, Act of 1898.

82—Sec. 57d, Act of 1898; analogous provision of Act of 1867. "Sec. 23. . . . The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers." *In re Ankeny*, 1 N. B. N. 482, 511, citing *In re Cochran*, 11 Fed. Cas. No. 606; *In re Felter*, 7 Fed. Cas. No. 204; *In re Merrick*, 17 Fed. Cas. No. 75;

fact, but complies substantially with the forms, orders and the statute, it is the referee's duty to allow it as requested, since he is not required to examine claims further than to see that the proof contains the formal requisites prescribed by the law and General Orders, as parties in interest have the right to file objections or petition for a re-examination.<sup>83</sup> However, it is his duty to examine the proofs to see whether they are in the statutory form, and he is not justified in allowing a claim when the proofs do not comply with the requirements of the statute or general orders, whether creditors or the trustee raise specific objections to the sufficiency of the proofs filed or not.<sup>84</sup>

If the allegations of the proof do not sufficiently set forth all the necessary facts to establish a claim, or are self-contradictory, the claim may be disallowed; or the referee may order proper inquiries into the fairness and legality of such claim, that he may be enabled to pass on it intelligently and judicially.<sup>85</sup>

#### § 642. — Bankrupt's attorney cannot appear for creditor.

The attorney for the bankrupt should not be permitted to appear in the proceedings as attorney for a creditor also, yet, in the absence of a rule of court on the subject, a claim thus duly proved against the bankrupt's estate has been allowed, though such practice cannot be too severely condemned.<sup>86</sup>

#### § 643. — Right to jury trial.

It has been held that a creditor presenting a claim for proof and allowance, which is contested by the trustee, is not entitled to demand a trial by jury, because proceedings in bankruptcy are of equitable cognizance and the seventh amendment to the Constitution of the United States does not apply thereto, and no act of Congress at present in force authorizes it.<sup>87</sup>

#### § 644. — Prima facie case.

If proof is made in the manner directed by the statute, the verified statement of the claim makes a prima facie case for its

In re Patterson, 18 Fed. Cas. No. 1313;

In re Trowbridge, 24 Fed. Cas. No. 218.

83—In re Shaw, 109 Fed.' 780, 6 A. B.

R. 499; In re Ankeny, 1 N. B. N. 511.

84—In re Goble Boat Co., 190 Fed. 92, 27 A. B. R. 48.

85—Orr v. Park, 183 Fed. 683, 25 A. B. R. 544.

86—In re Kimball, 2 N. B. N. R. 46, 100 Fed. 777, 4 A. B. R. 144.

87—In re Christensen, 101 Fed. 243, 4 A. B. R. 99, citing Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672.

allowance, notwithstanding the claim is objected to, and the burden is upon the contestant or objector to go on with the proof.<sup>88</sup> It is immaterial that the contest is based upon the plea of non est factum or forgery.<sup>89</sup> The prima facie case may, however, be overcome by testimony of the claimant's own witnesses without any evidence being submitted in opposition.<sup>90</sup>

#### § 645. — Examination of claimant and witnesses.

The claimant cannot be required to appear and submit to an examination, but where he fails to appear upon notice, the referee may pass upon the claim, its merits, and the sufficiency of the proofs.<sup>91</sup> A witness appearing voluntarily or under compulsory process to give testimony in support of a claim may be examined under oath.<sup>92</sup>

A creditor summoned to appear for examination respecting his claim is entitled to reasonable hotel and travelling expenses, but not to counsel fees.<sup>93</sup>

#### § 646. — Admissibility of evidence and order of proof.

A creditor who has filed a statement of his claim under oath, cannot sustain it by evidence of an indebtedness arising in a different manner from that stated.<sup>94</sup>

The referee has discretionary power to determine the order of introduction of evidence.<sup>95</sup>

Testimony taken before the referee will not be admitted upon

88—*Moore v. Crandall*, 205 Fed. 689, 30 A. B. R. 517; *In re United Wireless Tel. Co.*, 201 Fed. 445, 29 A. B. R. 848; *In re Goble Boat Co.*, 190 Fed. 92, 27 A. B. R. 48; *In re Coventry Evans Furniture Co.*, 166 Fed. 516, 22 A. B. R. 272; *In re New York Car Wheel Works*, 141 Fed. 430, 15 A. B. R. 571; *In re Castle Braid Co.*, 145 Fed. 224, 17 A. B. R. 143; *In re Roanoke Furnace Co.*, 152 Fed. 846, 18 A. B. R. 661; *Whitney v. Dresser*, 200 U. S. 532, 50 L. ed. 584, 15 A. B. R. 326, aff'g 135 Fed. 495, 13 A. B. R. 747; *In re Carter*, 138 Fed. 846, 15 A. B. R. 126; *In re Shaw*, 109 Fed. 780, 6 A. B. R. 499; *In re Sumner*, 101 Fed. 224, 2 N. B. N. R. 681, 4 A. B. R. 123.

89—*In re Montgomery*, 185 Fed. 955, 25 A. B. R. 431.

90—*In re Cannon*, 133 Fed. 837, 14 A. B. R. 114; *In re Greenfield*, 193 Fed. 98, 27 A. B. R. 427; *In re McIntyre & Co.*, 174 Fed. 627, 24 A. B. R. 1.

91—*In re Goble Boat Co.*, 190 Fed. 92, 27 A. B. R. 48. But see cases cited in § 658n, 34.

92—*United States v. Simon*, 146 Fed. 89, 17 A. B. R. 41.

93—*In re Watkinson & Co.*, 130 Fed. 218, 12 A. B. R. 370.

94—*In re Lansaw*, 118 Fed. 365, 9 A. B. R. 167; *Orr v. Park*, 25 A. B. R. 544.

95—*In re Montgomery*, 185 Fed. 955, 25 A. B. R. 431.

the hearing before the court against the objection that the claimant was not notified that the same was to be used against him.<sup>96</sup>

### § 647. — Competency of witnesses.

In proceedings against the estate of a deceased bankrupt a creditor is competent to prove the contract on which his claim is based.<sup>97</sup>

### § 648. — Adjudication of bankruptcy as *res adjudicata*.

It has been held that an existing adjudication in bankruptcy precludes all inquiry touching the existence or validity of the debt of a petitioning creditor.<sup>98</sup> Certainly, where the respondent, in a petition in involuntary bankruptcy, denies his alleged indebtedness to the petitioning creditor, and takes issue on the validity and consideration on which such creditor claims, and upon evidence offered on both sides, the court sustains the petitioner and adjudges respondent bankrupt, such adjudication is conclusive of petitioner's claim, when presented for allowance, as to the bankrupt, and any creditor who joined in the proceedings and opposed the adjudication.<sup>99</sup>

However, the adjudication is not conclusive, nor does it preclude the bankrupt from opposing the allowance of notes, made by the bankrupt to third parties and offered in evidence on the question of solvency, such notes not being directly in issue but only collaterally brought in question, the holders not being parties to the proceedings.<sup>1</sup> An allegation in an involuntary petition that a petitioning creditor is a creditor of the alleged bankrupt to the amount stated, and the failure to answer the petition and controvert the allegation, does not make it *res adjudicata* as to the other creditors or the trustee, but the claimant must still file proof of claim and procure its allowance.<sup>2</sup>

96—In re Hersey, 171 Fed. 1004, 22 A. B. R. 863.

97—In re Merrill, 16 N. B. R. 35, 9 Ben. 165, Fed. Cas. No. 9466.

98—In re Fallon, 2 N. B. R. 92, Fed. Cas. No. 4628; contra, In re Continental Corporation, 14 A. B. R. 538.

A petitioning creditor, whose claim is declared valid, on the application for an adjudication, cannot be required to establish it again before the referee at the

suggestion of the bankrupt and creditors not parties to the petition in bankruptcy. Ayres v. Cone, 138 Fed. 935, 14 A. B. R. 739.

99—See In re Sheridan, 98 Fed. 406, 3 A. B. R. 554.

1—In re Sheridan, 98 Fed. 406, 3 A. B. R. 554.

2—In re Harper, 175 Fed. 412, 23 A. B. R. 918.

### § 649. — Judgment of state court as *res adjudicata*.

The judgment of a state court against the claim concludes the bankruptcy court.<sup>3</sup>

### § 650. — Appeal and review.

A referee's finding upon a claim will usually be accepted, but a court may review his decision when asked to do so because of testimony claimed to have been overlooked.<sup>4</sup>

Upon reversal of an order of the referee disallowing a claim upon motion of the trustee, the district court should remand the case with directions to allow the trustee to put in his proofs.<sup>5</sup>

### § 651. Objections to claims.

### § 652. — Jurisdiction of referee.

Where objections to a proof of debt are filed and a hearing is had before the referee, he may pass upon the same;<sup>6</sup> or upon request may certify the matter to the court.<sup>7</sup>

### § 653. — Who may object.

Any "party in interest" may object to the allowance of a claim.<sup>8</sup> This includes all persons who have an interest in the *res* to be administered.<sup>9</sup> The bankrupt not only has the right but it is his duty to examine and file objections to the proof and allowance of unjust or fictitious claims against his estate;<sup>10</sup> while either the trustee,<sup>11</sup> a stockholder,<sup>12</sup> or a creditor<sup>13</sup> may

3—*Handlan v. Walker*, 200 Fed. 566, 29 A. B. R. 4.

4—*In re Grand*, 118 Fed. 73.

5—A decree reversing the referee's order and allowing the claim is improper. *In re Livingston Co.*, 144 Fed. 971, 16 A. B. R. 385.

6—*In re Keller*, 18 N. B. R. 331, Fed. Cas. No. 7654.

7—*In re Clark*, 6 N. B. R. 202, Fed. Cas. No. 2808.

8—Act of 1898, § 57d.

9—*Rosenbaum v. Dutton*, 203 Fed. 838, 30 A. B. R. 155, rev'g 198 Fed. 316, 28 A. B. R. 880.

10—Sec. 7 (3), Act of 1898; *In re Ankeny*, 1 N. B. R. 511, 2 N. B. R.

349, 100 Fed. 614; *In re Horne*, 22 A. B. R. 269.

11—*Atkins v. Wilcox*, 105 Fed. 595, 53 L. R. A. 118, 5 A. B. R. 313.

12—Stockholders of a bankrupt corporation upon whom an assessment has been made and who will be relieved of paying the same if the claim be disallowed are parties in interest and entitled to object. *Rosenbaum v. Dutton*, 203 Fed. 838, 30 A. B. R. 155, rev'g 198 Fed. 316, 28 A. B. R. 880.

13—An unsecured creditor may object to the proof of claim by another unsecured creditor; *In re Hatem*, 161 Fed. 895, 20 A. B. R. 470.

also object. A disinterested party can only be heard by leave of the court.<sup>14</sup>

In respect to opposing allowance of claims, the trustee is not bound to comply with every request preferred by objecting creditors irrespective of merit; nor is he clothed with absolute discretion to refuse. He is bound to exercise his judgment and act in the best interests of the estate, but subject to the supervising power of the court. He does not act judicially, and if he refuses to oppose a claim or move for a reconsideration when he ought to do so, he may be compelled to act or permit the objecting creditors to act in his name.<sup>15</sup>

While a creditor must ordinarily file his own objections and cannot ordinarily adopt objections made by bankrupt,<sup>16</sup> yet, upon application of a creditor, the court may in a proper case instruct the trustee to contest what appears to be a doubtful claim, provided the objecting creditor indemnifies the estate against the cost of so doing.<sup>17</sup> A trustee cannot object to a judgment creditor's claim on the ground that the judgment was for a debt procured by fraud on the bankrupt, and was secured by default, as such defense should have been set up in the court rendering the judgment.<sup>18</sup>

Where the validity of a claim is conceded and the only dispute is between two persons claiming ownership thereof, each of such persons may object to the proof of claim of the other.<sup>19</sup>

Creditors either of the partnership or of the individual members thereof may appear and contest the claim of the partnership estate against the individual estate of a partner, where the same person is acting as trustee for both estates.<sup>20</sup>

### § 655. — Time of making.

An attack upon a claim may ordinarily be made at any time before the estate is closed.<sup>21</sup> Certainly objections may be filed

14—*Dressel v. North State Lumber Co.*, 119 Fed. 531; *In re Sully & Co.*, 152 Fed. 619, 18 A. B. R. 123.

15—*Bank v. Cooper*, 9 N. B. R. 529, 20 Wall. 171, 22 L. ed. 273; *In re Little River Lumber Co.*, 101 Fed. R. 558, 3 A. B. R. 682; *In re Stern*, 144 Fed. 956, 16 A. B. R. 510.

16—*Ayres v. Cone*, 138 Fed. 935, 14 A. B. R. 739.

17—*In re Canton Iron & Steel Co.*, 197 Fed. 767, 28 A. B. R. 791.

18—*Stillwell v. Walker*, 17 N. B. R. 569, Fed. Cas. No. 13451.

19—*In re Dunlap Carpet Co.*, 206 Fed. 726, 30 A. B. R. 664.

20—*In re Coe*, 154 Fed. 162, 18 A. B. R. 715.

21—*In re Canton Iron & Steel Co.*, 197 Fed. 767, 28 A. B. R. 791.

until a direct or indirect order of allowance is made and the mere filing of a claim cannot be considered an allowance thereof so as to prevent objections thereto from being thereafter made, and as to necessitate a motion for reconsideration.<sup>22</sup>

### § 656. — Manner of making objections.

The Bankruptcy Act is silent as to the form of objections to claims. Although, preferably they should be filed in writing, they may be stated orally,<sup>23</sup> or they may be noted by the stenographer.<sup>24</sup> The objections need not be in any particular form, but should be sufficiently explicit to indicate to the claimant the nature and character thereof,<sup>25</sup> but they are not required to be under oath.<sup>26</sup> Irregularity in making objections is waived by the creditor's appearance, submitting to examination, and participating in the examination of other witnesses without objection.<sup>27</sup>

### § 657. — Time of hearing.

Objections to claims must be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.<sup>28</sup>

### § 658. — Proof in case of objections.

A sworn objection to a claim is not *prima facie* evidence of its truth<sup>29</sup> and does not require a creditor to produce such evidence of his claim as would be necessary at an ordinary trial.<sup>30</sup> Nor does such objection transfer the burden of proof to the objector to disprove the claim; all he is required to do is

22—In re Two Rivers Woodenware Co., 199 Fed. 877, 29 A. B. R. 518.

23—Embry v. Bennett, 162 Fed. 139, 20 A. B. R. 651; Orr v. Park, 183 Fed. 683, 25 A. B. R. 544; In re Cannon, 133 Fed. 837, 14 A. B. R. 114. But see, In re Royce Dry Goods Co., 133 Fed. 100, 13 A. B. R. 257.

24—In re Shaw, 109 Fed. 780, 6 A. B. R. 499.

25—In re Royce Dry Goods Co., 133 Fed. 100, 13 A. B. R. 257; In re Linton, 7 A. B. R. 676.

26—In re Wooten, 118 Fed. 670, 9 A. B. R. 247.

27—Orr v. Park, 183 Fed. 683, 25 A. B. R. 544.

28—Sec. 57f, Act of 1898.

29—In re Goble Boat Co., 190 Fed. 92, 27 A. B. R. 48; In re Castle Braid Co., 145 Fed. 224, 17 A. B. R. 143.

The fact of the claim being secured or, the receipt of a preferential payment being made thereon cannot be assumed to exist because alleged by the objecting party. *Id.*

30—In re Saunders, 13 N. B. R. 164, 2 Lowell, 444, Fed. Cas. No. 12371.

to produce evidence the probative force of which is equal to or greater than that offered in the first instance by the claimant upon whom the burden of proof remains,<sup>31</sup> the statute merely pointing out how he may meet it, in making a *prima facie* case, or how the creditor, or other person entitled, may, by interposing objection, so relate himself to the record as to be able to give evidence in opposition to the claim.<sup>32</sup>

An objecting creditor shall be heard<sup>33</sup> and given an opportunity to examine the claimant and other witnesses, if their attendance can be procured without embarrassing delay.<sup>34</sup>

### § 659. — Costs in case of objection.

See post, chapter XXXI.

### § 660. Postponement of hearing on claims.

As between contending creditors, the court or referee in the interest of fair dealing and good conscience, has the unquestioned power to postpone the claim of a creditor, and should do so whenever the circumstances are such as to arouse suspicion or to throw doubt upon the validity of the claim. Thus a claim may be postponed, although a just one, as where there is evidence of a fraudulent combination and scheme of such creditor to defeat the claim of others;<sup>35</sup> or where the officers of a bankrupt corporation present large claims;<sup>36</sup> or where the names of certain creditors, by whom claims against the estate are presented, do not appear upon the schedule;<sup>37</sup> or where a *prima facie* case is made out that certain creditors have received pref-

31—*In re Wooten*, 118 Fed. 670, 9 A. B. R. 247.

32—*Whitney v. Dresser*, 200 U. S. 532, 50 L. ed. 584, 15 A. B. R. 326; *aff'd* 135 Fed. 495, 13 A. B. R. 747; *In re Sumner*, 2 N. B. N. R. 681, 101 Fed. 224, 4 A. B. R. 123.

33—*In re Mendelsohn*, 12 N. B. R. 533, 3 Sawy. 342, Fed. Cas. No. 9420.

34—*In re Sumner*, 2 N. B. N. R. 681, 101 Fed. 244, 4 A. B. R. 123; *In re Columbia Iron Works*, 142 Fed. 234, 14 A. B. R. 526.

The verification of the proof of debt is in no true sense an *ex parte* affidavit. In case of contest the claimant is subject

to call by the court or the contestant for explanations in the nature of a cross-examination and should not be permitted to decline to answer any proper question propounded by the court, referee or contestant. *Baumhauer v. Austin*, 186 Fed. 260, 26 A. B. R. 385.

35—*In re Headley*, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 Fed. 765; *State v. Hope*, 102 Mo. 431.

36—*In re Lake Sup. Ship Canal, R. R. & Iron Co.*, 7 N. B. R. 376, Fed. Cas. No. 7997.

37—*In re Milwain*, 12 N. B. R. 358, Fed. Cas. No. 9623



erences, or that their claims have been purchased with money belonging to the bankrupt and in collusion with him;<sup>38</sup> or where the claim is founded on a large open account between the parties, and which is in dispute between them.<sup>39</sup>

If the referee is not satisfied with the *prima facie* case made by the claimant in his statement accompanying the claim, it should not be accepted as proven until disposition has been made of such objection or the court is convinced of its validity;<sup>40</sup> and in such case the hearing may be postponed and the question heard at some subsequent time.<sup>41</sup> In a proper case, the determination of the matter may be suspended until evidence can be taken on deposition, but this is only where the referee is convinced that there is substantial reason for believing the evidence necessary for the just administration of the estate,<sup>42</sup> but the proceeding should not be suspended for purpose of obtaining the evidence of witnesses beyond the jurisdiction, unless the court is satisfied that the objection is interposed in good faith, and that the evidence desired is of substantial value and necessary to a just determination of the case. In such case, the claim should not be accepted until the objection is disposed of or the court is satisfied of the validity of the claim.<sup>43</sup>

Proof of a claim may be postponed until after the choice of trustee,<sup>44</sup> and, if so, it may be treated in all respects as if it had not been tendered and postponed.<sup>45</sup>

### § 661. Withdrawal of a claim.

The withdrawal of a claim upon discovery of the fraud of the bankrupt is a matter of right in the creditor, and not a matter of discretion with the referee or judge.<sup>46</sup>

A claim may be withdrawn to enable a creditor to sue thereon in the state court.<sup>47</sup>

38—In re Herrman, 3 N. B. R. 153, Fed. Cas. No. 6426.

39—In re Jones, 2 N. B. R. 20, Fed. Cas. No. 7447.

40—In re Sumner, 2 N. B. N. R. 681, 101 Fed. 224, 4 A. B. R. 123.

41—In re Eagles & Crisp, 2 N. B. N. R. 462, 99 Fed. 695, 3 A. B. R. 733; In re Frank, 5 N. B. R. 194, 5 Ben. 164, Fed. Cas. No. 5050.

42—In re Sumner, *supra*.

43—In re Sumner, 2 N. B. N. R. 681, 101 Fed. 224, 4 A. B. R. 123.

44—In re Smith, 1 N. B. R. 25, 2 Ben. 113, Fed. Cas. No. 12971.

45—In re Herrman, 3 N. B. R. 161, 4 Ben. 126, Fed. Cas. No. 6425.

46—In re Stewart, 178 Fed. 463, 24 A. B. R. 474.

47—In re Strickland, 167 Fed. 867, 21 A. B. R. 734.

## § 662. Re-examination of claims.

### § 663. — Who may petition.

The trustee or any creditor desiring the re-examination of any claim filed against a bankrupt's estate, which includes only those that were in existence at the commencement of the proceedings and not claims for expenses of administration,<sup>48</sup> may apply by petition to the judge or the referee to whom the case is referred for an order for such re-examination,<sup>49</sup> and he must thereupon make an order fixing a time for hearing the petition, of which due notice must be given by mail to the creditor. General Order XXI excludes action on the application of any one but the trustee or a creditor.<sup>50</sup>

Where a general creditor is dissatisfied with the allowance of the claim of another creditor, his proper remedy is a demand upon the trustee to move for a reconsideration or review of such claim, or, if the trustee upon the demand declines to act, then by motion to the court that the trustee be required to move, or that the objecting creditor be permitted to move in his own name.<sup>51</sup>

If the trustee wrongfully refuses to apply for a reconsideration of a claim, the bankrupt may apply for an order against him to show cause why he should not be compelled to act. On the hearing of such motion the merits of the application and of the contention that the claim has been allowed for an excessive amount may be gone into by the court itself, or the court may order the matter to be investigated by the referee, in case the application is not made to him in the first instance. If the matter is brought to the attention of the referee in an irregular manner, it is his duty to ascertain whether the application or

48—In *re Reliance Storage and Warehouse Co.*, 100 Fed. 619, 4 A. B. R. 49.

49—Sec. 57k, Act of 1898; In *re Syracuse Paper & Pulp Co.*, 164 Fed. 275, 21 A. B. R. 174; In *re Tift*, 17 N. B. R. 502, Fed. Cas. No. 14029; In *re Russell*, 105 Fed. 501, 5 A. B. R. 566.

50—In *re Sully & Co.*, 142 Fed. 895, 15 A. B. R. 304; In *re Levy*, 7 A. B. R. 56.

Debtor cannot move for reconsideration. In *re Pittsburgh Lead & Zinc Co.*, 198 Fed. 316, 28 A. B. R. 880.

A debtor of the bankrupt sued by the trustee cannot by reason of his interest in the outcome of the suit be permitted to petition for a re-examination of claims. In *re Daniel Sully & Co.*, 142 Fed. 895, 15 A. B. R. 304.

Stockholder of bankrupt corporation held not entitled to move for reconsideration. In *re Pittsburgh Lead & Zinc Co.*, 198 Fed. 316, 28 A. B. R. 880.

51—In *re Mexico Hardware Co.*, 197 Fed. 650, 28 A. B. R. 736; In *re Stern*, 144 Fed. 956, 16 A. B. R. 510.

petition in fact has merit, and he may order the trustee to appear and contest the claim, or may, after ascertaining the real facts if he believes the application for reconsideration has no merit, certify that such application is without merit and dismiss the same upon the ground of the informality of the mode in which the matter was presented to him.<sup>52</sup>

While there may be some question as to the right of a creditor whose claim has been disallowed to obtain a re-examination under section 57k, in view of the General Orders,<sup>53</sup> the law, being broader than the orders, would doubtless comprehend such an application, though if refused, a petition for review should be filed.<sup>54</sup>

### § 664. — Time for asking reconsideration.

The Bankruptcy Act merely provides that "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."<sup>55</sup> An application for reconsideration should, however, be seasonable, and if one has been guilty of laches, or has permitted a claim to be allowed and paid without objection, only on a proper showing should such application be considered.<sup>56</sup> A delay of one year is not of itself such laches as to bar a re-examination, no dividend having been declared in the interim.<sup>57</sup> An objection to the reconsideration of a claim upon the ground of laches is waived by failure to object at the hearing.<sup>58</sup> A referee's refusal to reopen a case to allow creditors who have been guilty of laches in presenting their claims, to be heard, will ordinarily be upheld by the judge unless manifestly error.<sup>59</sup>

Claims will not be reconsidered upon the hearing of an application for a discharge, where no objection was made by the bankrupt at the time they were allowed.<sup>60</sup>

52—In re Ferrer, 5 Porto Rico Fed. Rep. 184, 22 A. B. R. 785.

53—G. O. XXI (6).

54—See In re Chambers, Calder & Co., 6 A. B. R. 707.

55—Sec. 57k, Act of 1898.

56—In re Merwin & Willoughby Co., 208 Fed. 293, 32 A. B. R. 385. See In re Chambers, Calder & Co., 6 A. B. R. 707; In re Reliance Storage Warehouse Co., 100 Fed. 619, 4 A. B. R. 49; In re Hamilton Furniture Co., 116

Fed. 116, 8 A. B. R. 588; In re Stein, 94 Fed. 124, 1 A. B. R. 662; In re Wood, 95 Fed. 946, 2 A. B. R. 695.

57—In re Globe Laundry, 198 Fed. 365, 28 A. B. R. 831.

58—In re Effinger, 184 Fed. 724, 25 A. B. R. 924.

59—In re Wood, 1 N. B. N. 430, 2 A. B. R. 695, 95 Fed. 946.

60—In re Carton & Co., 148 Fed. 63, 17 A. B. R. 343.

The court may, in the exercise of a sound judicial discretion, set aside an order disallowing a claim, even after the expiration of the time for an appeal.<sup>61</sup> Where an appeal has been taken from an order disallowing a claim, the district court is without jurisdiction to order a rehearing unless such appeal is dismissed.<sup>62</sup>

### § 665. — Consolidation of proceedings.

The trustee may institute a joint proceeding against several creditors for a re-examination of their claims.<sup>63</sup>

### § 666. — Mode of procuring re-examination.

The ruling of the referee upon a claim cannot be brought into the district court for review by merely filing exceptions thereto in that court,<sup>64</sup> but irregularity in obtaining reconsideration of an allowed claim upon filing of objections rather than a petition for reconsideration has been held not prejudicial.<sup>65</sup>

The petition of the trustee for a reconsideration of an allowed claim need not allege facts sufficient to disprove the claim. All that is required is the allegation of facts sufficient to require a re-examination.<sup>66</sup> If the petition for reconsideration or disallowance does not aver the essential facts with sufficient particularity, a motion should be made for a more specific statement and not to strike out parts of the petition. Such motion may be made by the bankrupt where no trustee has been appointed.<sup>67</sup>

### § 667. — Answer to petition.

An answer to a petition to expunge a claim cannot be filed where the time allowed has expired and the trustee has already presented all his testimony in support of the petition.<sup>68</sup>

### § 668. — Conduct of hearing and relief awarded.

At the time appointed the creditor or any witnesses that may be called by either party will be examined, and if it appears

61—West v. McLaughlin & Co., 162 Fed. 124, 20 A. B. R. 654.

62—First Nat. Bank of Miles City v. State Nat. Bank of Miles City, 131 Fed. 430, 12 A. B. R. 440.

63—In re Lyon, 7 A. B. R. 61.

64—In re Hawley, 116 Fed. 428, 8 A. B. R. 632.

65—In re Canton Iron & Steel Co., 197 Fed. 767, 28 A. B. R. 791.

66—In re Watkinson & Co., 130 Fed. 218, 12 A. B. R. 370.

67—In re Ankeny, 2 N. B. N. R. 349, 100 Fed. 614, 4 A. B. R. 72.

68—In re Lewis, Eck & Co., 153 Fed. 495, 18 A. B. R. 657.

from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.<sup>69</sup> The referee has no power to do more than allow the petition, expunge or diminish the claim, or refuse to do either. He has no jurisdiction to render any affirmative judgment against the creditor, and cannot decide questions regarding the title to property.<sup>70</sup>

Under section 57k, section 2 (2), and General Order XXI (6), the court may by summary proceeding diminish or expunge an allowed claim unless the claimant pays to the trustee the value of the property of the bankrupt he has taken and converted to his own use, without any prior claim to it, after the petition in bankruptcy has been filed,<sup>71</sup> but the court cannot upon reconsideration of a claim allowed in favor of a stockholder of the bankrupt, summarily compel the latter to pay the balance due on his stock subscription, since such liability, if any, can only be enforced by a plenary suit.<sup>72</sup>

When the application is for the purpose of increasing or decreasing the amount at which a claim has been allowed, the better practice is to vacate the former allowance and allow the claim at the new amount as if then moved for the first time.<sup>73</sup>

A creditor moving to expunge the allowance of a claim of another creditor stands in the shoes of the bankrupt, and has no greater rights than he.<sup>74</sup> In a proceeding to reconsider a claim which has been allowed, the burden of proof rests upon the petitioner,<sup>75</sup> so when a creditor appears and offers himself for examination, the burden of proof rests upon the trustee or contesting creditors.<sup>76</sup> The moving party is entitled to open and close at the hearing.<sup>77</sup>

It is proper to use the answer to the petition as evidence at a hearing on a petition to expunge a proof of claim.<sup>78</sup>

69—G. O. XXI (6).

70—In re Peacock, 178 Fed. 851, 24 A. B. R. 159.

71—In re W. A. Paterson Co., 186 Fed. 629, 34 L. R. A. (N. S.), 31, 25 A. B. R. 855.

72—In re Howe Mfg. Co., 193 Fed. 524, 27 A. B. R. 477.

73—In re Smith, 1 N. B. N. 404, 2 A. B. R. 648.

74—In re Arnold & Co., 133 Fed. 789, 13 A. B. R. 320.

75—In re Pittsburg Lead & Zinc Co.,

198 Fed. 316, 28 A. B. R. 880; In re Howard, 100 Fed. 630, 4 A. B. R. 69; In re Doty, 5 A. B. R. 58; See also In re Lount, Fed. Cas. No. 8543.

Proofs of claim already filed make out a prima facie case. In re Elk Val. Min. Co., 210 Fed. 386, 31 A. B. R. 545.

76—In re Robinson, 14 N. B. R. 130, 8 Ben. 406, Fed. Cas. No. 11938.

77—Canby v. McLear, 13 N. B. R. 22, Fed. Cas. No. 2378.

78—Canby v. McLear, 13 N. B. R. 22, Fed. Cas. No. 2378.

If a claim offered for proof is thoroughly investigated by the referee, and allowed, the judge will not expunge it on the application of other creditors, who contend that fraud is presumable from the relationship of the parties and attempt to support such presumption by unimportant variances in the evidence.<sup>79</sup> If through inadvertence a claim is proved without surrender of a voidable preference, it may be allowed to stand, treating it as a surrender, or, if that result be opposed by the creditor or he deny the preference and that fact be found against him so that opposition amounts to a fraud upon the act, or the proceedings by evincing an intention to obtain through them an advantage over other creditors, the entire claim will be expunged.<sup>80</sup>

The allowance of a claim against a bankrupt's estate in favor of an assignee thereof who acquired it after the adjudication, but from an innocent bona fide holder, in whose hands it was valid and provable, will not be set aside upon allegation that the claim was brought for the purpose of acquiring a majority interest in the estate, and of hindering and defrauding the other creditors, when it does not appear that such fraudulent purpose has actually been carried out.<sup>81</sup>

### § 669. — Costs and expenses.

Where the re-examination of a claim is instituted and conducted by a creditor, in the name of the trustee, through attorneys selected by the creditor, the creditor must stand the expense.<sup>82</sup>

General Order X does not require a party seeking re-examination of an allowed claim to indemnify the claimant for travelling expenses incurred by him in coming to the hearing.<sup>83</sup>

### § 670. Effect of proving claim.

#### § 671. — In general.

When a creditor seeks to prove a claim against the estate of a bankrupt, he stands in the position of a plaintiff at law,<sup>84</sup> and

79—In re Rider, 96 Fed. 811, 3 A. B. R. 192.

80—In re Wise, 2 N. B. N. R. 151.

81—In re Headley, 2 N. B. N. R. 250, 97 Fed. 765, 3 A. B. R. 272.

82—In re Sully & Co., 152 Fed. 619, 18 A. B. R. 123.

83—In re Elk Val. Coal Min. Co., 210 Fed. 386, 31 A. B. R. 545.

84—In re Prescott, 9 N. B. R. 385, 5 Biss. 523, Fed. Cas. No. 11389.

is a party to the suit and bound by the decision.<sup>85</sup> In the case of a foreign creditor his rights remain unaffected by the domestic proceedings, except that his remedy, when sought in the United States courts, must be in accordance with the bankruptcy act and laws of the United States.<sup>86</sup>

Where proof has been duly presented a *prima facie* case is made, subject only to an order for further proof and the right of a creditor, or person interested, to offer counter proof;<sup>87</sup> and when such proof is admitted the rights of creditors accrue, and they may then ask for an amendment of the petition for any defect.<sup>88</sup> However, allegations in the proofs of claim as to priority are not to be taken as *prima facie* true for the purpose of establishing the priority.<sup>89</sup> In passing upon and allowing a claim, the referee does not adjudicate whether the creditor has obtained a preference, and allowing a claim in no way affects the right of the trustee to sue for and recover back a preference from a creditor whose claim has been allowed.<sup>90</sup>

A creditor by filing a claim acquiesces in the adjudication.<sup>91</sup>

A receiver in proceedings supplementary to execution does not lose his right to property of the bankrupt by the filing of a claim by the judgment creditor.<sup>92</sup>

Proving a debt does not of itself operate as an absolute extinguishment or satisfaction of the debt, the creditor being remitted to his former rights and remedies if the bankrupt is refused a discharge;<sup>93</sup> the weight of authority holding that the right of action is merely suspended, pending the granting of the discharge.<sup>94</sup> However, it is held, that an election to prove

85—*Wiswall v. Campbell*, 15 N. B. R. 421, 93 U. S. (3 Otto) 347, 23 L. ed. 923; *In re Kornit Mfg. Co.*, 192 Fed. 392, 27 A. B. R. 244; *In re Kenyon*, 156 Fed. 863, 19 A. B. R. 194.

86—*In re Bugbee*, 9 N. B. R. 258, Fed. Cas. No. 2115. See also, *In re Knight, Yancey & Co.*, 190 Fed. 893, 26 A. B. R. 787.

87—*In re Sumner*, 2 N. B. R. 681, 101 Fed. 224, 4 A. B. R. 123; *In re Saunders*, 13 N. B. R. 164, 2 Lowell, 444, Fed. Cas. No. 12371.

88—*In re Jones*, 2 N. B. R. 20, Fed. Cas. No. 7447.

89—*In re Jones*, 151 Fed. 108, 18 A. B. R. 206.

90—*Utah Ass'n of Credit Men v. Boyle Furn. Co.*, 39 Utah 518, 26 A. B. R. 867.

91—*In re New York Tunnel Co.*, 166 Fed. 284, 21 A. B. R. 531.

92—*Wrede v. Clark*, 132 App. Div. (N. Y.) 293, 21 A. B. R. 821, rev'g 61 Misc. (N. Y.) 530, 21 A. B. R. 170.

93—*Dingee v. Becker*, 9 N. B. R. 508, Fed. Cas. No. 3919; *Miller v. O'Kain*, 14 N. B. R. 145.

94—*Miller v. O'Kain*, 14 N. B. R. 145; *Dingee v. Becker*, 9 N. B. R. 508; *Davis v. Anderson*, 6 N. B. R. 146, Fed. Cas. No. 3623.

against the estate for the value of stock wrongfully hypothecated by the bankrupt is a waiver of the right to subsequently claim the stock or its profits specifically,<sup>95</sup> that proof of a claim based upon a judgment and the allowance thereof is a waiver of the lien growing out of the commencement of the action in which the judgment was rendered,<sup>96</sup> and that filing a claim for goods sold and delivered to the bankrupt is a waiver of the right to dispute the passing of the title of the goods to the bankrupt.<sup>97</sup>

### § 672. — Effect on collateral proceedings.

No creditor, who holds a claim which might be proven in bankruptcy, whether the debt is secured by lien or not, can enforce such debt in a state court against a debtor after his adjudication in bankruptcy, except by permission of the court of bankruptcy.<sup>98</sup> This inhibition would probably not extend to collateral remedies, and hence the right of action against a person as a stockholder of a corporation would not be affected.<sup>99</sup> A creditor secured by a mortgage on the bankrupt's estate, having proved his claim, may, with leave of the court of bankruptcy, and in the absence of objection by the trustee, proceed to foreclose the mortgage in a state court;<sup>1</sup> but a creditor, who asserts his lien in the court of bankruptcy, is not entitled to resort to a state tribunal to enforce his lien against the same property which was the subject of adjudication in the bankruptcy court.<sup>2</sup> The fact that a creditor, after the adjudication in bankruptcy, abandoned attachment proceedings instituted by him within four months prior thereto and filed his claim as a general creditor does not constitute a waiver of his right to attach, or estop him from subsequently attaching, property which has been set aside by the bankruptcy court as exempt.<sup>3</sup>

A creditor does not waive his right to recover for false pretenses or representations by proving his claim since such claim is not allowable in the bankruptcy court,<sup>4</sup> nor does the proof and

95—*In re Berry & Co.*, 174 Fed. 409, 23 A. B. R. 27.

96—*Dunn Salmon Co. v. Pillmore*, 55 Misc. (N. Y.) 546, 19 A. B. R. 172.

97—*Lynch v. Bronson*, 160 Fed. 139, 20 A. B. R. 409.

98—*In re Winn*, 1 N. B. R. 131, Fed. Cas. No. 17876.

99—*Allen v. Ward*, 10 N. B. R. 285.

1—*McHenry v. La Societe Francaise*, 16 N. B. R. 385, 95 U. S. (5 Otto) 58, 24 L. ed. 370.

2—*Spilman v. Johnson*, 16 N. B. R. 145.

3—*Northern Shoe Co. v. Ceeka*, 22 N. D. 631, 28 A. B. R. 935.

4—*Maxwell v. Martin*, 130 App. Div. (N. Y.) 80, 22 A. B. R. 93.



allowance of a claim for the unpaid purchase price of goods for a subsequent action to recover the balance due, it being alleged that the goods were obtained through fraud.<sup>5</sup>

**§ 673. — Right to oppose discharge.**

Whether he has proved his debt or not, any creditor may oppose bankrupt's discharge.<sup>6</sup> Under the former law it was held that a discharge would not be set aside after bankrupt's death in order that demands might be proved against his estate in the hands of his administrator.<sup>7</sup>

**§ 674. Effect of failure of proof.**

A creditor who has not proved his claim does not acquire any rights superior to those who do, but if the claim is scheduled it will be released by the discharge, and as a penalty he loses his dividend. Such creditor has no rights in composition proceedings;<sup>8</sup> nor can he proceed in an action against the bankrupt pending the determination as to his discharge.<sup>9</sup> The indorser of a note is not released by the failure of the holder to prove his claim or to tender the note to the indorser.<sup>10</sup>

5—Orr Shoe Co. v. Upshaw & Powledge, 13 Ga. App. 501, 30 A. B. R. 534.

6—In re Sheppard, 1 N. B. R. 115, Fed. Cas. No. 12753; In re Boutelle, 2 N. B. R. 51, Fed. Cas. No. 1705, contra; In re Burke, 3 N. B. R. 76, Deady, 425, Fed. Cas. No. 2156; In re Levy, 1 N. B. R. 66, 2 Ben. 169, Fed. Cas. No. 8297.

7—Young v. Ridenbaugh, 11 N. B. R. 563, 3 Dill, 239, Fed. Cas. No. 18173.

8—In re Mathers, 17 N. B. R. 225, Fed. Cas. No. 9274.

9—In re Schwartz, 15 N. B. R. 330, 14 Blatch. 196, Fed. Cas. No. 12502.

10—Nat. Bank of South Reading v. Sawyer, 177 Mass. 490, 6 A. B. R. 154.

## CHAPTER XIX

### TRUSTEES; THEIR QUALIFICATIONS, APPOINTMENT AND COMPENSATION

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- § 709. — Extra compensation.
- § 710. — Apportionment between several trustees.
- § 711. — Withholding compensation.
- § 712. — Procedure to procure compensation.

**§ 675. Official or general trustee.**

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases,<sup>1</sup> but the mere fact that the person chosen by the creditors has acted as trustee in numerous other proceedings is no ground for a disapproval of the choice.<sup>2</sup>

**§ 676. Ancillary trustee.**

An ancillary trustee cannot be appointed by a court other than that of original jurisdiction.<sup>3</sup>

**§ 677. Trustee in partnership cases.**

Upon the adjudication of a firm in bankruptcy, whether there are firm assets or not, the creditors of the individual members have no voice whatever in the election of a trustee, this being by statute left entirely to the firm creditors;<sup>4</sup> and the choice must be by a majority in number and amount of creditors whose claims have been proved and allowed,<sup>5</sup> but if the creditors fail to elect,<sup>6</sup> or if a majority in number vote for one person and a majority in amount for another, the judge or referee may appoint.<sup>7</sup> In the case of the separate bankruptcy of one member of a firm, both joint and separate creditors may prove their debts and vote for trustee,<sup>8</sup> though all the assets are partnership assets.<sup>9</sup>

The appointment of separate trustees for the estate of a partnership and its individual members is not to be encouraged.<sup>10</sup>

1—G. O. XIV.

2—In re Kreuger, 196 Fed. 705, 27 A. B. R. 440.

3—In re Tybo Mining & Reduction Co., 132 Fed. 697, 13 A. B. R. 62.

4—Sec. 5b, Act of 1898; In re Eagles & Crisp, 99 Fed. 696, 3 A. B. R. 733, 2 N. B. N. R. 462; In re Phelps, 1 N. B. R. 139, Fed. Cas. No. 11071; In re Scheiffer, 2 N. B. R. 179, Fed. Cas. No. 12445; Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395, 22 L. ed. 801, s. c. 8 N. B. R. 228, 10 Blatch. 361, Fed. Cas. No. 1167; Atkinson v. Kellogg, 10 N. B. R. 535, Fed. Cas. No. 613.

5—Sec. 56, Act of 1898; In re Brown, 2 N. B. R. 590; In re Lewinsohn, 2 N.

B. N. R. 315, 3 A. B. R. 299, 98 Fed. 576; In re Scheiffer, 2 N. B. R. 179, Fed. Cas. No. 12445.

6—Sec. 44, Act of 1898; In re Brooke, 2 N. B. N. R. 680, 100 Fed. 432, 4 A. B. R. 50.

7—In re Richards, 2 N. B. N. R. 1024.

8—In re Webb, 16 N. B. R. 253, 4 Sawy. 326, Fed. Cas. No. 17317; In re Falkner, 16 N. B. R. 503, Fed. Cas. No. 4624; Wilkins v. Davis, 2 Lowell, 511, Fed. Cas. No. 17664.

9—In re Beck, 110 Fed. 140, 6 A. B. R. 554.

10—In re Currie, 197 Fed. 1012, 28 A. B. R. 834; In re Coe, 154 Fed. 162, 18 A. B. R. 715.

### § 678. When appointment of trustee unnecessary.

If the schedules of a voluntary bankrupt disclose no assets and if no creditor appears at the first meeting, no trustee should be appointed;<sup>11</sup> but the court may, upon the subsequent discovery of assets, appoint a trustee though more than a year has elapsed since the first meeting of creditors.<sup>12</sup>

If at the first meeting the bankrupt announces his purpose to offer a composition, the appointment of a trustee may be postponed to give an opportunity to file such composition, and, when filed, the appointment may be further postponed until the composition is refused; or if approved, the necessity for a trustee, of course, ceases to exist.<sup>13</sup>

### § 679. Election of trustee.<sup>14</sup>

### § 680. — Time of election.

The trustee is to be chosen at the first meeting of creditors, after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked,<sup>15</sup> and the vote should be taken at the earliest moment practicable.<sup>16</sup> The referee will not be held to have abused his discretion in declining to postpone the election, on holding proxies disqualified, in order that new proxies may be obtained.<sup>17</sup> Where an adjudication has been made and notice of the first meeting given and the bankrupt files a second petition in which the same debts are set out, the trustee should be chosen in the first proceeding.<sup>18</sup> The election of trustee is not irregular because occurring pending the determination of the question of jurisdiction and the referee's report thereon.<sup>19</sup>

11—G. O. XV; In re Levy, 101 Fed. 247.

12—Clark v. Pidcock, 129 Fed. 745, 12 A. B. R. 309.

13—In re Rung Bros., 1 N. B. N. 406, 2 A. B. R. 620.

14—See also, *ante* Chap. XIV.

15—See 44a, Act of 1898; In re Jones, 2 N. B. R. 20, Fed. Cas. No. 7447.

16—In re Lake Superior Ship Canal,

R. R. & Iron Co., 7 N. B. R. 376, Fed. Cas. No. 7997.

17—In re McGill, 106 Fed. 57, 5 A. B. R. 155, *aff'g* 104 Fed. 292, 4 A. B. R. 782.

18—In re Wielarskie, 4 N. B. R. 130, 4 Ben. 468, Fed. Cas. No. 17619.

19—In re Pennsylvania Con. Coal Co., 163 Fed. 579, 20 A. B. R. 872.

**§ 681. — Votes counted.**

The qualifications of voters and the majority required to elect a trustee are fully treated in chapter XIV.

**§ 682. Approval or disapproval of creditors' choice.**

The creditor's selection of a trustee is subject to the approval or disapproval of the judge or referee,<sup>20</sup> and when they fail to approve, they have no power to appoint a trustee, but another creditors' meeting must be called to make the selection, the same as in the case of a vacancy.<sup>21</sup> However, where a referee disapproves of the selection of the creditors and appoints another as trustee without sufficient grounds for his action, the trustee so appointed by him may nevertheless be allowed to act as trustee it appearing that nothing remains to be done but the distribution of the assets.<sup>22</sup>

The right of disapproval is not to be lightly exercised. It cannot be exercised arbitrarily but only for cause.<sup>23</sup>

Those seeking confirmation of trustees appointed by creditors in case of a contest are the moving parties and should file such papers as they see fit in support of the motion.<sup>24</sup> Where the referee disapproves a person whom the creditors elect as trustee, he must do so expressly, and not merely by holding that there has been no election, so that his ruling in that regard may be reviewed if any creditor so petitions.<sup>25</sup> An order of a referee approving the appointment of the trustee is likewise subject to review.<sup>26</sup>

**§ 683. Appointment by judge or referee.**

Where the creditors fail to appoint at the first meeting,<sup>27</sup> or where the referee's time is consumed in maneuvering to elect a

20—G. O. XIII; *Morris v. Swartz*, 10 N. B. R. 305; *Kiser Co. v. Georgia Cotton Oil Co.*, 208 Fed. 548, 31 A. B. R. 376; *In re Clay*, 192 Fed. 830, 27 A. B. R. 715.

21—*In re MacKellar*, 116 Fed. 547, 8 A. B. R. 669; *In re Lewensohn*, 98 Fed. 576, 3 A. B. R. 299; *In re Hare*, 119 Fed. 246; *In re Van De Mark*, 175 Fed. 287, 23 A. B. R. 760; *In re Margolies*, 191 Fed. 369, 27 A. B. R. 398.

22—*In re Jacobs and Roth*, 154 Fed. 988, 18 A. B. R. 728.

23—*In re Kreuger*, 196 Fed. 705, 27 A. B. R. 440. See *post* § 685.

24—*In re Am. Waterproof Cloth Co.*, 3 N. B. R. 74, 1 Ben. 526, Fed. Cas. No. 318.

25—*In re Kaufman*, 179 Fed. 552, 24 A. B. R. 117.

26—*In re Hanson*, 156 Fed. 717, 19 A. B. R. 235.

27—Sec. 44a, Act of 1898. *Anon.* 1 N. B. N. 2; *In re Brooke*, 2 N. B. N. R. 680, 4 A. B. R. 50, 100 Fed. 32; *In re MacKellar*, 116 Fed. 547, 8 A. B. R. 669;

special favorite, or to elect a particular trustee for merely personal objects,<sup>28</sup> or there is not a majority in number and amount of claims for a candidate,<sup>29</sup> or where the trustee offers to pay certain creditors in full for their support,<sup>30</sup> or where the creditors, upon disapproval of their selection of a trustee, neglect or fail to choose another approved by the referee,<sup>31</sup> or where a vacancy is caused by resignation,<sup>32</sup> the judge or referee may appoint the trustee. If at the first meeting of creditors all claims offered for proof are in dispute, and it is impracticable at that time to settle the disputes, the referee may appoint a trustee to act until the contested claims have been passed upon and a trustee regularly elected.<sup>33</sup> If the creditors at their first meeting do not choose a trustee, nor request that an election be had, nor nominate a candidate for the office, and the referee, presiding at the meeting, appoints one, his appointment will not be set aside merely because the creditors desire a different person.<sup>34</sup>

#### § 684. Notice of appointment and acceptance of trust.

It is the duty of the referee to notify the trustee of his appointment.<sup>35</sup> The trustee is required forthwith, on receipt of notice of his appointment, to notify the referee of his acceptance or rejection of the trust.<sup>36</sup>

#### § 685. Qualifications of trustee.

#### § 686. — In general.

All the creditors have a right to a fair and impartial trustee, one not under the influence of the bankrupt or his attorney to

In re Newton, 107 Fed. 429, 6 A. B. R. 52; see In re Sumner, 4 A. B. R. 123.

Referee's refusal to adjourn meeting and his appointment of a trustee held not erroneous where creditors failed to elect at first meeting and supporters of both candidates informed referee that agreement was hopeless. In re Goldstein, 199 Fed. 665, 29 A. B. R. 301.

28—In re Kuffler, 2 N. B. N. R. 29, 3 A. B. R. 162.

29—In re Kenney & Co., 136 Fed. 451, 14 A. B. R. 611; In re Morris, 154 Fed. 211, 18 A. B. R. 828; In re Machin and Brown, 128 Fed. 315, 11 A. B. R. 449; In re Henschel, 109 Fed. 861, 6 A. B. R. 305.

30—In re Haas, 8 N. B. R. 189, Fed. Cas. No. 5884.

31—In re Clay, 192 Fed. 830, 27 A. B. R. 715.

32—Hull v. Burr, 63 Fla. 440, 28 A. B. R. 837.

33—In re Joseph Cohen, 131 Fed. 391, 11 A. B. R. 439.

34—In re Brooke, 2 N. B. N. R. 680, 4 A. B. R. 50, 100 Fed. 432; In re Kuffler, 2 N. B. N. R. 29, 3 A. B. R. 162, 97 Fed. 187; Falter v. Reinhard, 2 N. B. N. R. 1119, 104 Fed. 292.

35—36—G. O. XVI.

any substantial degree, especially where there are or may be conflicting interests, and questions as to claims and the conduct of the bankrupt prior to and after bankruptcy.<sup>37</sup>

The trustee is the representative of the creditors and in his capacity as such he is frequently required to act in opposition to the bankrupt. The authorities under the present law, as well as under the act of 1867, are uniform in maintaining the proposition that the bankrupt has no right to influence nor has he a voice in the choice of a trustee. Accordingly, interference by the bankrupt, the voting of claims in his interest or at his direction should be discountenanced and held to invalidate a choice of trustee thus secured.<sup>38</sup>

The election of a trustee is not, however to be disapproved unless the election was directed, managed or controlled by the bankrupt or by his attorney or by some influence opposed to the creditor's interests,<sup>39</sup> and the mere fact that the bankrupt suggested his choice as trustee and that the person so designated was elected,<sup>40</sup> or that the person elected is friendly to the bankrupt,<sup>41</sup> will not justify the disapproval of the election. The choice of the creditors should not be interfered with on slight grounds and, unless incompetency, want of capacity or integrity or lack of an office or residence within the judicial district is shown, the appointment should be approved.<sup>42</sup>

Neither residence nor citizenship is required, but merely that

37—In re Sitting, 182 Fed. 917, 25 A. B. R. 682.

38—In re Lloyd, 148 Fed. 92, 17 A. B. R. 96; In re Hanson, 156 Fed. 717, 19 A. B. R. 235; In re Turner & Co., 20 A. B. R. 646; In re Van De Mark, 175 Fed. 287, 23 A. B. R. 760; In re Ployd, 183 Fed. 791, 25 A. B. R. 194; In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526; Birmingham Coal & Iron Co. v. Southern Steel Co., 160 Fed. 212, 20 A. B. R. 151; In re Machin & Brown, 128 Fed. 315, 11 A. B. R. 449; In re McGill, 106 Fed. 57, 5 A. B. R. 155, aff'g 104 Fed. 292, 4 A. B. R. 782; In re Wooten, 118 Fed. 670; In re Lewensohn, 98 Fed. 576, 3 A. B. R. 299; In re Lemont, 2 N. B. N. R. 291; In re Wetmore, Fed. Cas. No. 17466; In re Bliss, Fed.

Cas. No. 1543; In re Dayville Woolen Co., 114 Fed. 674, 8 A. B. R. 85; In re Rekersdres, 108 Fed. 206, 5 A. B. R. 811; In re Henschel, 109 Fed. 865, 6 A. B. R. 305; In re Morton, 118 Fed. 908; but see In re Noble, Fed. Cas. No. 10282.

39—40—In re Eastlack, 145 Fed. 68, 16 A. B. R. 529.

41—In re Turner & Co., 20 A. B. R. 646.

42—In re Krueger, 196 Fed. 705, 27 A. B. R. 440; In re Lewensohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 Fed. 576; In re McGlynn, 2 Lowell 127, 16 Fed. Cas. No. 122; In re Funkenstein, Fed. Cas. No. 1004; In re Barrett, 2 N. B. R. 533, 2 Fed. Cas. No. 909; In re Grant, 2 N. B. R. 35, Fed. Cas. No. 5292; In re Clairmont, 1 N. B. R. 276, 5 Fed. Cas. No. 810.

the proposed trustee have an office within the judicial district of which his bankruptcy district is a part.<sup>43</sup> The fact that the person chosen lives remote from the place where the trust is to be administered is no ground for disapproval of the choice.<sup>44</sup>

### § 687. — Trustee held qualified.

The mere fact of relationship on the part of the proposed trustee to the bankrupt or a creditor will not necessarily disqualify him,<sup>45</sup> if he is otherwise qualified and satisfactory to the creditors, and the court is satisfied that he will perform the duties without fear or favor, though as a rule such selections should be discountenanced. The referee is unauthorized to disapprove the selection made by the creditors solely on the ground that the person chosen was the attorney for some of the creditors,<sup>46</sup> or because he voted for himself at the meeting of creditors,<sup>47</sup> nor can the referee's approval of the selection made by creditors be withheld because the person selected has incurred the hostility of the bankrupt, or because he has, as receiver, unreasonably delayed to account for the funds in his hands, thereby hindering the distribution of them to creditors.<sup>48</sup> So the fact that the person chosen acted as assignee under the general assignment made by the bankrupt which constituted the act of bankruptcy upon which the adjudication was had does not necessarily disqualify the creditors' selection,<sup>49</sup> nor does the fact that the person selected shares offices with an attorney representing stockholders of the bankrupt corporation.<sup>50</sup> The fact that one solicits the appointment will not necessarily operate as a disqualification,<sup>51</sup> especially where it appears that the bank-

43—In re Woodbury, 2 N. B. N. R. 284, 98 Fed. 833, 3 A. B. R. 457; see In re Havens, 1 N. B. R. 126, Fed. Cas. No. 6231; In re Loder, 2 N. B. R. 161, Fed. Cas. No. 8459; In re Jacobs and Roth, 154 Fed. 988, 18 A. B. R. 728; In re Seider, 163 Fed. 138, 20 A. B. R. 708.

Alien not disqualified. In re Coe, 154 Fed. 162, 18 A. B. R. 715.

44—In re Kreuger, 196 Fed. 705, 27 A. B. R. 440.

45—In re Zinn, 4 N. B. R. 145, 4 Ben. 500, Fed. Cas. No. 18215; s. c. 4 N. B. R. 123, Fed. Cas. No. 18216; In re Powell, 2 N. B. R. 17, Fed. Cas. No. 11354.

46—In re Margolies, 191 Fed. 369, 27 A. B. R. 398; In re Barrett, 2 N. B. R. 165, 2 Hughes, 444, Fed. Cas. No. 1043; In re Clairmont, 1 N. B. R. 42, 1 Lowell 230, Fed. Cas. No. 2781; In re Lawson, 2 N. B. R. 44, Fed. Cas. No. 8150.

47—In re Margolies, 191 Fed. 369, 27 A. B. R. 398.

48—In re Mangan, 133 Fed. 1000, 13 A. B. R. 303.

49—50—In re Blue Ridge Packing Co., 125 Fed. 619, 11 A. B. R. 36.

51—In re Brown, 2 N. B. N. R. 590; but see In re "a bankrupt," 2 N. B. R. 100; In re Smith, 1 N. B. R. 25, 2



rupt has filed his schedules and that the list of creditors was open to anyone.<sup>52</sup>

The fact that the trustee chosen by a majority of the creditors has business relations with, or is a blood relation of, the referee, would not disqualify him.<sup>53</sup>

**§ 688. — Trustee held not qualified.**

The appointment, as trustee, of a stockholder of one of the creditors, procured through the active efforts of such creditor will be disapproved where it appears that such creditor is charged with having received a preference,<sup>54</sup> as will the selection of a director of a bank in whose favor bankrupt confessed judgment.<sup>55</sup> Ordinarily the attorney or former attorney of the bankrupt is disqualified to act as trustee,<sup>56</sup> as is a son of one member of a bankrupt firm, who, with the other members of bankrupt's family, have presented claims against the estate,<sup>57</sup> or one who has himself been adjudged a bankrupt,<sup>58</sup> or one who was for years bankrupt's bookkeeper and voted under powers of attorney from different creditors.<sup>59</sup> So, the fact that the person selected by the creditors is the bankrupt's assignee whose accounts are unsettled, or the attorney of such assignee, or the latter's partner, will justify the disapproval of the selection by the referee.<sup>60</sup>

**§ 689. — Corporation as trustee.**

"Corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed, may act as trustees."<sup>61</sup>

Ben. 133, Fed. Cas. No. 12971; In re Haas, 8 N. B. R. 189, Fed. Cas. No. 5884.

52—In re Crooker Co., 27 A. B. R. 241.

53—In re Brown, 2 N. B. N. R. 590.

54—In re Anson Mercantile Co., 185 Fed. 993, 25 A. B. R. 429.

55—In re Powell, 2 N. B. R. 17, Fed. Cas. No. 11354.

56—"The presumption against the eligibility as trustee of an attorney for the bankrupt is so strong it is doubtful whether his choice should ever be confirmed where he has solicited and obtained the assistance of the bankrupt

in securing his election." In re Wink, 206 Fed. 348, 30 A. B. R. 298.

Choice of a stockholder of bankrupt corporation who acted as legal adviser of those formerly in control of the corporation disapproved. In re Gordon Supply & Mfg. Co., 129 Fed. 622, 12 A. B. R. 94.

57—In re Bogert, 3 N. B. R. 161, Fed. Cas. No. 1600.

58—In re Smith, 1 N. B. N. 136, 1 A. B. R. 37.

59—In re Wetmore, 16 N. B. R. 514, Fed. Cas. No. 17466.

60—In re Clay, 192 Fed. 830, 27 A. B. R. 715.

61—Sec. 45a, Act of 1898.

## § 690. Bond of trustee.

### § 691. — In general.

Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, must respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.<sup>62</sup> Joint trustees may give joint or several bonds.<sup>63</sup>

Bonds should be filed in the office of the clerk of court.<sup>64</sup>

### § 692. — Fixing amount.

The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of a trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, must fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as provided the court must do so.<sup>65</sup>

### § 693. — Sureties.

There must be at least two sureties upon each bond.<sup>66</sup>

The court must require evidence as to the actual value of the property of sureties<sup>67</sup> which must equal over and above their liabilities and exemptions, on each bond, at least the amount of such bond.<sup>68</sup>

62—Sec. 50b, Act of 1898. Analogous provision of act of 1867. "Sec. 13. . . . The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party.

If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place."

The notice to be sent to the trustee of his appointment should contain a statement of the penal sum of his bond. (G. O. XVI.)

63—Sec. 50j, Act of 1898.

64—Sec. 50h, Act of 1898.

65—Sec. 50c, Act of 1898.

66—Sec. 50e, Act of 1898.

67—Sec. 50d, Act of 1898.

68—Sec. 50f, Act of 1898.

“Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.”<sup>69</sup> Congress has provided that, whenever a bond is required with one or more sureties, a corporation, organized under the laws of the United States or of any state, having power to execute similar bonds, may be the sole surety, provided the court approves the same;<sup>70</sup> and it has been held that statutes not inconsistent with each other and relating to the same subject matter should be construed together and effect given to all, though they contain no reference to each other and were passed at different times;<sup>71</sup> accordingly the requirement<sup>72</sup> that the actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond, and<sup>73</sup> that corporations may be accepted whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected, differentiates corporate security from personal. Hence two sureties are required if they are individuals but one if a surety company.<sup>74</sup>

#### § 694. — Failure to give bond.

The trustee's failure to give bond creates a vacancy in his office<sup>75</sup> to be filled primarily by the creditors, or if they fail to appoint one, or it is impracticable for them to elect, by the judge or referee.<sup>76</sup>

#### § 695. — Liability on bond.

See post, section 736.

69—Sec. 50g, Act of 1898.

70—Act of August 13, 1894, 28 U. S. Stat., 2 Supp. R. S. 237.

71—In re Kalter, 1 N. B. N. 384; 2 A. B. R. 590, citing A. & Eng. Ency. of Law, v. 23, p. 311.

72—Sec. 50f, Act of 1898.

73—Sec. 50g, Act of 1898.

74—In re Kalter, 1 N. B. N. 384, 2 A. B. R. 590.

75—Sec. 50k, Act of 1893. Analogous provision of Act of 1867. “Sec. 13. . . . If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

76—Sec. 44, Act of 1898; In re Lewensohn, 2 N. B. N. R. 315, 98 Fed. 576, 3 A. B. R. 299.

### § 696. Additional trustees.

The act authorizes the appointment of one or three trustees; and, if it should be found that one cannot properly attend to the affairs of the estate, there is no reason why additional trustees should not be chosen subsequently, but, in that case, a majority would be required to perform any act required of them as trustees. Under the act of 1867, an additional trustee was obtainable upon a petition to the court showing cause for his appointment,<sup>77</sup> and the same course would be proper now; but a resolution of creditors nominating a committee to supervise the trustee will not be approved.<sup>78</sup>

### § 697. Vacancy in office of trustee.

### § 698. — In general.

It is evidently the intent of the act to give the creditors the control of the selection of the trustee not only in the original election at the first meeting, but (1) after a vacancy has occurred in the office of trustee; (2) after an estate has been reopened; (3) after a composition has been set aside; (4) or a discharge revoked, or (5) "if there is a vacancy in the office of trustee;" which seems to provide for all possible cases. There is a vacancy in the office of trustee whenever that office is unoccupied or unfilled, as when the trustee chosen refuses the office or fails to qualify, or is disapproved by the court, whether the office has been previously filled or not, and in such case the judge or referee cannot appoint until an opportunity has been given the creditors for a new election if practicable.<sup>79</sup>

After an estate once closed has been reopened, the creditors have the same power and authority with respect to the appointment of a trustee as is conferred upon them at the first meeting after the adjudication.<sup>80</sup>

Where a trustee dies before qualifying and while the first meeting of creditors is still open, having been adjourned for the

77—In re Overton, 5 N. B. R. 366, Fed. Cas. No. 10625.

78—In re Stillwell, 2 N. B. R. 104, Fed. Cas. No. 13447.

79—In re Hare, 119 Fed. 246; In re Fisher & Co., 135 Fed. 223, 14 A. B. R.

366; In re Lewensohn, 2 N. B. R. 315, 3 A. B. R. 299, 98 Fed. 576; In re MacKellar, 116 Fed. 547, 8 A. B. R. 669.

80—In re Newton, 107 Fed. 429, 6 A. B. R. 52. But see, Fowler v. Jenks, 90 Minn. 74, 11 A. B. R. 255.

bankrupt's examination, it is as though no trustee had been chosen and the creditors who chose him may choose another.<sup>81</sup>

Where at the first meeting of creditors, two trustees are elected, a vacancy in the office of the third trustee will be held to exist, and the creditors at a subsequent meeting may elect the third trustee.<sup>82</sup>

### § 699. — Resignation and abandonment of office.

While the statute is silent upon the point as to whether a trustee may resign his office after qualifying, no objection appears to exist to granting such request, unless the interests of the estate would be injuriously affected, in which event the court would undoubtedly have the power to compel the trustee to proceed with its administration. In any event the resignation would not be complete until acceptance.

An abandonment of his office by a trustee ipso facto vacates the same, and a new trustee may be appointed without notice to him.<sup>83</sup> The failure of the court to summon the creditors to elect another trustee after the abandonment of his office by the trustee first elected, is a mere irregularity which cannot be taken advantage of collaterally.<sup>84</sup>

### § 700. — Removal for cause.

Courts of bankruptcy have jurisdiction upon complaints of creditors, to remove trustees for cause upon hearings and after notice to them,<sup>85</sup> the power being vested in the judge alone and not in the referee.<sup>86</sup> The removal of a trustee rests in the discretion of the court, but it is a legal discretion and cause must be shown, as gross neglect, mismanagement, fraud, or concealment of material facts, incompetency or want of integrity,<sup>87</sup> and the election of a trustee will not be set aside on account of any irregularity in a claim when its exclusion would not have

81—In re Wright, 1 N. B. N. 405, 2 A. B. R. 497.

82—In re Fisher & Co., 135 Fed. 223, 14 A. B. R. 366.

83—84—Scofield v. United States, 174 Fed. 1, 23 A. B. R. 259.

85—Sec. 2 (17), Act of 1898.

86—G. O. XIII; In re Stokes, 1 N. B. R. 130, Fed. Cas. No. 13475.

87—In re Blodgett, 5 N. B. R. 472, Fed. Cas. No. 1552; In re Mallery, 4 N. B. R. 38, Fed. Cas. No. 8990; In re Morse, 7 N. B. R. 56, Fed. Cas. No. 9852; In re Price, 4 N. B. R. 137, Fed. Cas. No. 11409; In re Sacchi, 6 N. B. R. 398, Fed. Cas. No. 12200; In re Perkins, 8 N. B. R. 56, Fed. Cas. No. 10982.

affected the result;<sup>88</sup> nor will a trustee be removed in the absence of imputation upon his capacity or integrity.<sup>89</sup>

A change of residence to another district does not require the removal of a trustee where such change does not make it impossible for him to perform his duties, nor difficult for the creditors to locate or communicate with him.<sup>90</sup>

That the trustee and some of his relatives were the owners of some of the securities redeemed by him as receiver by order of the court, and that he has declined to apply to the court for a rescission of its orders respecting the sale and redemption of the securities, has been held no ground for removal.<sup>91</sup>

If it is desired to have a trustee removed, a petition should be presented setting forth the grounds on which it is sought to have him removed.<sup>92</sup> Where a creditor's proof of claim has not been disallowed, his standing as a creditor cannot be attacked collaterally upon the latter's petition to remove the trustee.<sup>93</sup>

### § 701. — Effect of death or removal upon pending actions.

Section 46 of the act prevents the death or removal of a trustee from interfering with the progress of the administration of the estate and avoids delay and additional expense, which would be incurred if his successor had to institute new suits, or proceedings, besides the possible interposition of the bar of the statute of limitation.

### § 702. Compensation of trustees.

### § 703. — Where no assets disclosed.

A trustee is not required to serve without compensation and, if no assets are disclosed and creditors insist upon the appointment of a trustee, they must provide for his compensation.<sup>94</sup>

88—In re Jackson, 14 N. B. R. 449, 7 Biss. 280, Fed. Cas. No. 7123.

89—In re Lewensohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 Fed. 576; In re McGlynn, 2 Lowell 127, 16 Fed. Cas. No. 122; In re Funkenstein, 9 Fed. Cas. No. 1004; In re Barrett, 2 N. B. R. 533, 2 Fed. Cas. No. 909; In re Grant, 2 N. B. R. 35, Fed. Cas. No. 5292; In re Clairmont, 1 N. B. R. 276, 5 Fed. Cas. No. 810; In re Dewey, 4 N. B. R. 139, Fed. Cas. No. 3849.

90—In re Seider, 163 Fed. 708, 20 A. B. R. 138.

91—In re Carothers & Co., 192 Fed. 691, 27 A. B. R. 603.

92—In re Hicks, 19 N. B. R. 449, Fed. Cas. No. 6457.

93—In re Roanoke Furnace Co., 152 Fed. 846, 18 A. B. R. 661.

94—In re Levy, 101 Fed. 247, 4 A. B. R. 108.

**§ 704. — Fees.**

The clerk is required to collect the fee of \$5 for the trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt, which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fee.<sup>95</sup> The trustee is entitled to a compensation of fifty cents for each copy of the decree of adjudication filed by him, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.<sup>96</sup>

**§ 705. — Expenses.**

The compensation allowed to trustees shall not include expenses necessarily incurred in the performance of their duties, and allowed upon the settlement of their accounts.<sup>97</sup>

Before incurring any expense in publishing and mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, indemnity may be required from the person for whom such service is to be rendered.<sup>98</sup>

The trustee may be allowed a reasonable amount for services and attorneys' fees in a controversy involving the validity of liens.<sup>99</sup>

**§ 706. — Commissions in general.**

Trustees shall receive for their services, payable after they are rendered, from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars.<sup>1</sup> Within the limits fixed by

95—Sees. 48a, 51, Act of 1898.

96—Sec. 47c, Act of 1898.

97—G. O. XXXV.

98—G. O. X.

99—In re Waterloo Organ Co., 154 Fed. 657, 18 A. B. R. 752, mod'g 147 Fed. 814, 17 A. B. R. 301.

1—Section 48a is substituted by the Act of February 5, 1903, for the matter

following, which appeared in the Act of July 1, 1898: "Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such com-

law, the amount to be allowed as commissions is subject to the sound discretion of the court.<sup>2</sup>

Commissions are to be computed on all moneys lawfully disbursed by the trustee, and held by him as such, whether to creditors, secured or unsecured or having priority, or to other persons. If to creditors it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends or in satisfaction of liens upon the fund.<sup>3</sup> The phrase, "on all moneys disbursed," is comprehensive enough to entitle the trustee to commissions on all sums disbursed which includes moneys paid for fees and expenses. When, however, a secured creditor has recourse to a state court to foreclose his lien, or when personal property, without coming into the custody of the bankruptcy court, is sold by the pledgee thereof under a specific contract of sale, and the pledgee does not participate in the bankruptcy proceedings, no commissions are computed on amounts realized.<sup>4</sup>

Commissions are to be allowed upon all sums which would have been paid through the trustee but for an outside agreement between parties, and where property subject to liens is sold by

missions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars."

Analogous provision of Act of 1867. "Sec. 17. . . . He shall be allowed, and may retain out of the money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

"Sec. 28. . . . In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per

centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars, and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him."

2—In re Schoenfeld, 183 Fed. 219, 25 A. B. R. 748.

3—In re Castleberry, 143 Fed. 1021, 16 A. B. R. 430; In re Cramond, 145 Fed. 966, 17 A. B. R. 22.

4—In re Meadows, 199 Fed. 304, 29 A. B. R. 165.

Commissions of amount realized from sale of property pledged by the bankrupt and not in the possession of the trustee allowed only on the excess of the amount received over the amount due the pledgees where pledgees did not consent to sale. *Id.*



consent of parties holding such liens, the trustee is entitled to commissions on the purchase price in full.<sup>5</sup> So the trustee is entitled to commissions on the entire purchase price of property sold by him though the purchaser is required to pay only the balance thereof after deducting his distributive share of the price.<sup>6</sup>

The trustee cannot be allowed his statutory percentage out of property which comes into his possession through the fraud of the bankrupt and is adjudged to be returned to the real owner.<sup>7</sup>

The computation of the trustee's commissions is on the same identical sums as those of the referee and hence the discussion and cases cited as to the referee's commission apply equally here.<sup>8</sup>

### § 707. — Commissions for continuing business.

Where the business is conducted by the trustee, as provided in clause five of section two of the act, the court may allow him additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by him, such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars; but in case of the confirmation of a composition the commission cannot exceed one-half of one per centum of the amount to be paid creditors on such composition.<sup>9</sup>

This provision was inserted by the amendment of 1910 and settles any doubts as to the method and amount of compensation raised by the decisions under the act as it existed prior thereto.<sup>10</sup>

5—In re Sanford Furn. Mfg. Co., 126 Fed. 888, 11 A. B. R. 414.

6—In re Morse Iron Works & Dry Dock Co., 154 Fed. 214, 18 A. B. R. 846.

7—Gillespie v. Piles & Co., 178 Fed. 886, 44 L. R. A. (N. S.) 1, 24 A. B. R. 502.

8—Sec. 40, Act of 1898. See ante § 370.

9—Secs. 2 (5) and 48e as amended June 25, 1910.

10—See, In re Dimm & Co., 146 Fed. 402, 17 A. B. R. 119; In re Cambridge, 136 Fed. 983, 14 A. B. R. 168; In re Hart & Co., 17 A. B. R. 480; In re Pequod Brewing Co., 18 A. B. R. 352; In re Shiebler & Co., 174 Fed. 336, 23 A. B. R. 162.

### § 708. — Commissions where composition confirmed.

“In case of confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.”<sup>11</sup>

### § 709. — Extra compensation.

Section 72 of the act prohibits all extra allowances to trustees for their services, however onerous, meritorious, and valuable.<sup>12</sup> The use of the term “for their services” is an evident indication that congress meant services rendered by the trustee as such. It is only the services trustees are required to perform as such under the act, for which the compensation prescribed is in full; and, if they go outside of such duties and perform services which are not within the scope of the duties of a trustee, a reasonable allowance should be made under “expenses necessarily incurred in the performance of their duties.”<sup>13</sup> So, if professional services, necessary to the proper administration of the trust, have been rendered by the trustee himself he is clearly entitled to such reasonable compensation as he would have paid had he employed other competent counsel.<sup>14</sup>

A contract whereby a creditor agrees to pay the trustee compensation in excess of that allowed by the bankruptcy act is void as against public policy and cannot be enforced.<sup>15</sup>

### § 710. — Apportionment between several trustees.

In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court should apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid

11—Secs. 48a, 48e, Act of 1898.

12—In re Coventry Evans Furn. Co., 171 Fed. 673, 22 A. B. R. 623.

Additional compensation not allowed for investigating the bankrupt's disposition of property and the destruction of his property by fire. In re Screws, 147 Fed. 989, 17 A. B. R. 269.

13—See in re Mitchell, 1 N. B. N. 264, 1 A. B. R. 687; In re Plummer, 2 N. B. N. R. 292, 3 A. B. R. 320; In re Welge,

1 Fed. 216; Contra, In re Meldaur, 17 Fed. Cas. No. 958; In re Epstein, 109 Fed. 878.

14—In re Mitchell, 1 N. B. N. 264, 1 A. B. R. 687; contra, In re Felson, 139 Fed. 275, 15 A. B. R. 185; In re Halbert & Co., 134 Fed. 236, 13 A. B. R. 399; In re McKenna, 137 Fed. 611, 15 A. B. R. 4.

15—Devries v. Orem, 104 Md. 648, 17 A. B. R. 876.

to trustees, for the administering of any estate a greater amount than one trustee would be entitled to.<sup>16</sup>

**§ 711. — Withholding compensation.**

The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause,<sup>17</sup> or who has been guilty of fraud or wilful misconduct,<sup>18</sup> or even mere negligence.<sup>19</sup>

**§ 712. — Procedure to procure compensation.**

Before the allowance of compensation for conducting the business of the bankrupt, ten days' notice of the application, specifying the amount asked, must be given creditors.<sup>20</sup> The compensation of a trustee cannot, ordinarily, be fixed by an order to operate in futuro,<sup>21</sup> though in any case in which the trustee's fee is not required to be paid before filing the petition, the judge may order it paid at any time out of the estate, or, after notice and proof of bankrupt's ability to pay it, require him to do so.<sup>22</sup>

16—Sec. 48b, Act of 1898.

17—Sec. 48e, Act of 1898; *In re Fidler & Son*, 172 Fed. 632, 23 A. B. R. 16; *In re Leverton*, 155 Fed. 931, 19 A. B. R. 434.

18—*In re Leverton*, 155 Fed. 931, 19 A. B. R. 434.

19—*In re Schoenfeld*, 183 Fed. 219, 25 A. B. R. 748.

20—Sec. 48e, Act of 1898, as amended June 25, 1910.

21—*In re Russell Card Co.*, 174 Fed. 202, 23 A. B. R. 300.

22—G. O. XXXV.

## CHAPTER XX

### POWERS AND DUTIES OF TRUSTEES IN GENERAL

- § 713. An officer of the court.
- § 714. Fiduciary relation to bankrupt and creditors.
- § 715. — In general.
- § 716. — Creditors must act through trustee.
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- § 735. Enforcement of stockholder's liability.
- § 736. Liability of trustee and sureties.
- § 737. — In general.
- § 738. — Actions against trustee and sureties.
- § 739. Actions by trustee.
- § 740. Compensation of trustee.

#### § 713. An officer of the court.

The trustee in the performance of his duties is subject to the order and direction of the bankruptcy court. He has no judicial authority, and where such is needed, he must resort to the court, as the bankrupt would have been compelled to do, had no proceedings been instituted;<sup>1</sup> and any power the trustee has must be found in the bankrupt law itself.<sup>2</sup> He is an officer of the

<sup>1</sup>—In re Darby, 4 N. B. R. 98, Fed. Cas. No. 70.

<sup>2</sup>—Dutcher v. Bk., 11 N. B. R. 457, 12 Blatch. 436, 435, Fed. Cas. No. 423.

court, and is strictly limited to powers conferred by the act and orders of the court.<sup>3</sup>

### § 714. Fiduciary relation to bankrupt and creditors.

#### § 715. — In general.

The trustee stands to creditors in a fiduciary relation and should have no interest except to conserve the estate. In all matters between the bankrupt and creditors he should stand indifferent.<sup>4</sup> He is chosen to represent all creditors, and he cannot yield his judgment to the majority of creditors merely because they are a majority. He may consult with creditors upon important matters and get the benefit of their opinions, but the responsibility of decision rests upon him.<sup>5</sup>

It is not the trustee's duty to do anything towards perfecting an imperfect lien, or asserting a perfect one in behalf of creditors;<sup>6</sup> nor to do anything if the bankrupt states at the first meeting of creditors his intention of offering a composition, until the refusal to confirm such composition.<sup>7</sup> The trustee cannot attack the trust he assumed to execute and defend,<sup>8</sup> nor should he refuse to contest a debt which he knows or believes to have been fraudulently proved.<sup>9</sup> He has no relation whatever to the bankrupt except to set apart his exemption.<sup>10</sup>

#### § 716. — Creditors must act through trustee.

The trustee is the representative of all the creditors and<sup>11</sup> is the proper person to take any steps that become necessary in the course of administration of a bankrupt's estate. Proceedings by creditors after the appointment of a trustee are irregular;<sup>12</sup>

3—In re Ryan & Griffin, 6 N. B. R. 235, Fed. Cas. No. 12182; see McLean v. Mayo, 113 Fed. 106, 7 A. B. R. 115; U. S., ex rel. Schauffler v. Union Surety & Guaranty Co., 118 Fed. 482, 9 A. B. R. 114; Hahlo v. Cole, 112 App. Div. (N. Y.) 636, 15 A. B. R. 591.

4—In re Wrisley Co., 133 Fed. 388, 13 A. B. R. 193.

5—In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526.

6—Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104.

7—In re Rung Bros., 2 A. B. R. 620.

8—John v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7408.

9—Bk. v. Cooper, 9 N. B. R. 529, 20 Wall. 171, 22 L. ed. 273.

10—Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111.

11—In re Martin, 173 Fed. 597, 23 A. B. R. 151; Atkins v. Wilcox, 105 Fed. 595, 53 L. R. A. 118, 5 A. B. R. 313; In re McLean v. Mayo, 113 Fed. 106, 7 A. B. R. 115.

12—Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 22 A. B. R. 643; In re Carter, 1 N. B. N. 162, 1 A. B. R. 160;

and, if he refuses to act, a petition to compel him to act should be filed.<sup>13</sup>

### § 717. Majority must concur where three trustees appointed.

Whenever three trustees have been appointed for an estate, the concurrence of at least two of them is necessary to the validity of their every act concerning the administration of the estate.<sup>14</sup>

### § 718. General powers of trustee of bankrupt corporation.

The trustee of a bankrupt corporation has all the powers originally vested in the board of directors.<sup>15</sup>

### § 719. Duty to file decree of adjudication.

The trustee is required to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, within thirty days after the adjudication, and pay the fee for such filing.<sup>16</sup> This record need only be made in cases instituted on and subsequent to February 5, 1903.

The trustee becomes vested by operation of law with the title to all of bankrupt's property, real, personal or mixed, except such as is exempt, that may be situated within the United States or its territories, as of the date he was adjudged a bankrupt. While this is true, if bankrupt owns real estate out of the jurisdiction of the court where the proceedings have been instituted, the record title to such property is defective without some such notice as here provided, showing that the title has passed from the bankrupt. In the case of property located in a foreign country the filing of such decree is unnecessary, since in the absence of a treaty our insolvency laws are not recognized.

In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819; In re Adams, 1 A. B. R. 94, 1 N. B. N. 167.

Creditor cannot petition for an order for restitution of money paid by the bankrupt to his attorneys without alleging that the trustee has refused, upon request, to act. In re Oakley, 215 Fed. 265, 31 A. B. R. 806.

13—Glenny v. Langdon, 19 N. B. R. 24, 98 U. S. (8 Otto) 20, 25 L. ed. 43.

Creditors may sue, with leave of court, where trustee fails to. In re Morris, 204 Fed. 770, 30 A. B. R. 319.

14—Sec. 47b, Act of 1898.

15—In re Monarch Corporation, 177 Fed. 464, 24 A. B. R. 428.

16—Sec. 47c, Act of 1898. Subdivision "c" was not a part of the Act of July 1, 1898, but was inserted by the amendatory Act of February 5, 1903.

abroad, and the only method of obtaining title to bankrupt's property located beyond the jurisdiction of the United States is through a proper conveyance from the bankrupt.<sup>17</sup>

### § 720. Preparation of inventory.

Immediately on entering upon his duties the trustee should prepare a complete inventory of all the property of the bankrupt that comes into his possession.<sup>18</sup>

### § 721. Accounts and reports.

The trustee is required to keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; to report to the court, in writing, the condition of the estate and the amounts of money on hand, and such other details as may be required by the court, within the first month after his appointment and every two months thereafter, unless otherwise ordered by the court; to lay before the final meeting of the creditors detailed statements of the administration of the estate; and to make final report and file final account with the court fifteen days before the day fixed for the final meeting of the creditors.<sup>19</sup> In case of a partnership he must keep separate accounts of the partnership property and of the property belonging to the individual partners.<sup>20</sup>

All his accounts must be referred as of course to the referee for audit, unless otherwise specially ordered by the court,<sup>21</sup> and in such case it is the referee's duty to approve them if correct, which discharges the trustee.<sup>22</sup> The trustee is not required to amend his report when it is not shown to be proper or that it will affect the bankrupt either way.<sup>23</sup>

Failure of the trustee to file an account in compliance with an order of the referee may render him liable for contempt<sup>24</sup> and in case he neglects to file any report or statement required by the act, or by any general rule in bankruptcy, within five days

17—Sec. 7a (5), Act of 1898.

18—G. O. XVII.

19—Sec. 47a, Act of 1898.

20—Sec. 5d, Act of 1898.

21—G. O. XVII, Official Forms 49 and 50, §§ 1717, 1718, *post*. In re Bazinsky, Mitchell & Co., 1 N. B. N. 360, 2 A. B. R. 243; In re Carr, 116 Fed. 556, 8 A. B. R. 635; but see In re Hicks, 19 N. B. R. 449, Fed. Cas. No. 6457; In re Hubbel, 9 N. B.

R. 523, Fed. Cas. No. 6828; In re Clark, 9 N. B. R. 67, Fed. Cas. No. 2810; In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10866.

22—Official Form No. 5, § 1691, *post*.

23—In re Kingon, 3 N. B. R. 446, Fed. Cas. No. 7815.

24—O'Connor v. Sunseri, 184 Fed. 712, 25 A. B. R. 1.

after the same shall be due, the referee must make an order requiring him to show cause before the judge, at a time specified in the order, why he should not be removed from office, and cause a copy of such order to be served on him at least seven days before the time fixed for the hearing, and proof of service to be delivered to the clerk.<sup>25</sup>

### § 722. Arbitration and compromise of claims.

See post, chapter XXVIII.

### § 723. Duty to furnish information.

The accounts and papers of trustees are open to the inspection of officers and all parties in interest.<sup>26</sup> It is his duty to furnish such information concerning the estates of which he is trustee and their administration as may be requested by parties in interest; and his refusal to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do will subject him to a fine and the loss of his office.<sup>27</sup> Unlawfully secreting or destroying any document belonging to a bankrupt estate which came into his hands as trustee will subject him to imprisonment,<sup>28</sup> in either case both the court of bankruptcy and the district court having jurisdiction to try him.<sup>29</sup>

The trustee may assist in the prosecution of the bankrupt by allowing a use of the bankrupt's books by the prosecuting officer,<sup>30</sup> and may be compelled to file with the referee or clerk a copy of the testimony of the bankrupt, given upon his examination, or to permit an examination thereof.<sup>31</sup>

### § 724. Duty to collect and reduce estate to money.

The principal duty of the trustee is to collect and reduce to money the property of the estates in his charge, wherever found,

25—G. O. XVII.

26—Sec. 49a, Act of 1898. Analogous provision of Act of 1867. "Sec. 15. . . . The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort."

27—Sec. 29c, Act of 1898; Blaisdell,

6 N. B. R. 78, 5 Ben. 420, Fed. Cas. No. 1488.

28—Sec. 29a, Act of 1898.

29—Secs. 2 (4) and 23c, Act of 1898.

30—In re Tracy & Co., 177 Fed. 532, 23 A. B. R. 438.

31—In re Samuelsohn, 174 Fed. 911, 23 A. B. R. 528.



under the direction of the court, and close them up as expeditiously as is compatible with the best interests of the parties concerned.<sup>32</sup> The terms "property" and "estate," in section 47a (2) are used in the broadest sense and include every species of property, not legally exempt, that can be made available for the benefit of creditors, and would include an interest under a will;<sup>33</sup> unpaid subscriptions to corporations;<sup>34</sup> the excess in value of property over the amount secured on it; besides the usual visible forms of property. It is the trustee's duty to investigate the securities held by creditors to determine their value, how and by what right they are held, and whether anything may be obtained from them for the general creditors; and take proper steps to have the securities declared invalid if they are so; or, if they are valid, redeem the property from the lien if, after application to the court,<sup>35</sup> that seems desirable, in which case he may be subrogated to the rights of the lienor if necessary,<sup>36</sup> or if there is likely to be a surplus and a foreclosure suit is pending, intervene in such suit;<sup>37</sup> but, unless the estate will be benefited, he need not move in the matter.<sup>38</sup>

For the purpose of collecting and reducing to money the property of the estate, the trustee takes not only all the rights and title of the bankrupt, but he takes also all the rights of creditors as against adverse claimants to the estate. He takes the estate free from all claims that are not valid against creditors or any one of them;<sup>39</sup> and he may set aside fraudulent preferences, or fraudulent conveyances;<sup>40</sup> though the bankrupt himself might

32—Sec. 47a, Act of 1898; In re Stein, 1 N. B. N. 337, 94 Fed. 124, 1 A. B. R. 662; In re Wright, 177 Fed. 578, 24 A. B. R. 437.

33—In re Baudouine, 1 N. B. N. 506, 96 Fed. 536, 3 A. B. R. 55; In re Wood, 98 Fed. 972, 3 A. B. R. 572; In re Wetmore, 99 Fed. 703, 3 A. B. R. 700; In re Tiffany, 133 Fed. 799, 13 A. B. R. 310.

34—In re Crystal Springs Bottling Co., 3 A. B. R. 194, 96 Fed. 945; Michener v. Payson, 13 N. B. R. 49, Fed. Cas. No. 9524; Myers v. Seeley, 10 N. B. R. 411, Fed. Cas. No. 9994.

35—G. O. XXVIII; Official Form No. 43, § 1800, *post*.

36—McLean v. Cadwalader, 15 N. B. R. 383.

37—In re Holloway, 1 N. B. N. 264, 93 Fed. 638, 1 A. B. R. 659; Heath v. Shaffer, 1 N. B. N. 399, 93 Fed. 647, 2 A. B. R. 98.

38—In re Lambert, 2 N. B. R. 138, Fed. Cas. No. 8026.

39—Sec. 67a, Act of 1898; In re Kindt, 2 N. B. N. R. 369; In re Booth, 2 N. B. N. R. 377, 98 Fed. 975, 3 A. B. R. 574. See *post*, Chap. XXI.

40—Act of 1898, §§ 60b, 67c, 70e; In re Griffith, 1 N. B. N. 546; In re Gray, 47 App. Div. (N. Y.) 554, 3 A. B. R. 647; In re McNamara, 2 N. B. N. R. 341; Upton v. Jackson, Fed. Cas. No. 16802;

not be able to do so. He will be subrogated to and may enforce the rights of any creditor who is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt,<sup>41</sup> and as to all property in the custody or coming into the custody of the bankruptcy court, is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and, also as to all property not in the custody of the bankruptcy court he is vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.<sup>42</sup>

He may reclaim and recover by legal proceedings or otherwise any property, not exempt, transferred within four months of the bankruptcy with intent to hinder, delay or defraud creditors, except as to purchasers in good faith and for a present fair consideration, and any such property transferred within such four months and while the debtor was insolvent when such transfer is void as to creditors by the state law.<sup>43</sup> He takes the property unaffected by any lien obtained through legal proceedings against an insolvent within four months of bankruptcy, except as against a bona fide purchaser for value without notice or reasonable cause for inquiry, or may be subrogated to the rights of the lienor;<sup>44</sup> and may recover the excess over a reasonable amount where a debtor in contemplation of bankruptcy has paid money or transferred property to an attorney for services to be rendered.<sup>45</sup>

He may also do whatever the bankrupt could to make the estate available for the benefit of creditors, as prove a claim

In re Leland, 9 N. B. R. 209, 7 Ben. 156, Fed. Cas. No. 8230; Bradshaw v. Klein, Fed. Cas. No. 1790; In re Metzger, 2 N. B. R. 114, Fed. Cas. No. 9510; In re Duncan, 14 N. B. R. 18, 8 Ben. 365, Fed. Cas. No. 4131; Barker v. Barker's Ass., 12 N. B. R. 474, 2 Woods, 87, Fed. Cas. No. 986; In re Adams, 1 N. B. R. 167, 1 A. B. R. 94; Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111; In re Wynne, 4 N. B. R. 5, Fed. Cas. No. 18117; Allen v. Mussey, 4 N. B. R. 75, Fed. Cas. No. 231; Thurmond v. Andrews, 13 N. B. R. 157.

41—Sec. 67b, Act of 1898.

42—Sec. 47a (2) as amended by Act of June 25, 1910.

For the discussion and authorities under this amendment, see *post*, § 748.

43—Sec. 67e, Act of 1898; In re Gray, 47 App. Div. (N. Y.) 554, 3 A. B. R. 647.

44—Sec. 67f, Act of 1898.

45—Sec. 60d, Act of 1898.

against another estate in bankruptcy and have it allowed in the same manner and upon like terms as other creditors.<sup>46</sup>

A payment made to the trustee under a mistake of law is recoverable.<sup>47</sup>

Being vested with the title, the trustee is not only authorized to take possession of all the property in the active or constructive possession of the bankrupt, but it is his imperative duty to do so.<sup>48</sup> He is bound to use due diligence to get in the assets of the estate—to secure possession of the tangible property and collect debts. If he fails in his duty he may be charged in his accounts with the value of the assets thereby lost, less reasonable costs and expenses of collection.<sup>49</sup> He should be as vigilant to pursue alleged preferential claims as to collect assets.<sup>50</sup> If he takes no steps to secure property or collect debts, of which he has knowledge, he is presumptively negligent, and the burden is upon him to explain his failure to act.<sup>51</sup>

### § 725. Performance of contracts of bankrupt.

The trustee may in a proper case complete contracts of the bankrupt,<sup>52</sup> or the court may, at the instance of the creditors, order the trustee to rescind an executory contract under which the bankrupt is vendee, and to execute a release of the bankrupt's interest in the property.<sup>53</sup> It is the trustee's duty to decide, within a reasonable time, whether a lease is beneficial to the estate and whether he will accept it or not.<sup>54</sup>

### § 726. Redemption of property.

If it is deemed for the benefit of the estate to redeem property from any mortgage, or other pledge, or deposit, or lien, or a conditional contract, or to tender performance of the conditions of the last, the trustee should petition the court, which will fix a time for a hearing thereon and direct how notice shall be

46—Sec. 57m, Act of 1898.

47—*Carpenter v. Southworth*, 165 Fed. 428, 21 A. B. R. 390.

48—Sec. 47a (2). *Smith v. Berman*, 8 Ga. App. 262, 24 A. B. R. 849.

49—*In re Monsarrat*, 25 A. B. R. 20; *In re Reinboth*, 157 Fed. 672, 19 A. B. R. 15.

50—*In re Columbia Iron Works*, 142 Fed. 234, 14 A. B. R. 526.

51—*In re Reinboth*, 157 Fed. 672, 19 A. B. R. 15.

52—*Corbett v. Riddle*, 209 Fed. 811, 31 A. B. R. 330.

53—*Kenyon v. Mulert*, 184 Fed. 825, 26 A. B. R. 184.

54—*In re Schierman*, 2 N. B. N. R. 118; *In re Laurie*, 4 N. B. R. 7. See also *post* § 827.

given, and upon a hearing make such order as seems proper;<sup>55</sup> and, in case it is necessary, the trustee may be subrogated to the rights of the holder of such security until from the proceeds of the property, the fund is made good.<sup>56</sup>

### § 727. Sale of property.

The trustee should sell bankrupt's property under the order of the court and subject to its approval, or, if sold otherwise than subject to the approval of the court, it should be for not less than seventy-five per centum of its appraised value; such sales to be at public auction unless for good cause shown the court may authorize a private sale,<sup>57</sup> after at least ten days' notice by mail to creditors,<sup>58</sup> or an immediate sale is ordered by the court on account of the perishable nature of the property without notice.<sup>59</sup> After the sale is confirmed by the court the trustee should convey the property to the purchaser.<sup>60</sup>

The trustee cannot purchase at his own sale,<sup>61</sup> nor can his solicitor bid at such sale.<sup>62</sup>

For a full discussion and authorities on this subject, see post, chapter XXX.

### § 728. Deposit and payment of money.

Courts of bankruptcy are directed to designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and are empowered from time to time as occasion may require, by like order to increase the number of depositories or the amount of any bond or change such depositories.<sup>63</sup> The provisions of the act are mandatory in form, and were designed to insure the safety of the funds rather than an increment by way of interest while they are idle.<sup>64</sup>

55—G. O. XXVIII; Official Form 43, § 1800, *post*; Reed v. Bullington, 11 N. B. R. 408.

56—McLean v. Cadwalader, 15 N. B. R. 383.

57—G. O. XVIII.

58—Sec. 58a, Act of 1898.

59—G. O. XVIII.

60—Sec. 70c, Act of 1898.

61—Lockett v. Hodge, 9 N. B. R. 167, Fed. Cas. No. 8444.

62—Bank v. Ober, 13 N. B. R. 328, 1 Woods, 80, Fed. Cas. No. 2731.

63—Sec. 61a, Act of 1898; Sec. 47a (3).

64—Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 20 A. B. R. 349.

The bond of the designated depositories must be filed of record in the office of the clerk of court and may be sued upon in the name of the United States for the use of any person injured by a breach of its conditions.<sup>65</sup> The same rules as to the sufficiency of the sureties thereon apply as in case of bonds of trustees.<sup>66</sup> Trustees are required to deposit to their credit<sup>67</sup> without delay, all moneys received by them in one of the designated depositories and disburse the same only by check or warrant on the same,<sup>68</sup> which check or warrant is to be signed by the clerk of the court or by the trustee, and countersigned by the judge of the court, or by a referee designated for the purpose, or by the clerk or his assistant, under an order from the judge and should state the date, the sum, and the account for which it is drawn. The name of any referee or judge authorized to countersign such checks must be furnished to the depository.<sup>69</sup> An entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, must be forthwith made in a book kept for that purpose by the trustee; and all checks and drafts must be entered in the order of time in which they are drawn, and must be numbered in the case of each estate.<sup>70</sup>

A bank in which funds are deposited to the credit of a trustee in bankruptcy has no power to pay out any of said funds except upon proper warrant under the authority of the court of bankruptcy. A state court has no authority to order such a bank to pay out of such funds a judgment rendered against the trustee.<sup>71</sup> Under the act of 1867, the banks were not required to keep a separate account with each bankrupt estate, in which the deposits were made in the name of the United States District Court, and the same rule would doubtless apply under the present law,<sup>72</sup> but this would not be true if deposited to the credit of the trustee. The bankruptcy court has no jurisdiction

65—Sec. 50h, Act of 1898.

66—See *ante* § 693.

67—In *re* Carr, 116 Fed. 556, 8 A. B. R. 635.

68—Sec. 47a, Act of 1898. Analogous provision of Act of 1867. "Sec. 17. . . . That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or other-

wise keep it distinct and apart from all other money in his possession."

69—In *re* Cobb, 112 Fed. 655, 7 A. B. R. 202.

70—G. O. XXIX; In *re* Rude, 101 Fed. 805, 4 A. B. R. 319; In *re* Carr, 116 Fed. 556, 8 A. B. R. 635.

71—Havens v. Bank, 13 N. B. R. 95.

72—State Nat. Bk. v. Dodge, 124 U. S. 333, 31 L. ed. 458.

to determine the right of the trustee to priority in funds deposited by him with a trust company whose property is subsequently taken possession of by a state officer for the purpose of liquidation.<sup>73</sup> Such right of priority depends upon the state law.<sup>74</sup>

The trustee will not be required by a summary proceeding to pay into court moneys received by him as receiver of the bankrupt in a state court, without a hearing on the disputed items of his account.<sup>75</sup>

A trustee is liable personally for unauthorized payments made by him. A decision by the district court disallowing payments made by him is conclusive upon the question of authority where not appealed from.<sup>76</sup>

### § 729. Attachment of funds in trustee's hands.

While funds in the hands of the trustee are not subject to attachment or garnishment,<sup>77</sup> yet where a judgment is recovered in the state court against the trustee as garnishee, the bankruptcy court may, with the consent of the trustee, out of respect of the state court, direct that the trustee pay the judgment.<sup>78</sup>

### § 730. Liability for interest.

The trustee is required to account for and pay over to the estate under his control all interest received upon property of such estate, implying that such property may be temporarily, at least, invested so as to produce interest, as was expressly authorized by the former act.<sup>79</sup>

### § 731. Payment of taxes.

Under the order of the court, the trustee should pay all taxes legally due the United States, state, county, district, or municipality in advance of dividends, and, in case the amount or

73—*In re Bologh*, 185 Fed. 825, 25 A. B. R. 726.

74—Trustee held entitled to priority in *New York. Morris v. Carnegie Trust Co.*, 154 App. Div. (N. Y.) 596, 29 A. B. R. 884.

75—*Loveless v. Southern Grocer Co., Ltd.*, 159 Fed. 415, 20 A. B. R. 180.

76—*In re Hoyt & Mitchell*, 127 Fed. 968, 11 A. B. R. 784.

77—*In re Kranich*, 182 Fed. 849, 25 A. B. R. 50.

*In re Hollander*, 181 Fed. 1019, 25 A. B. R. 48.

78—*In re Kranich*, 182 Fed. 849, 25 A. B. R. 50.

79—Sec. 47a (1), Act of 1898; Act of 1867, Sec. 17.

legality of such tax is questioned, have it determined in the court of bankruptcy.<sup>80</sup> His failure to pay taxes, when having in hand sufficient funds, renders him liable to be surcharged to the extent of interest and penalties accruing because of the default in payment.<sup>81</sup>

### § 732. Duty with respect to bankrupt's exemptions.

It is the trustee's duty to set apart the bankrupt's exemptions and to report to the court, within twenty days after receiving notice of his appointment, the articles set off to the bankrupt with the estimated value of each, when any creditor may except to the same within twenty days after the report is filed, and the referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party.<sup>82</sup>

For the discussion and authorities on this subject, see Exemptions, chapter XXIV.

### § 733. Payment of dividends.

The trustee is required to pay dividends within ten days after they are declared by the referee,<sup>83</sup> of which notice<sup>84</sup> should be given; and, if they remain unclaimed for six months after the final dividend has been declared, he should pay them into court.<sup>85</sup> Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.<sup>86</sup>

For a further discussion of the duty of trustees in this respect see chapter XXVII.

### § 734. Employment of attorney.

The trustee is under no obligation to perform legal services and may employ legal assistance when necessary. He may select his own counsel, subject only to the limitation that counsel representing interests which are adverse to the estate or in con-

80—Sec. 64a, Act of 1898.

81—*In re Monsarrat*, 25 A. B. R. 820.

82—Sec. 47a, Act of 1898. G. O.

XVII; *McGahan v. Anderson*, 113 Fed. 115, 7 A. B. R. 641.

83—Sec. 47a (9), Act of 1898.

84—Official Form No. 41, § 1744, *post*.

85—Sec. 66a, Act of 1898.

86—Sec. 57c, Act of 1898.

dict with other interests represented by the trustee, or to which he owes a duty, should not be selected.<sup>87</sup> He must decide in the first instance himself whether it is necessary, as a court will not give him directions in advance,<sup>88</sup> though if he desires he may submit the question of such employment to the creditors at the first meeting.<sup>89</sup> In special cases the court has selected counsel to represent the trustee,<sup>90</sup> but the custom followed as a rule, however, is for the trustee to select his own counsel.

One who acted as bankrupt's attorney in the preparation of the case cannot subsequently act as attorney for the trustee on being relieved by the bankrupt, since the rule with reference to the confidential nature of communications between attorney and client apply with equal force in proceedings in bankruptcy.<sup>91</sup>

The trustee should not pay money out of the estate to his attorney without the order or authority of the court. He may, however, pay for legal services out of his own funds, and ask reimbursement from the estate.<sup>92</sup>

Allowances to attorneys, see post, chapter XXXI.

### § 735. Enforcement of stockholder's liability.

The trustee cannot sue to enforce the liability of stockholders of the bankrupt corporation since such liability is not an asset of the corporation.<sup>93</sup> He may, however, ask for an assessment upon the capital stock to such an amount as shall be needed to pay the debts and expenses, provided the stock shall be found to be in fact partly unpaid for, no matter what the original terms

87—In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526. Trustee should not ordinarily employ the attorney who represents the bankrupt, or interests in the litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee, and where there are matters in controversy between different classes of creditors, the court will usually decline to authorize the employment by the trustee of the attorney representing one of these classes. In re Smith, 203 Fed. 369, 29 A. B. R. 628.

88—In re McKenna, 137 Fed. 611, 15 A. B. R. 4; In re Abram, 3 N. B. N. R. 28, 103 Fed. 272, 4 A. B. R. 575; In re

Baber, 119 Fed. 520; In re Baxter, 19 N. B. R. 295, Fed. Cas. No. 1122.

89—In re Smith, 1 N. B. N. 136, 1 A. B. R. 37; In re Little River Lumber Co., 101 Fed. 558, 3 A. B. R. 682; but see In re Abram, 103 Fed. 272, 3 N. B. N. R. 28, 4 A. B. R. 575.

90—In re Arnett, 112 Fed. 770, 7 A. B. R. 522.

91—In re Teuthorn, 5 A. B. R. 767.

92—In re McKenna, 137 Fed. 611, 15 A. B. R. 4.

93—Hunt v. Sharkey, Cal. 31 A. B. R. 894; Breck v. Brewster, 138 N. Y. S. 821, 31 A. B. R. 842; Rosoff v. Gilbert Transportation Co., 204 Fed. 349, 30 A. B. R. 359.



of issue were,<sup>94</sup> and in case an assessment has been made by the bankruptcy court, or under its direction, ratably distributing the liability of the bankrupt estate among the subscribers to the stock, he may sue to enforce the assessment.<sup>95</sup> Actual notice of a preliminary hearing on the question of assessments should be given to all stockholders and parties who have appeared in the proceeding. Any stockholder, creditor, or person interested may appear at the hearing to contest claims filed. Pending the hearing, suits by the trustee to recover the unpaid subscriptions should be stayed.<sup>96</sup>

In this connection reference should also be had to subsequent chapters.<sup>97</sup>

### § 736. Liability of trustee and sureties.

#### § 737. — In general.

A trustee cannot be held liable, personally or on his bond, to the United States, for any penalties or forfeitures incurred by the bankrupt under the act.<sup>98</sup>

In the discharge of his quasi official duties, the court will protect him,<sup>99</sup> and a mere mistake of judgment is insufficient to involve the trustee in personal liability.<sup>1</sup> Accordingly he has been held not to be personally liable for rent of a hotel operated for the benefit of the estate,<sup>2</sup> though he has been held personally liable for damages resulting from his failure to surrender leased premises at the expiration of the lease.<sup>3</sup> Where the trustee with notice of an equity upon the fund, turns over the assets to the bankrupt in pursuance of an order confirming a composition, without bringing the equity to the court's attention he is personally liable to the owner of the equity for the amount thereof.<sup>4</sup>

Trover will lie against the trustee to recover the amount of an

94—*In re Monarch Corporation*, 177 Fed. 464, 24 A. B. R. 428.

95—*Hunt v. Sharkey*, Cal. 31 A. B. R. 894.

96—*Rosoff v. Gilbert Transportation Co.*, 204 Fed. 349, 30 A. B. R. 359.

97—See *post*, § 1125.

98—Sec. 50i, Act of 1898.

99—*McLean v. Mayo*, 7 A. B. R. 115;  
*In re Carothers & Co.*, 193 Fed. 687, 27 A. B. R. 921.

1—*In re Bayley*, 177 Fed. 522, 22 A. B. R. 249.

2—*In re Bayley*, 177 Fed. 522, 22 A. B. R. 249.

3—*In re Hunter*, 151 Fed. 904, 18 A. B. R. 477.

4—*In re Cadenos & Coe*, 178 Fed. 158, 24 A. B. R. 135.

incumbrance on property sold by the trustee free from liens without notice to the incumbrancer.<sup>5</sup>

A trustee who is charged with mismanagement and removed at the instance of creditors, will be protected against costs of administration where he acts in good faith and they will be paid out of the estate;<sup>6</sup> as in the case of a bill of complaint filed without sufficient cause, but where the want is not sufficiently clear to impeach his good faith.<sup>7</sup>

The trustee's bond does not become void upon a recovery thereon, but continues in force for two years after the estate is closed, unless the amount thereof is previously exhausted.<sup>8</sup> The liability of the surety on the bond of a trustee extends to such expenditures of the funds of the estate as become necessary as the immediate result of the trustee's embezzlement, but does not include the premium on the bond of a new trustee.<sup>9</sup>

### § 738. — Actions against trustee and sureties.

An action will not lie in the state courts to recover property seized by the trustee.<sup>10</sup> An action in trespass, or for conversion brought against the trustee in bankruptcy by one who sold property to the bankrupt, to recover the proceeds of a sale of the property or its value, based on the claim that title remained in the vendor will be enjoined, since the question may be fully determined by the bankruptcy court.<sup>11</sup> However, suit may be brought in the state courts for wrongful acts of the trustee where he goes entirely beyond his duties as an officer and is guilty of such conduct as is actionable in its character, particularly as against third persons.<sup>12</sup>

Suits upon trustees' bonds may be brought at any time prior to two years after the estate has been closed,<sup>13</sup> and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.<sup>14</sup> Where the suit is

5—*In re Platteville Foundry & Machine Co.*, 147 Fed. 828, 17 A. B. R. 291.

6—*In re Mallory*, 4 N. B. R. 38, Fed. Cas. No. 890.

7—*Coxe v. Hale*, 8 N. B. R. 562, Fed. Cas. No. 3310.

8—*In re Kajita*, 13 A. B. R. 19.

9—*In re Kajita*, 13 A. B. R. 19.

10—*Berman v. Smith*, 171 Fed. 735, 22 A. B. R. 662.

11—*In re Mertens*, 131 Fed. 507, 12 A. B. R. 698.

12—*Berman v. Smith*, 8 Ga. App. 262, 24 A. B. R. 849; *Berman v. Smith*, 171 Fed. 735, 22 A. B. R. 662.

13—Sec. 50m, Act of 1898.

14—Sec. 50h, Act of 1898.

brought in a name other than that of the United States leave must be obtained.<sup>15</sup> A suit on the bond of the trustee can be brought in a state court.<sup>16</sup>

Where the defaulting trustee is a fugitive from justice and is not within the state, he is not a necessary party to the action.<sup>17</sup> A trustee in bankruptcy may institute suit in the district court in the name of the United States on the bond of a former trustee to recover the value of property for which he has failed to account.<sup>18</sup>

A stockholder of a bankrupt has no standing in the bankruptcy proceedings such as to require the trustee to answer a petition filed by him.<sup>19</sup>

### § 739. Actions by trustee.

See post, chapter XXVI.

### § 740. Compensation of trustees.

See ante, section 702.

15—*Alexander v. Union Surety and Guaranty Co.*, 89 App. Div. (N. Y.) 3, 11 A. B. R. 32.

16—*Alexander v. Union Surety and Guaranty Co.*, 89 App. Div. (N. Y.) 3, 11 A. B. R. 32.

17—*Alexander v. Union Surety and Guaranty Co.*, 89 App. Div. (N. Y.) 3, 11 A. B. R. 32.

18—*U. S. v. Union Surety & Guaranty Co.*, 9 A. B. R. 114, 118 Fed. 482; see *Platt, Rec. v. Beach*, 2 Ben. 303.

19—*In re Witherbee*, 202 Fed. 896, 30 A. B. R. 314.

## CHAPTER XXI

### PROPERTY OF BANKRUPT AND TITLE THERETO

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- § 855. Wages.

### § 741. Title vests in trustee by operation of law.

In the case of property within the United States or any of its provinces, the title to property of a bankrupt passes to his trustee by operation of law without any conveyance from the bankrupt,<sup>1</sup> while in case of property beyond the jurisdiction of the United States a conveyance by the bankrupt is necessary.

The act expressly provides that “a certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.”<sup>2</sup>

A trustee's representative character need not be averred in the pleadings, and it is not necessary to prove all the steps in the proceedings if a duly certified copy of the order approving the bond, which is the equivalent of “assignment” under the former act, be put in evidence,<sup>3</sup> as the court is bound to take judicial notice that all the bankrupt's property and effects are vested, by operation of law, in the trustee, after it is shown that the defend-

1—In re Arsen, 188 Fed. 475, 26 A. B. R. 684. See Markson & Spalding v. Heaney, 4 N. B. R. 165, Fed. Cas. No. 17980.

2—Sec. 21e, Act of 1898. See anal-

ogous provisions of Act of 1867 under subd. d.

3—Mambmann v. White, 12 N. B. R. 438.

ant has been declared a bankrupt.<sup>4</sup> A certified copy of the order approving the bond of the trustee, no one opposing, must be recorded when presented,<sup>5</sup> but a record is not necessary to give force or validity to the transfer to the trustee.<sup>6</sup>

Since the amendment of 1903 the trustee is required to file a copy of the decree of adjudication in the proper record office of the county where the bankrupt owned real estate, but a failure to file the adjudication in the county where the property lies does not prevent the passing of title to the trustee as upon the date of the adjudication, the statute requiring recordation being directory only.<sup>7</sup>

Under the act of 1867,<sup>8</sup> in addition to the petition and the adjudication and order approving the trustee's bond, as required now, an assignment was necessary to vest the assets in the assignee, such vesting creating a trust against which the statute of limitations ceased to run, as is the case now.<sup>9</sup>

#### § 742. When title passes to trustee.

Title to property of the bankrupt passes to the trustee of his estate, or his successor if he has one, upon the trustee's appointment and qualification.<sup>10</sup> No trustee having been appointed, the bankrupt is not divested of his title by the filing of a petition in bankruptcy and an adjudication thereon.<sup>11</sup>

#### § 743. Title vests as of date of adjudication.

Section 70a provides that the trustee shall, upon his appointment and qualification be vested with title to non-exempt property of the bankrupt "as of the date he was adjudged a bankrupt."<sup>12</sup> This clause in section 70a should be construed together

4—*Morris v. Davidson*, 11 N. B. R. 454.

5—*In re Neale*, 3 N. B. R. 43, Fed. Cas. No. 10066.

6—*Davis v. Anderson*, 6 N. B. R. 146, Fed. Cas. No. 3623.

7—*Hiehl v. Burr*, 61 Fla. 625, 26 A. B. R. 897.

8—Sec. 14, Act of 1867.

9—*In re Resler*, 1 N. B. N. 280, 2 A. B. R. 166, 95 Fed. 804; *In re Lipman*, 1 N. B. N. 310, 2 A. B. R. 49, 94 Fed. 353; *Sutherland v. Davis*, 10 N. B. R. 424; *In re Eldridge*, 12 N. B. R. 540, 2 Hughes, 256, Fed. Cas. No. 4331; *Stark-*

*weather v. Ins. Co.*, 4 N. B. R. 110, Fed. Cas. No. 13308.

10—Sec. 70a, Act of 1898; *In re Fletcher*, 15 Ohio Fed. Dec. 210, 16 A. B. R. 491; *Johnson v. Collier*, 222 U. S. 538, 56 L. ed. 306, 27 A. B. R. 454.

11—*Rand v. Iowa Cent. Ry. Co.*, 186 N. Y. 58, 16 A. B. R. 692; *Gordon v. Mechanics' & Traders' Ins. Co.*, 120 La. Ann. 441, 22 A. B. R. 649; but see, *In re Fletcher*, 15 Ohio Fed. Dec. 210, 16 A. B. R. 491.

12—Act of 1898, § 70a (5). See, *In re Thomas*, 199 Fed. 214, 29 A. B. R. 945;

with the clause in the same subdivision that the trustee is vested with all property, which prior to the filing of the petition, the bankrupt could have transferred; the provisions of the act under which the right to prove claims or procure a discharge therefrom is determined as of the day the petition is filed;<sup>13</sup> and the provision that the schedules of property in voluntary proceedings must be filed with the petition;<sup>14</sup> and construing the act as a whole, the line of cleavage with reference to the condition of the bankrupt estate is fixed as of the time at which the petition was filed, and the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.<sup>15</sup>

#### § 744. Nature of trustee's title.

#### § 745. — Derived from bankruptcy act.

If the trustee has any power over a subject, it must be found in the bankruptcy act.<sup>16</sup>

#### § 746. — Purpose for which title vests.

Title vests in the trustee only for the purposes of administration and distribution among creditors, and if by reason of the confirmation of a composition no such distribution is necessary title reverts in the bankrupt.<sup>17</sup>

#### § 747. — Title prior to amendment of 1910.

Under the act of 1898 as it existed prior to the amendment of 1910, the trustee stood in the shoes of the bankrupt and took no

Lovell v. Newman & Son, 192 Fed. 753, 27 A. B. R. 746; In re Zotti, 186 Fed. 84, 26 A. B. R. 234; In re Letson, 157 Fed. 78, 19 A. B. R. 506; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 18 A. B. R. 1, aff'g 144 Fed. 818, 15 A. B. R. 362, rev'g 134 Fed. 101, 14 A. B. R. 226; In re Fletcher, 15 Ohio Fed. Dec. 210, 16 A. B. R. 493.

A bank honoring checks of the bankrupt after the filing of the petition, but before the adjudication in bankruptcy cannot be compelled to turn over to the trustee the amount thereof. In re Zotti, 186 Fed. 84, 26 A. B. R. 234.

13—Act of 1898, § 17, 63.

14—Act of 1898, § 7 (8).

15—Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, aff'g 192 Fed. 834, 27 A. B. R. 704, 188 Fed. 702, 26 A. B. R. 775; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262. See also, Corbett v. Riddle, 209 Fed. 811, 31 A. B. R. 330; Tooff v. City Nat. Bank, 206 Fed. 250, 30 A. B. R. 79; Crowe v. Baumann, 190 Fed. 399, 27 A. B. R. 100; In re Duncan, 148 Fed. 464, 17 A. B. R. 283; In re Pease, 2 N. B. N. R. 1108, 4 A. B. R. 578.

16—Dutcher v. Bk., 11 N. B. R. 457, 12 Blatch, 435, Fed. Cas. No. 4203.

17—Bracklee Co. v. O'Connor, 67 Misc. (N. Y.) 599, 24 A. B. R. 499.



better title than belonged to the bankrupt or to his creditors at the time when the trustee's title accrued,<sup>18</sup> and could not therefore convey any better title.<sup>19</sup>

The adjudication in bankruptcy was held not equivalent to a judgment, attachment or other specific lien upon the property, and the trustee was not regarded as a subsequent purchaser in good faith within the meaning of recording statutes. Neither did he stand *ex officio* in the position of a creditor armed with process.<sup>20</sup> Except in cases affected by fraud, illegal preferences, or liens avoided by the adjudication in bankruptcy, the trustee took the bankrupt's property with like right, title, power and authority as the bankrupt had subject to any valid lien, equity, or claim existing thereon,<sup>21</sup> whether created by the act of the

18—*In re Wall*, 207 Fed. 994, 29 A. B. R. 901; *In re McConnell*, 197 Fed. 438, 28 A. B. R. 659; *In re Interstate Paving Co.*, 197 Fed. 371, 28 A. B. R. 573; *Title Guaranty & Surety Co. v. Witmire*, 195 Fed. 41, 28 A. B. R. 235; *Sexton v. Kessler & Co., Ltd.*, 225 U. S. 90, 56 L. ed. 995, 28 A. B. R. 85; *Lovell v. Newman & Son*, 192 Fed. 753, 27 A. B. R. 746; *In re Great Western Mfg. Co.*, 152 Fed. 123, 18 A. B. R. 259; *In re Muncie Pulp Co.*, 151 Fed. 732, 18 A. B. R. 56; *In re Blake*, 150 Fed. 279, 17 A. B. R. 668; *In re Platteville Foundry & Machine Co.*, 147 Fed. 828, 17 A. B. R. 291; *Crosby v. Miller*, 16 A. B. R. 805; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 15 A. B. R. 633, rev'g 135 Fed. 52, 14 A. B. R. 52; *Southern Pine Co. of Georgia v. Savannah Trust Co.*, 141 Fed. 802, 15 A. B. R. 618; *In re Burnham*, 140 Fed. 926, 15 A. B. R. 548; *In re Hunt*, 139 Fed. 283, 14 A. B. R. 416; *Bush v. Export Storage Co.*, 136 Fed. 918, 14 A. B. R. 138; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n; *Allen v. Hollander*, 128 Fed. 159, 11 A. B. R. 753; *In re New York Economical Printing Co.*, 110 Fed. 514, 6 A. B. R. 615; *Duplan Silk Co. v. Spencer*, 115 Fed. 689, 8 A. B. R. 367.

19—*In re Kellogg*, 112 Fed. 52, 7 A.

B. R. 270, citing *In re New York Economical Printing Co.*, 110 Fed. 514, 6 A. B. R. 615; *Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. 755, 4 A. B. R. 441.

20—*In re Wade*, 185 Fed. 664, 26 A. B. R. 169; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 15 A. B. R. 633, rev'g 135 Fed. 52, 14 A. B. R. 52; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986, 11 A. B. R. 709. But see, *In re Butterwick*, 131 Fed. 371, 12 A. B. R. 536.

21—*Rode & Horn v. Phipps*, 195 Fed. 414, 27 A. B. R. 827; *In re Hurley*, 185 Fed. 851, 26 A. B. R. 434; *Zartman v. First Nat. Bank*, 216 U. S. 134, 54 L. ed. 418, 23 A. B. R. 635; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 19 A. B. R. 291, aff'g 143 Fed. 32, 16 A. B. R. 49; *In re Alden*, 15 Ohio Fed. Dec. 120, 16 A. B. R. 362; *In re Kaplan*, 144 Fed. 159, 16 A. B. R. 267; *In re Winn*, 1 N. B. R. 131, Fed. Cas. No. 17876; *Courier Journal Co. v. Schaeffer-Myer Co.*, 101 Fed. 699, 4 A. B. R. 183; *Donaldson v. Farwell*, 15 N. B. R. 277; *Bk. v. Rome Iron Co.*, 102 Fed. 755, 4 A. B. R. 755; *In re Hanna*, 3 N. B. N. R. 237; *In re Dow*, 6 N. B. R. 10, Fed. Cas. No. 4036; *Bacon v. Heathcote*, 1 A. B. R. 160.

parties or by operation of law,<sup>22</sup> but the lien must have been perfected before the commencement of the bankruptcy proceedings,<sup>23</sup> and not one which the act itself avoided.<sup>24</sup> While the trustee was held not to be a purchaser from the bankrupt and not to occupy a relation similar to a judgment creditor, he was held to have greater rights than the assignee had under the act of 1867,<sup>25</sup> and to represent the general creditors as well as the bankrupt.<sup>26</sup>

### § 748. — Title subsequent to amendment of 1910.

The trustee, however, no longer stands in the shoes of the bankrupt. The amendment of 1910 specifically provides that "as to all property in the custody or coming into the custody of the bankruptcy court," the trustee "shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."<sup>27</sup> The amendment must be construed together with section 70 of the original act,<sup>28</sup> and the trustee can no longer be said to have the limited title of the bankrupt.<sup>29</sup>

22—In re Rich, 15 Ohio Fed. Dec. 255, 17 A. B. R. 893.

23—In re Smith, 1 N. B. R. 169, 2 Ben. 432, Fed. Cas. No. 12973.

24—In re Cramond, 145 Fed. 966, 17 A. B. R. 22; In re Wells, 114 Fed. 222, 8 A. B. R. 75; Rowe v. Page, 13 N. B. R. 366.

25—Sec. 67a, Act of 1898.

26—In re G. & K. Trunk Co., 176 Fed. 1007, 23 A. B. R. 914; In re Yukon Woolen Co., 1 N. B. N. 420, 96 Fed. 326, 2 A. B. R. 805; In re Rudnick, 2 N. B. N. R. 979, 102 Fed. 750, 4 A. B. R. 531; In re McNamara, 2 N. B. N. R. 341; Upton v. Jackson, Fed. Cas. No. 16802; Contra, In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; In re Ohio Co-op. Shear Co., 2 A. B. R. 775, 1 N. B. N. 477; In re Bozeman, 1 N. B. N. 479, 2 A. B. R. 809; In re Booth, 2 N. B. N. R. 377, 98 Fed. 975, 3 A. B. R. 574; comp. In re Griffith, 3 N. B. R. 179; Potter v. Cogswell, 4 N. B. R. 9; Bromley v. Smith, 5

N. B. R. 152, 2 Biss. 511, Fed. Cas. No. 1922; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, Fed. Cas. No. 17664; Allen v. Montgomery, 10 N. B. R. 503; In re Appold, 1 N. B. R. 178, Fed. Cas. No. 499; Rogers v. Winsor, 6 N. B. R. 246, Fed. Cas. No. 12023; In re Dow, 6 N. B. R. 10, Fed. Cas. No. 4036; White v. Jones, 6 N. B. R. 175, Fed. Cas. No. 17550.

27—Section 47a, subd. 2, as amended by sec. 8, amendment of June 25, 1910.

28—In re Hammond, 188 Fed. 1020, 26 A. B. R. 336.

The fact that the amendment is incorporated in section 47 rather than in section 70 is immaterial. The act must be construed as a whole, and it cannot be assumed that the amendment would have been added to section 47, if the unamended language of section 70 were to operate to neutralize the amendment. In re Morris, 204 Fed. 770, 30 A. B. R. 319.

29—Pacific State Bank v. Coats, 205

While the purpose of the amendment was rather to reach personal than real property,<sup>30</sup> yet the lien operates upon all property, and for the benefit of all creditors.<sup>31</sup>

Under the law, as amended, a lien void as to the creditors of the bankrupt, though valid as to the bankrupt, cannot be enforced against the trustee.<sup>32</sup> The purpose of the amendment was to give to the trustee the rights, remedies and powers of each and all classes of creditors who are clothed by the recording statutes of the states, as construed by their courts, with the right to avoid secret and unrecorded liens and conveyances.<sup>33</sup> While the trustee has no greater rights than creditors of the bankrupt,<sup>34</sup> and is not considered a bona fide purchaser,<sup>35</sup> yet he has all the rights of the most favored creditor under the local law.<sup>36</sup> But he is not vested with rights of a judgment creditor which such creditor could only have obtained by the levying of an attachment without notice or by statutory proceedings to take the property.<sup>37</sup>

While it is not necessary to give the trustee the title provided for, that there should, in fact, have been lien or judgment creditors when the petition was filed,<sup>38</sup> yet creditors existing at the

Fed. 618, 30 A. B. R. 655; In re Harrington, 29 A. B. R. 690; In re Riehl, 200 Fed. 455, 29 A. B. R. 613; In re Grozinger, 199 Fed. 935, 28 A. B. R. 732; In re Farmers' Supply Co., 196 Fed. 990, 28 A. B. R. 535; In re Geiver, 193 Fed. 128, 28 A. B. R. 413; Sturdivant Bank v. Schade, 195 Fed. 188, 27 A. B. R. 673, rev'g 189 Fed. 636, 26 A. B. R. 915; In re Kreuger, 199 Fed. 367, 27 A. B. R. 623; In re Downing, 192 Fed. 683, 27 A. B. R. 309, aff'd 201 Fed. 93, 29 A. B. R. 228; In re Nelson, 191 Fed. 233, 27 A. B. R. 272; In re Hammond, 188 Fed. 1020, 26 A. B. R. 336.

30—In re Harrington, 29 A. B. R. 690; and see, In re Snelling, 202 Fed. 259, 29 A. B. R. 818.

31—In re Whatley Bros., 199 Fed. 326, 29 A. B. R. 64.

32—In re Hammond, 188 Fed. 1020, 26 A. B. R. 336.

33—In re Dancy Hardware & Furniture Co., 198 Fed. 336, 28 A. B. R. 444.

34—In re Rutland-Perry Co., 205 Fed.

200, 30 A. B. R. 383. But see, In re O'Callaghan, 30 A. B. R. 97.

35—In re Scruggs, 205 Fed. 673, 31 A. B. R. 95; In re Superior Drop Forge & Mfg. Co., 208 Fed. 813, 31 A. B. R. 455; In re Charles Town L. & P. Co., 199 Fed. 846, 29 A. B. R. 721.

As to property in the possession of the bankrupt the trustee has only such title as the bankrupt had and such as the trustee can obtain by asserting the rights of a creditor holding a legal or equitable lien. In re Thompson, 205 Fed. 556, 30 A. B. R. 64.

36—In re Farmers Co-operative Co. of Barlow, 202 Fed. 1008, 30 A. B. R. 190.

37—Clark v. Snelling, 205 Fed. 240, 30 A. B. R. 50, aff'g 202 Fed. 259, 29 A. B. R. 818.

38—In re Dancy Hardware & Furniture Co., 198 Fed. 336, 28 A. B. R. 444; In re Waite-Robins Motor Co., 192 Fed. 47, 27 A. B. R. 541. Contra: In re East End Mantel & Tile Co., 202 Fed. 275, 29

time of the creation of a lien, do not have their rights enlarged by the adjudication, and the adjudication will not be held to invalidate unrecorded liens unless there are subsequent creditors.<sup>39</sup>

The lien which the trustee is considered as holding is a lien attaching as of the date of the filing of the petition in bankruptcy<sup>40</sup> and does not relate back to the beginning of the four month period prior thereto.<sup>41</sup>

The amendment is constitutional<sup>42</sup> and applies to every bankruptcy, the petition in which was filed after its passage, and may be invoked to avoid transfers made prior to its passage,<sup>43</sup> though it is held that it will not be given a retroactive effect so as to avoid transfers made prior thereto which would have been valid as against the trustee but for the amendment.<sup>44</sup>

### § 749. Extent of trustee's title.

### § 750. — Under act of 1867.

Under the act of 1867, it was held that all the rights and the duties of the bankrupt in respect to whatever property, not

A. B. R. 793; and see, *In re Lausman*, 183 Fed. 647, 25 A. B. R. 186.

39—*In re Rutland-Perry Co.*, 205 Fed. 200, 30 A. B. R. 383.

40—*In re Farmers Co-operative Co. of Barlow*, 202 Fed. 1005, 30 A. B. R. 187.

The lien given by the amendment attaches as of the date of the adjudication. *In re Rose*, 206 Fed. 991, 30 A. B. R. 791.

41—*Big Four Implement Co. v. Wright*, 207 Fed. 535, 47 L. R. A. (N. S.) 1223, 31 A. B. R. 125; *Hart v. Emerson-Brantingham Co.*, 203 Fed. 60, 30 A. B. R. 218; *In re Jacobson & Perrill*, 200 Fed. 812, 29 A. B. R. 603.

The trustee may assert every right which a lien creditor could have asserted during the four month period. *Bank of North America v. Penn Motor Car Co.*, 235 Pa. 194, 31 A. B. R. 395.

42—*In re Williamsburg Knitting Mill*, 190 Fed. 871, 27 A. B. R. 178, aff'd 193 Fed. 1020, 27 A. B. R. 578.

43—*Holt v. Henley*, 193 Fed. 1020, 27 A. B. R. 578, aff'g 190 Fed. 871, 27 A. B. R. 178.

The amendment is a purely remedial statute, which gives a rule of interpretation rather than a substantive right and which may properly be given a retroactive effect. *In re Farmers Co-operative Co. of Barlow*, 202 Fed. 1008, 30 A. B. R. 190.

Amendment held to apply to a mortgage dated March 17, 1908, which was filed September 8, 1909, where bankrupt was adjudicated September 5, 1911, it appearing that the state statute required a renewal affidavit to be filed within thirty days before the expiration of two years from the original filing and that no such affidavit had been filed. *In re Smith*, 198 Fed. 876, 29 A. B. R. 527.

44—*Arctic Ice Mach. Co. v. Armstrong County Trust Co.*, 192 Fed. 114, 27 A. B. R. 562.

Amendment of 1910 to section 47a does not affect rights vested under a conditional sale contract made before its passage. *In re Schneider*, 203 Fed. 589, 29 A. B. R. 469.

excluded from the operation of the bankruptcy act, he might hold under whatever title, legal or equitable, however incumbered, passed to the assignee upon the filing of the petition;<sup>45</sup> likewise all money and property on hand used and held as his own, notwithstanding an endeavor to set up title in a third person merely to hold it himself as against the assignee.<sup>46</sup>

§ 751. — Property acquired prior to filing of petition.

The effect of the adjudication is to transfer the title to all property of the bankrupt wherever situated to his trustee.<sup>47</sup> While certain classes of property passing to the trustee are expressly enumerated in the act,<sup>48</sup> the act cannot be construed so narrowly as to exclude any interest constituting an asset available to creditors merely on the ground that it is not expressly enumerated.<sup>49</sup>

Under section 70a (5) the trustee is vested with property which prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process. If property is not exempt under the state laws, the fact that it could not have been levied upon and sold at the date of the adjudication will not prevent its passing to the trustee if it is property which the bankrupt could by any means have transferred, the statute being in the alternative.<sup>50</sup>

Mere ability of the bankrupt, by deed or otherwise, to estop or preclude himself from claiming title to or enjoying property, acquired after the execution of such deed, does not constitute property which prior to the filing of the petition he could by any means have transferred.<sup>51</sup>

45—In re Wynne, 4 N. B. R. 5, Fed. Cas. No. 18117; In re Rosenberg, 3 N. B. R. 33, 3 Ben. 366, Fed. Cas. No. 12055; Smith v. Buchanan, 4 N. B. R. 133, Fed. Cas. No. 13016; Markson v. Heaney, 4 N. B. R. 165, 1 Dill. 497, Fed. Cas. No. 9098; Purviance v. Bk., 8 N. B. R. 447, Fed. Cas. No. 11475; Bk. v. Bk., 10 N. B. R. 44; Randolph v. Canby, 11 N. B. R. 296, Fed. Cas. No. 11559; Barnard v. R. R. Co., 14 N. B. R. 469, 4 Cliff. 351, Fed. Cas. No. 1007; Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111; Hayes v. Dickinson, 15 N. B.

R. 350; Hersey v. Elliott, 18 N. B. R. 358.

46—In re Moses, 1 Fed. 845, 19 N. B. R. 412, Fed. Cas. No. 9870.

47—Robertson v. Howard, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611.

48—Act of 1899, § 70a.

49—In re Baudouine, 1 N. B. N. 506, 96 Fed. 536, 3 A. B. R. 55.

50—Spencer v. Lowe, 198 Fed. 961, 29 A. B. R. 877.

51—In re Twaddell, 110 Fed. 145, 6 A. B. R. 539.

The distinction between the property which vests in the trustee and the time the title of the bankrupt to such property vests in him should be observed. The trustee is vested with the title of the bankrupt as of the date of the adjudication of bankruptcy,<sup>52</sup> but as to the class of property referred to in section 70, subdivision 5, only to that which "prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process." This limits the amount of that particular kind of property, but still as to this the trustee is vested with the title of the bankrupt as of the date of adjudication.<sup>53</sup> The words "prior to the filing of the petition," refer to what passes, while the apparently antagonistic words earlier in the section refer to when it passes.<sup>54</sup>

Where bankrupt made a voluntary assignment prior to filing a petition in bankruptcy, the status of creditors, who did not consent to the assignment, is not affected by it, but is fixed by the filing of the petition.<sup>55</sup> To illustrate: suppose, prior to filing his petition, the bankrupt had a transferable interest in a business left by his father, who, to protect the business, had provided in his will that, in case of the bankruptcy of any of his children, his interest should cease and there should be paid to whomever was entitled the value of such interest as of the day he filed the petition in bankruptcy. Suppose, further, that between the filing of the petition and the adjudication, events occurred which caused the business to increase largely in value, and by the death of a brother, the bankrupt received an interest equal to the one he had formerly had. His trustee in bankruptcy would take the bankrupt's first interest as the bankrupt held it on the day of the adjudication, that is, its value on the day the petition was filed, while, as shown by the interest still held by the bankrupt, the property itself then was quite different both in form and value. The elimination of the part of the paragraph

52—In re Kellogg, 113 Fed. 120, 7 A. B. R. 623. See *ante*, § 743.

53—In re Pease, 2 N. B. N. R. 1108, 4 A. B. R. 578; In re Burka, 104 Fed. 326, 5 A. B. R. 12.

54—Acme Harvester Co. v. Beekman

Lumber Co., 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262; Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, 30 A. B. R. 1, *aff'g* 192 Fed. 834, 27 A. B. R. 704, 188 Fed. 702, 26 A. B. R. 775.

55—In re Swift, 3 N. B. N. R. 52.

between the provisions will further emphasize what is meant. "The trustee . . . shall in turn be vested . . . with the title of the bankrupt, as of the date he was adjudged a bankrupt . . . to all . . . (5) property which prior to the filing of the petition he could by any means have transferred. . . ."

If insolvency proceedings were pending when the bankruptcy act was passed and the bankrupt's assets were vested in the assignee appointed therein, the trustee is entitled only to property acquired between the institution of the insolvency proceedings and the filing of the petition.<sup>56</sup>

To summarize, it may be generally stated that the trustee becomes vested as of the date of the adjudication to all property of the bankrupt which at the time the petition was filed by or against him might in any way, by legal or equitable proceedings, be subjected to the claims of his creditors,<sup>57</sup> including such as may have been conveyed in fraud of the act or of creditors, or by any voidable transfers whatever. This transition of title is limited as to the class of property in subdivision 5 of section 70a, to such interests in property as the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise subjected to the claims of his creditors prior to the filing of the petition, or property into which such interests have been converted, including such as may have vested in him on the day but prior to the filing of the petition.<sup>58</sup>

The trustee takes all of the bankrupt's right and title and all those of the creditors against adverse claimants to the estate, free of all claims not valid against the creditors and every one of them.<sup>59</sup>

A fraction of a day should properly be considered where it is a question whether property inherited or acquired on the date a petition in bankruptcy is filed, was before or after such filing.<sup>60</sup>

56—In re Mussey, 2 N. B. N. R. 113, 99 Fed. 71, 3 A. B. R. 592.

57—In re Elmira Steel Co., 109 Fed. 456, 5 A. B. R. 484; In re Lewis & Bros., 91 Fed. 632, 1 A. B. R. 458; In re Appel, 103 Fed. 931, 4 A. B. R. 722.

58—In re Pease, *supra*; In re Stoner, 105 Fed. 752, 5 A. B. R. 402.

59—In re Kindt, 2 N. B. N. R. 369, reversed 101 Fed. 107, 4 A. B. R. 148.

60—In re Stoner, 105 Fed. 752; In re Petit, 1 Ch. Div. 478.

### § 752. — Property acquired between filing petition and adjudication.

Since it is the purpose of the act to apply the property owned by the bankrupt at the time of filing the petition to the payment of the debts of bankrupt then owing, though the title thereto does not vest until the adjudication, all property acquired between the filing of the petition and adjudication, unless simply a substitute for property held before such filing, can be retained by bankrupt and does not become a part of his estate for the payment of debts, and need not therefore be scheduled.<sup>61</sup> If the interest is vested when the petition is filed, it would be otherwise.<sup>62</sup> Thus, an inheritance received during this period but over which bankrupt had no control at the time of filing the petition, remains his individual property.<sup>63</sup>

Where, at the time of the filing of the petition, a creditor is still investigating the value of a note of a third person offered as collateral by the bankrupt, he cannot after the filing of the petition accept the offer of the bankrupt and thereby obtain title to the note.<sup>64</sup>

### § 753. — Property acquired after adjudication.

Section 70a (5) of the act does not undertake to vest the bankrupt with title to property to which he had no title prior to his bankruptcy. It only relates to property, the title to which he has acquired to such an extent as to render the same liable to seizure and sale under execution for his debts, and the right to the possession of which could be maintained by him upon the strength of such title in a proper proceeding for the recovery of the same<sup>65</sup>

All property acquired by the bankrupt subsequent to his

61—In re Gerdes, 2 N. B. N. R. 131, 102 Fed. 318, 4 A. B. R. 346; In re Harris, 1 N. B. N. R. 384, 2 A. B. R. 359; In re Freeman, 2 N. B. N. R. 569; In re Judson, 192 Fed. 834, 27 A. B. R. 704, aff'd 188 Fed. 702, 26 A. B. R. 775, aff'd 228 U. S. 474, 57 L. ed. 927, 30 A. B. R. 1.

62—In re Wood, 98 Fed. 972, 3 A. B. R. 572; In re Schenberger, 102 Fed. 978, 2 N. B. N. R. 783, 4 A. B. R. 487; Smith v. Schultz, 17 N. B. R. 520; see also In

re Baudouine, 1 N. B. N. R. 506, 96 Fed. 536, 3 A. B. R. 55.

63—In re Freeman, 2 N. B. N. R. 569; In re Wetmore, 99 Fed. 703, 3 A. B. R. 700; s. c. 102 Fed. 290; In re Hoadley, 2 N. B. N. R. 704, 101 Fed. 233, 3 A. B. R. 780.

64—In re Duncan, 148 Fed. 464, 17 A. B. R. 283.

65—Wood Mowing & Reaping Machine Co. v. Vanstory, 171 Fed. 375, 22 A. B. R. 740.



adjudication remains his individual property, and does not inure to the benefit of creditors.<sup>66</sup> Thus a lease which proved valuable, after the adjudication on a forfeited contract though it appeared not to be so at the time of filing the petition and was accordingly not scheduled, no creditor objecting to the omission, was held to be after-acquired property;<sup>67</sup> as were a patent allowed after adjudication on application filed prior to the petition;<sup>68</sup> a government award made after the adjudication for information given it prior thereto,<sup>69</sup> and wages earned after the adjudication.<sup>70</sup>

**§ 754. — Property transferred after filing of petition.**

The filing of a petition is notice to all the world, and all persons dealing with the bankrupt thereafter do so at their peril, although it may be bona fide and without knowledge of the bankruptcy proceedings;<sup>71</sup> hence a purchaser of negotiable paper, after such filing, is not a bona fide holder without notice,<sup>72</sup> and a fraudulent transfer of property by the bankrupt after the filing of the petition is voidable at the option of the trustee.<sup>73</sup>

Where goods fraudulently transferred by the bankrupt after the filing of the petition are commingled with other goods of the purchaser so as to be incapable of identification, the purchaser may be required to restore the value of the goods in lieu of the goods themselves.<sup>74</sup>

**§ 755. Estoppel of trustee to assert title.**

Where the bankrupt delivers property under a contract and assigns his rights for the amount due thereunder as collateral security for a loan, the trustee is estopped to assert title to the property or the proceeds of the sale thereof.<sup>75</sup> So, where the

66—In re Barton's Estate, 144 Fed. 540, 16 A. B. R. 569.

67—In re Oliver, 2 N. B. N. R. 212; to same effect, Norton v. Hood, 124 U. S. 26, 31 L. ed. 364.

68—In re McDonald, 101 Fed. 239, 4 A. B. R. 92.

69—In re Ghazal, 174 Fed. 809, 23 A. B. R. 178.

70—In re Harrington, 200 Fed. 1010, 29 A. B. R. 666; In re Karns, 148 Fed. 143, 16 A. B. R. 841; In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168.

71—Opin. Attorney-General, 9 N. B. R. 117. In re Duncan, 148 Fed. 464, 17 A. B. R. 283. But see, In re Laplume Condensed Milk Co., 145 Fed. 1013, 16 A. B. R. 729; American Trust Co. v. Wallis, 126 Fed. 464, 11 A. B. R. 360.

72—In re Lake, 6 N. B. R. 542, 3 Biss. 204, Fed. Cas. No. 7992.

73—In re Denson, 195 Fed. 854, 28 A. B. R. 158.

74—In re Denson, 195 Fed. 854, 28 A. B. R. 158.

75—Aldine Trust Co. v. Smith, 182

bankrupt enters into a contract for the sale of certain goods and forges bills of lading, upon receipt of which the purchaser pays the contract price of the goods, the trustee is estopped to assert title to the goods when actually shipped though the bankrupt has possession of the genuine bills of lading.<sup>76</sup>

### § 756. Injunction against trustee.

No injunction can issue restraining the trustee from dealing with the property in his possession or its proceeds as the court may direct.<sup>77</sup>

### § 757. Title on setting aside composition or discharge.

Whenever a composition is set aside, or discharge revoked, the trustee is, upon his appointment and qualification, vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.<sup>78</sup> Upon application of parties in interest filed at any time within six months after a composition has been confirmed, the judge may set it aside and reinstate the case;<sup>79</sup> or he may revoke a discharge at any time within one year after it was granted.<sup>80</sup> In this event the title to all the property held by the bankrupt vests in the trustee, which would include not only such as was held at the time the petition was filed but also such as was acquired by him subsequent thereto. An assignment to a trustee after an incomplete composition must be without prejudice to lawful acts done or titles acquired under and by virtue of such composition.<sup>81</sup>

### § 758. By what law title determined.

Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the Bankruptcy Act which declares which property the trustee

Fed. 449, 25 A. B. R. 608, rev'g 176 Fed. 652, 23 A. B. R. 907.

76—*Lovell v. Newman & Son*, 188 Fed. 534, 26 A. B. R. 660.

77—*Treat v. Wooden*, 138 Fed. 934, 14 A. B. R. 736.

78—Sec. 70d, Act of 1898.

79—Sec. 13, Act of 1898.

80—Sec. 15, Act of 1898.

81—*Ex Hamlin*, 16 N. B. R. 320, 2 Lowell 571, Fed. Cas. No. 5993.

shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the state court. The other law regulates its passage to the trustee, and is interpreted by the federal court.<sup>82</sup> The trustee takes title to all of bankrupt's property which prior to the filing of the petition he could have transferred or which might have been levied upon, wherever situated, whether within the district or state where the petition is filed or beyond it.

Whether property is such as the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process is to be determined by the state law.<sup>83</sup> So, the validity of rights, claims and equities impressed upon the property in the hands of the bankrupt is to be determined, in the absence of federal statute, by local law as evidenced by the decisions of the state courts.<sup>84</sup>

### § 759. Title in case of confusion of goods.

Where a bailee, prior to his bankruptcy, mixes the property of another with his own so that the identical property cannot be distinguished, the whole passes to his trustee.<sup>85</sup> So, where property upon which a lien exists is commingled with other property of the bankrupt, the lien attaches to the whole.<sup>86</sup>

See also post, section 852.

### § 760. Failure to take possession or abandonment.

Neither a receiver nor trustee is bound to accept property of an onerous or unprofitable character, or to assume an obligation of the bankrupt, unless for the benefit of the creditors.<sup>87</sup> Accordingly, the trustee may refuse to take possession of mortgaged property, or property held in trust, and it is his duty to

82—In re Littlefield, 155 Fed. 838, 19 A. B. R. 18.

83—In re Waite-Robbins Motor Co., 192 Fed. 47, 27 A. B. R. 541; Rosenbluth v. DeForest & Hotchkiss Co., 85 Conn. 40, 27 A. B. R. 359.

84—In re Wade, 185 Fed. 664, 26 A. B. R. 169. See also, *post*, § 858.

85—Adams v. Meyers, 8 N. B. R. 214, 1 Sawy, 306, Fed. Cas. No. 62.

86—In re Hennis, 17 A. B. R. 889.

87—In re Scruggs, 205 Fed. 673, 31

A. B. R. 94; In re Hasie, 206 Fed. 789, 30 A. B. R. 83; Oldmixon v. Severance, 119 App. Div. (N. Y.) 821, 18 A. B. R. 823; In re Schierrmann, 2 N. B. N. R. 118; In re Ells, 2 N. B. N. R. 360, 98 Fed. 967, 3 A. B. R. 564; In re Chambers, 2 N. B. N. R. 388, 98 Fed. 865, 3 A. B. R. 537; File Co. v. Garrett, 110 U. S. 288, 28 L. ed. 149; Sessions v. Romadka, 145 U. S. 29, 36 L. ed. 609; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915; Kimberling v. Hartley, 1 Fed. 571.

do so, if its value, over and above the incumbrance, is not sufficient to justify an attempt to administer it.<sup>88</sup> Where property is mortgaged beyond its value and the trustee elects not to take the same, it may be surrendered to the mortgagee without prejudice to the right of the trustee to contest the validity of the mortgage.<sup>89</sup>

The trustee's failure to record the evidence of his title in a county in which land of the bankrupt is situated is evidence of a disposition not to assert title to such land and after a reasonable time, he will be estopped if the bankrupt in possession has sold it to an innocent purchaser for value.<sup>90</sup>

Where property may involve the trustee in litigation his claim thereto may be assigned.<sup>91</sup>

If the trustee disclaims onerous property he cannot thereafter claim its benefits.<sup>92</sup> Upon abandonment or refusal of title by the trustee, the property 'revests in the bankrupt,<sup>93</sup> but mere silence or inaction in the collection of a claim owing the bankrupt does not establish refusal or abandonment,<sup>94</sup> and where the trustee is ignorant of the existence of the property and has had no opportunity to make an election, the rule does not apply.<sup>95</sup> So, his failure for a number of years to prosecute a claim belonging to the bankrupt does not show an abandonment in the absence of evidence that he knew, or had means of knowing, of the existence of the claim.<sup>96</sup>

Where the bankrupt omits from his schedules a patent or like interest owned by him and the trustee asserts no claim thereto and after the discharge of both, the bankrupt sells the same, the title of the purchaser is good;<sup>97</sup> or, if he refuses to pay the dues on seats in stock exchanges, license fees, and the like, and

88—*In re Zehner*, 193 Fed. 787, 27 A. B. R. 536; *In re Jersey Island Packing Co.*, 138 Fed. 625, 2 L. R. A. (N. S.) 560, 14 A. B. R. 689.

89—*Equitable Loan & Security Co. v. Moss & Co.*, 125 Fed. 609, 11 A. B. R. 111.

90—*Taylor v. Irwin*, 20 Fed. 615.

91—*Oldmixon v. Severance*, 119 App. Div. (N. Y.) 821, 18 A. B. R. 823.

92—*In re Koester*, 15 Ohio Fed. Dec. 257, 17 A. B. R. 391.

93—*First Nat. Bank v. Lasater*, 196

U. S. 115, 49 L. ed. 408, 13 A. B. R. 698; *In re Wiseman & Wallace*, 159 Fed. 236, 20 A. B. R. 293.

94—*In re Wiseman & Wallace*, 159 Fed. 236, 20 A. B. R. 293.

95—*First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. ed. 408, 13 A. B. R. 698.

96—*Dunshane v. Beall*, 161 U. S. 513, 40 L. ed. 791; *Mabin v. Raymond*, 15 N. B. R. 353, Fed. Cas. No. 9338.

97—*Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609.

takes no steps to have them sold, he cannot years later compel their sale for the benefit of the estate, or make the bankrupt refund dividends paid his fellow members, both remedies having been lost through laches.<sup>98</sup>

### § 761. Intermeddling with estate.

A committee of less than all of the creditors which takes possession of the bankrupt's property, without his consent or authority, has no authority to sell the same, and is guilty of trespass and is liable to the trustee for any damage caused by its intermeddling.<sup>99</sup>

### § 762. Taxation of property of estate.

The power of a state with reference to the taxation of property within its jurisdiction extends to property in the hands of trustees, receivers and others acting in a fiduciary capacity, irrespective of the residence of the parties beneficially interested in the property.<sup>1</sup> Accordingly property in the hands of a trustee or receiver in bankruptcy is subject to taxation by the state the same as though in the hands of the bankrupt and proceedings in bankruptcy had not been instituted.<sup>2</sup>

Property in the hands of a receiver or trustee is in the custody of the court, and is therefore not subject to seizure and levy under process issuing from a court of the state to enforce the collection of a tax assessed under the laws of a state. The proper course is for the collector to apply to the court or referee for the payment of the taxes due, in which event such claim when so presented will be entitled to priority of payment. As stated

98—*Sparhawk v. Yerkes*, 142 U. S. 1; 35 L. ed. 915; *Id. v. Ackley*, *Id.*

99—*In re Thomas*, 199 Fed. 214, 29 A. B. R. 945.

Sale of property by self-appointed committee of creditors acting without authority of the debtor who had absconded held ineffective to divest title of the bankrupt. *Id.*

Where a committee representing a majority of creditors turned over property claimed by a mortgagee holding under an unrecorded mortgage and paid to another mortgagee the amount of his claim, without authority of bankrupt, the com-

mittee were held liable to the trustee for the proportional share of the non-assenting creditors and for a proportionate share of the expenses of administration. *Id.*

1—*Judson*, Tax. § 407.

2—*Swarts v. Hammer*, 194 U. S. 441, 48 L. ed. 1060, 11 A. B. R. 708, *aff'g* 120 Fed. 256, 9 A. B. R. 691; *In re Prince & Walter*, 131 Fed. 546, 12 A. B. R. 675; *In re Mitchell*, 16 N. B. R. 535, Fed. Cas. No. 9658; *Contra*, *In re Booth*, 14 N. B. R. 232, Fed. Cas. No. 1645.

by the supreme court of the United States in the case of Tyler, property in the hands of a receiver is in custodia legis, but is "not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it."<sup>3</sup>

The duty of the trustee to pay taxes is elsewhere treated.<sup>4</sup>

### § 763. Title by adverse possession.

Possession of real property by the trustee of a bankrupt is the possession of the bankrupt and may be tacked onto the possession of the bankrupt for the purpose of completing the bar of the statute of limitations.<sup>5</sup>

### § 764. Brokers, factors and their customers.

The relation between a broker and his customer is that of pledgor and pledgee and upon the bankruptcy of the former the customers are entitled to stock deposited with the broker or purchased by him on their account.<sup>6</sup>

To entitle a customer of a bankrupt broker, claiming ownership to shares of stock in the latter's possession, it is not necessary that he be able to put his finger upon the identical certificates of stock purchased for him by the bankrupt. It is enough that the bankrupt has shares of the same kind in his possession which are legally subject to the demand of the customer.<sup>7</sup>

Where the bankrupt, a broker, disposes of securities which

3—In re Tyler, 149 U. S. 164, 182, 37 L. ed. 689; In re Sims, 118 Fed. 356, 9 A. B. R. 162; In re Conhaim, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249; In re Baker, 1 N. B. N. 212, 1 A. B. R. 526; In re Frick, 1 N. B. N. 214, 1 A. B. R. 719.

4—See *ante*, § 731.

5—Cannon v. Prude, 181 Ala. 629, 30 A. B. R. 276.

6—In re Meadows, Williams & Co., 177 Fed. 1004, 24 A. B. R. 251, *aff'g* 173

Fed. 694, 23 A. B. R. 124; In re Bolling, 147 Fed. 786, 17 A. B. R. 399; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 19 A. B. R. 710. And see, Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 19 A. B. R. 717, *aff'g* 147 Fed. 659, 16 A. B. R. 842.

7—Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 30 A. B. R. 266, *rev'g* 171 Fed. 254, 22 A. B. R. 659. See, In re T. A. McIntyre & Co., 181 Fed. 960, 25 A. B. R. 93.

belong to several of his customers, and deposits the proceeds in a bank, and his drawings exhaust his own funds and such proceeds, a deposit made subsequently will be considered as a general restoration in which all the defrauded cestui que trust will share ratably.<sup>8</sup>

Where a bankrupt, having possession of another's property, with authority to sell and pay over the proceeds, sells, but uses the proceeds, either by depositing them to his own account or by dealings with a broker, the owner cannot establish a lien upon the bankrupt's account when less than the amount of such proceeds, nor upon stocks in the hands of the broker where there is no evidence that the same were purchased with the proceeds of the sale of his property.<sup>9</sup>

Proceeds of property sold by a factor constitute a trust fund and do not pass to his trustee.<sup>10</sup>

### § 765. Choses in action.

Any chose in action arising upon contract or from the unlawful taking or detention of, or injury to the bankrupt's property, if beneficial to the estate, will pass to the trustee.<sup>11</sup> Accordingly, a claim for usurious interest<sup>12</sup> or for damages for fraudulent representations,<sup>13</sup> or against an officer of a bankrupt corporation for misappropriation of its property,<sup>14</sup> passes to the trustee. Where prior to bankruptcy the debtor turns a long-pending suit over to his son, without consideration, and then after his discharge takes a reassignment, the fund should go to the trustee.<sup>15</sup>

A chose in action will not pass to the trustee if it be a right of action of a personal nature, or in tort,<sup>16</sup> such as for libel or

8—In re T. A. McIntyre & Co., 181 Fed. 960, 25 A. B. R. 93.

9—In re Mulligan, 116 Fed. 715, 9 A. B. R. 8.

10—Bills v. Schliep, 127 Fed. 103, 11 A. B. R. 607.

11—Sec. 70a (6), Act of 1898; Shesler v. Patton, 114 App. Div. (N. Y.) 846, 17 A. B. R. 372.

12—Wright v Bank, 18 N. B. R. 87, Fed. Cas. No. 18078; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. ed. 408, 13 A. B. R. 698.

13—In re Harper, 175 Fed. 412, 23 A. B. R. 918; In re Gay, 182 Fed. 260, 25 A. B. R. 111.

14—In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 A. B. R. 282.

15—Scott v. Devlin, 1 N. B. N. 561, 89 Fed. 970.

16—Friedman v. Myers, 30 Ohio Cir. Ct. 303, 19 A. B. R. 883; In re Brick, 19 N. B. R. 504; Cleland v. Anderson, 66 Neb. 276, 11 A. B. R. 605; Sibley v. Nason, 196 Mass. 125, 22 A. B. R. 712. But see, In re Burnstine, 131 Fed. 828,

slander, or for damages for a malicious prosecution and arrest suffered by the bankrupt prior to filing the petition;<sup>17</sup> or for the malicious abuse of the garnishee process;<sup>18</sup> or for conspiracy whereby bankrupt was driven out of business.<sup>19</sup> Nor will a chose in action pass to the trustee, if held by the bankrupt in a fiduciary capacity;<sup>20</sup> or of a wife not reduced to possession by her husband, the bankrupt,<sup>21</sup> but, if reduced to possession, it does, and the question of survivorship is laid aside by the bankruptcy;<sup>22</sup> unless by the laws of the state he has no interest in her choses in action; or if non-negotiable and suable only in the name of the assignor so as to be a set-off as a mutual debt or credit.<sup>23</sup>

Damages arising from a change of grade will not be applied to liens upon the property accruing after the right to damages.<sup>24</sup>

A bankrupt is not deprived of his right to sue upon a cause of action in the state court until the trustee is appointed,<sup>25</sup> but an assignment by the bankrupt long before his adjudication of an unliquidated cause of action in tort, which is unassignable, does not rest in the assignee any right in a judgment subsequently recovered on the cause of action.<sup>26</sup>

See Claims against the United States, post, section 854.

## § 766. Commercial paper.

The trustee takes all interest that a bankrupt has in commercial paper, but the trustee of the payee of negotiable paper

12 A. B. R. 596, holding that the bankrupt's interest in a claim for damages for death by wrongful act passes to his trustee.

17—Irion v. Knapp, 132 La. 60, 31 A. B. R. 891; Epstein v. Handwerker, 29 Okla. 337, 26 A. B. R. 712; In re Haensell, 91 Fed. 355, 1 N. B. N. 340 (note), 1 A. B. R. 286; see also Tufts v. Matthews, 10 Fed. 609; Noonan v. Orton, 12 N. B. R. 405; Wright v. Bank, 18 N. B. R. 87, Fed. Cas. No. 18078.

18—Noonan v. Orton, 2 N. B. R. 405. But see, Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 22 A. B. R. 877, holding that malicious attachment of corporate property is not a personal tort, but gives rise to a cause

of action for injury to property, and passes to the trustee.

19—Cleveland v. Anderson, 66 Neb. 276, 11 A. B. R. 605.

20—In re Bank of Madison, 9 N. B. R. 184, 5 Biss. 515, Fed. Cas. No. 890.

21—Wickham v. Valle's Ex'rs, 11 N. B. R. 83, Fed. Cas. No. 17613.

22—In re Boyd, 15 N. B. R. 119, 2 Hughes, 349, Fed. Cas. No. 1745.

23—Rollins v. Twitchell, 14 N. B. R. 201, 2 Hask. 66, Fed. Cas. No. 12027.

24—In re Torchie, 188 Fed. 207, 26 A. B. R. 579.

25—Rand v. Iowa Cent. Ry. Co., 186 N. Y. 58, 16 A. B. R. 692, rev'g 96 App. Div. (N. Y.) 413, 12 A. B. R. 164.

26—Rogers v. American Halibut Co., Mass. 31 A. B. R. 576.



is not entitled to such paper, where such payee sold and delivered the same before bankruptcy, but without indorsement, and such payee may indorse it after bankruptcy to enable the holder to sue on it in his own name.<sup>27</sup> The trustee is entitled to funds of the bankrupt held by the drawee of an ordinary commercial bill of exchange, which has merely been presented to such drawee, without his accepting it, such naked presentation not operating as an equitable assignment of such funds;<sup>28</sup> and he is entitled to demand the surrender of notes given for the excess over legal interest, such notes not being provable in bankruptcy.<sup>29</sup>

He cannot compel an indorser of a note, who receives none of its proceeds and whose contingent liability never becomes absolute, to pay the amount of the note paid by the bankrupt to the holder;<sup>30</sup> nor can he maintain an action to set aside the bankrupt's subscription to an endowment fund, for which the bankrupt gave his note.<sup>31</sup> Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy.<sup>32</sup>

### § 767. Concealed assets.

Money placed in the hands of a third person for concealment may be recovered, though there were no creditors at the time of the transfer.<sup>33</sup> Where the bankrupt conceals part of his assets and after his death the same are obtained by a third person with knowledge of the facts, the assets or property purchased therewith may be recovered by the trustee.<sup>34</sup>

### § 768. Conditional sale or bailment.

### § 769. — In general.

It is a general rule that property held by the bankrupt as bailee or consignee does not pass to his trustee.<sup>35</sup> The "property

27—Percy v. Elliott, 18 N. B. R. 358.

28—Randolph v. Canby, 11 N. B. R. 296, Fed. Cas. No. 11559.

29—Shafer v. Fritchery, 4 N. B. R. 179, Fed. Cas. No. 12697.

30—Bean v. Laffin, 5 N. B. R. 333, Fed. Cas. No. 1172.

31—Sturgis v. Colby, 18 N. B. R. 168, Fed. Cas. No. 13574.

32—In re Oleson, 110 Fed. 796, D. C. Iowa, 7 A. B. R. 22.

33—Breckons v. Snyder, 211 Pa. St. 176, 15 A. B. R. 112.

34—Clay v. Waters, 161 Fed. 815, 20 A. B. R. 561.

35—Wood Mowing & Reaping Machine Co. v. Vanstory, 171 Fed. 375, 22 A. B. R. 740; In re Smith & Nixon Piano Co.,

which prior to the filing of the petition he (the bankrupt) could have transferred" within the meaning of subdivision (5) of section 70, is property that he could by any means have transferred to another lawfully under the same terms that he transfers it by law to the trustee; that is to say, without consideration. It does not include property of another, which the bankrupt is authorized to transfer only on condition that he sells it for value, or sells it and holds the proceeds for the owner.<sup>36</sup>

It therefore becomes important to determine whether a particular transaction is a sale or a bailment, and, if it is a conditional sale, whether it is valid as against creditors. These are questions purely of local law,<sup>37</sup> to be determined by the law of the state where delivery is to be made, and the property is to be used.<sup>38</sup>

149 Fed. 111, 17 A. B. R. 636, rev'g 132 Fed. 983, 13 A. B. R. 276; *Chisholm v. Earle Ore Sampling Co.*, 144 Fed. 670, 16 A. B. R. 423; *In re Galt*, 120 Fed. 64, 13 A. B. R. 575.

The trustee is not entitled to goods in the possession of the bankrupt which have been left simply for repairs, storage or upon other bailments. *In re Wright-Dana Hardware Co.*, 211 Fed. 907, 31 A. B. R. 764, aff'g 205 Fed. 335, 30 A. B. R. 582.

Contract held not to be fraudulent but to be a consignment arrangement with the net proceeds of sales to be accounted for to the consignor, and with the right to return the unsold goods. *Ludvigh v. American Woolen Co.*, 231 U. S. 522, 58 L. ed. 345, 31 A. B. R. 481, rev'g 159 Fed. 796, 19 A. B. R. 795.

Contract providing that bankrupt to whom goods were delivered should sell such goods only in usual course of trade, and in case it became insolvent or sold the same in any other way except in due course of trade, all of its indebtedness should become due and payable, and that seller should take immediate possession thereof and credit the buyer with the invoice price thereof on his indebtedness held a chattel mortgage and not a bailment. *In re Marengo Co. Merc. Co.*, 199 Fed. 474, 29 A. B. R. 46.

36—*In re Dunlop*, 156 Fed. 545, 19 A. B. R. 361.

37—*In re Lutz*, 197 Fed. 492, 28 A. B. R. 649; *In re Nelson*, 191 Fed. 233, 27 A. B. R. 272; *In re Hartdagen*, 189 Fed. 546, 26 A. B. R. 532; *In re American Mach. Works*, 174 Fed. 805, 23 A. B. R. 483; *Deere Plow Co. v. Anderson*, 174 Fed. 815, 23 A. B. R. 480; *In re Agnew*, 178 Fed. 478, 23 A. B. R. 360; *Crucible Steel Co. of America v. Holt*, 174 Fed. 127, 23 A. B. R. 302; *In re Braselton*, 169 Fed. 960, 22 A. B. R. 419; *McElvain v. Hardesty*, 169 Fed. 31, 22 A. B. R. 320; *Wood Co. v. Eubanks*, 169 Fed. 929, 22 A. B. R. 307; *Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 53 L. ed. 997, 22 A. B. R. 111, aff'g 153 Fed. 841, 18 A. B. R. 567; *In re Burke*, 168 Fed. 994, 22 A. B. R. 69; *In re Morris*, 156 Fed. 597, 19 A. B. R. 422; *In re Heckathora*, 144 Fed. 499, 16 A. B. R. 467; *In re Tice*, 139 Fed. 52, 15 A. B. R. 97; *In re Miller & Brown*, 135 Fed. 868, 14 A. B. R. 439; *In re Galt*, 120 Fed. 64, 13 A. B. R. 575.

38—*In re Wall*, 207 Fed. 994, 29 A. B. R. 901; *In re Gray*, 170 Fed. 638, 21 A. B. R. 375; *Davis v. Crompton*, 158 Fed. 735, 20 A. B. R. 53; *In re Hess*, 138 Fed. 954, 14 A. B. R. 635; *Hart v. Mfg. Co.*, 7 Fed. 543; *Pittsburg L. & C. Wks. v. Bank*, Fed. Cas. No. 11198;

## § 770. — What constitutes a sale.

A conditional sale is one in which the vesting of title in the purchaser is subject to a condition precedent, or in which its reversion in the seller is subject to a failure of the buyer to comply with a condition subsequent.<sup>39</sup> Whether a transaction constitutes a conditional sale or a bailment, is a question of fact,<sup>40</sup> to be determined by the intention of the parties as gathered from the contract in its entirety,<sup>41</sup> and from the acts and circumstances attending its execution and performance,<sup>42</sup> and effect should be given the intention so expressed, unless such intention is found to be contrary to the local laws.<sup>43</sup> The fact that the original intention of the parties is to create a sale does not prevent a change of the agreement while it is still executory, into a bailment with an alternative of future conversion into a sale on the compliance with certain conditions.<sup>44</sup>

The true test is, has the sender the right to compel a return of the thing sent, or the receiver the option to pay for the thing in money. In a bailment the identical thing delivered is to be restored; in a sale there is an agreement express or implied to pay money or its equivalent for the thing delivered, and there is no obligation to return. Where there is no obligation to return the specific article, and no promise to pay the bankrupt any commissions or compensation for its services the transaction will be held to be a sale and title passes to the trustee,<sup>45</sup> notwithstanding

*Heryford v. Davis*, 102 U. S. (12 Otto) 235, 26 L. ed. 160; *Chi. Ry. Equip. Co. v. Bank*, 136 U. S. 268, 280, 34 L. ed. 349; *McGourney v. Ry. Co.*, 146 U. S. 536, 36 L. ed. 1079.

39—*In re Lutz*, 197 Fed. 492, 28 A. B. R. 649; *In re Columbus Buggy Co.*, 143 Fed. 859, 16 A. B. R. 759; *In re Dunlop*, 156 Fed. 545, 19 A. B. R. 361.

40—*Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, 28 A. B. R. 63; *Ludvigh v. American Woolen Co.*, 176 Fed. 145, 23 A. B. R. 314.

41—*Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, 22 A. B. R. 63.

42—*Mishawaka Woolen Mfg. Co. v. Westveer*, 191 Fed. 465, 27 A. B. R. 345.

43—*Southern Pine Co. of Georgia v.*

*Savannah Trust Co.*, 141 Fed. 802, 15 A. B. R. 618.

44—*In re Naylor Mfg. Co.*, 135 Fed. 206, 14 A. B. R. 284.

45—*In re Gaglione & Son*, 200 Fed. 81, 28 A. B. R. 694; *In re Priegle Paint Co.*, 175 Fed. 586, 23 A. B. R. 385; *In re Burt*, 155 Fed. 267, 19 A. B. R. 123; *In re Galt*, 120 Fed. 64, 13 A. B. R. 575; *In re Martin-Vernon Music Co.*, 132 Fed. 983, 13 A. B. R. 276.

A contract which contains no provision for the reservation of the title in the shipper of goods or for the return of the unsold portion of the goods will not be construed as a consignment entitling the consignor to a return thereof upon the bankruptcy of the consignee. *In re*

an agreement that the ownership shall remain in the seller, until the price is paid.<sup>46</sup>

The trustee is entitled to articles delivered under an arrangement whereby the bankrupt has the exclusive right to sell them, with the understanding that he is to pay for them if sold within a certain time, and, if not, he is "to take them for the next season," and the transaction appears on his books and upon the owner's invoices as a sale.<sup>47</sup>

A trustee is entitled to the proceeds of goods sold by the bankrupt, where, by agreement between the bankrupt and another, the latter was to furnish the bankrupt goods at a fixed price, the bankrupt to pay all freight, storage and charges, and, at the expiration of each three months, to pay for all goods sold or shipped from the bankrupt's warehouse.<sup>48</sup> So, when property is delivered to the bankrupt for consumption or sale, or to be dealt with in any way inconsistent with the ownership

*Zephyr Mercantile Co.*, 203 Fed. 576, 30 A. B. R. 203.

Contract providing for delivery of automobile "hubs" held a contract of sale with a reservation reserving a lien as security and not a conditional sale contract, and therefore void unless recorded. *In re King Motor Car Co.*, 31 A. B. R. 172.

A contract for the sale of beer, by the terms of which bankrupt was charged and promised to pay for the cases and bottles unless he desired to return the same, in which case he was to be credited with the amount of the charge held a contract of sale and return and not a mere option to purchase, nor a bailment in any sense and the trustee held entitled to the possession of the property. *In re Allen*, 183 Fed. 172, 25 A. B. R. 722.

46—*In re Harrington*, 29 A. B. R. 690; *In re Penny & Anderson*, 176 Fed. 141, 23 A. B. R. 115; *In re Poore*, 139 Fed. 862, 15 A. B. R. 174, *Mishawaka Woolen Mfg. Co. v. Westveer*, 191 Fed. 465, 27 A. B. R. 345; *In re Butterwick*, 131 Fed. 371, 12 A. B. R. 536;; *In re Garcewich*, 115 Fed. 87, 8 A. B. R. 149; *In re McCallum*, 113 Fed. 393, 7 A. B. R. 596.

A reservation of title cannot be coupled with a plain intent to transfer that title. *In re Waters-Colver Co.*, 206 Fed. 845, 30 A. B. R. 763.

47—*Wood M. & R. Mach. Co. v. Brooke*, 9 N. B. R. 395, 2 *Sawyer*, 576, Fed. Cas. No. 17980.

Consignment with right to return is a bailment. *In re Flanders*, 134 Fed. 560, 14 A. B. R. 27.

Contract of consignment of goods to be sold on commission by the consignee, as agent for the consignor for cash, held a bailment. *Deere Plow Co. v. McDavid*, 137 Fed. 802, 14 A. B. R. 653.

Title to machine held to have remained in lessor until payment in full. *Colonial Trust Co. v. Thorpe*, 194 Fed. 390, 27 A. B. R. 451.

Goods delivered to the bankrupt on a consignment, under which the bankrupt did not become liable to pay for unsold goods at any time, and acted merely as agent, may be reclaimed. *In re Chalmers*, 206 Fed. 143, 30 A. B. R. 521.

48—*In re Linforth*, 16 N. B. R. 435, 4 *Sawyer*, 370, Fed. Cas. No. 8369.

of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee.<sup>49</sup> The form of the transaction is of little consequence,<sup>50</sup> and the construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In such case the intent of the parties must be determined by the language employed, rather than by their acts.<sup>51</sup> The acceptance of a note as security for payment rebuts the idea of a lease,<sup>52</sup> but a conditional privilege of purchase conferred on the bankrupt by an agreement does not operate to convert the same into a contract of sale,<sup>53</sup> and a contract otherwise an agency contract is not made a sale contract by a provision requiring the agent at the first of each month to account for all goods sold during the preceding month.<sup>54</sup>

Machinery, fixtures and merchandise may be the subject of conditional sale, and the court will protect the claim of the conditional vendor as against the trustee who takes the property in such cases unaffected by fraud subject to all equities impressed upon it in the hands of the bankrupt. But where there is fraud, actual or constructive, the cases rest upon a different reasoning.<sup>55</sup>

A contract of sale of a stock of goods and fixtures title to

49—In re Rasmussen, 136 Fed. 704, 13 A. B. R. 462.

50—In re Gaglione & Son, 28 A. B. R. 694; In re Franklin Lumber Co., 26 A. B. R. 37; In re Levin, 127 Fed. 886, 11 A. B. R. 446.

Calling payments rent cannot make a sale a lease. In re Poore, 139 Fed. 862, 15 A. B. R. 174.

An agreement by the terms of which the vendor of a chattel reserves title until the payment of the purchase price, and the right of rescission in case of default is a conditional sale, though termed a lease. Unitype Co. v. Long, 143 Fed. 315, 16 A. B. R. 282, aff'g 136 Fed. 989, 14 A. B. R. 668.

"It is unnecessary to determine whether the contract . . . operated as an absolute sale with the reservation of a secret lien, or whether its effect was a conditional sale. . . . In either event it

would be constructively fraudulent and void as against creditors who had acquired a lien without notice of the rights of the vendor. . . . The trustee is by the amendment of the Bankruptcy Act clothed with the rights of such creditors." In re Appel Suit & Cloak Co., 198 Fed. 322, 28 A. B. R. 818.

51—Smith & Bro. Typewriter Co. v. Alleman, 199 Fed. 1, 28 A. B. R. 699, rev'g 187 Fed. 281, 26 A. B. R. 37.

52—In re Gaglione & Son, 200 Fed. 81, 28 A. B. R. 694.

53—In re Marx Tailoring Co., 196 Fed. 243, 28 A. B. R. 147.

Claimant held entitled to reclaim goods in the hands of the trustee as to which no option to purchase had been exercised. Id.

54—In re Reynolds, 203 Fed. 162, 29 A. B. R. 145.

55—In re Penny & Anderson, 176 Fed. 141, 23 A. B. R. 115.

remain in the seller until the payment of the purchase price may be upheld as a conditional sale as to the fixtures though invalid as a chattel mortgage upon the stock of goods because not recorded.<sup>56</sup>

If an owner of personalty leases it, neither the lessee's possession nor the lessee's representations confer any rights on creditors of the lessee as against the owner, even though the lessee is given power to bind the property in obtaining credit. The rights of the creditors in such case spring from and are measured by the owner's grant of power to the lessee, and exist only in cases where the power, before it is terminated, is acted upon by the lessee and creditors.<sup>57</sup>

### § 771. — Waiver of conditions.

The conditions upon the performance of which title is to pass to the bankrupt may be waived by the vendor, and when so waived the property will be held to have vested in the bankrupt notwithstanding nonperformance of the conditions.<sup>58</sup> Though, in cases of sales for cash, no title passes until payment, yet this condition may be waived by delay in reclaiming the property or by an absolute and unconditional delivery.<sup>59</sup>

### § 772. — Resale by bankrupt.

The trustee has been held to obtain no title as against subsequent purchasers, where the bankrupt was a conditional purchaser under an unrecorded contract, the state law requiring the recording thereof.<sup>60</sup> Where property is held under a conditional sale contract issued by the bankrupt, and the vendee enters into a similar contract with the original vendor, the trustee of the bankrupt is estopped to assert title to the proceeds of the sale as against the original vendor.<sup>61</sup>

### § 773. — Assumption of contract by trustee.

Even if a conditional sale contract is valid as to creditors, the trustee can take the property, paying what remains unpaid

56—In re Forse & Roseboom, 182 Fed. 212, 25 A. B. R. 134.

57—Nylin v. American Trust & Savings Bank, 166 Fed. 276, 21 A. B. R. 533.

58—In re Dixon, 12 A. B. R. 191.

59—In re O'Callaghan, 30 A. B. R. 97.

60—In re Kellogg, 112 Fed. 52, 7 A. B. R. 270.

61—In re Greek Mfg., etc., Co., 167 Fed. 424, 21 A. B. R. 717.

thereon.<sup>62</sup> The trustee is under no obligation, however, to purchase property covered by the contract. If he desires to do so, in order to acquire title to the property, such payment can only be made by an order of the court upon notice to the creditors.<sup>63</sup> Whenever it is deemed for the benefit of the estate to relieve property from any conditional contract, and to tender performance of the conditions thereof, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor, whereupon the court must appoint a time and place for hearing and notice be given to persons interested.<sup>64</sup>

### § 774. — Necessity of recording.

Under the act as it stood prior to the amendment of 1910 there was much diversity of opinion as to the title of the trustee to property held by the bankrupt under a conditional sale contract. Many courts held the trustee entitled to property in the possession of the bankrupt under a conditional contract of sale if such contract, by reason of not being recorded, or for want of a statement endorsed thereon, under oath, of the amount of the claim, or other similar reason, was not binding on every creditor.<sup>65</sup> Others held that a conditional sale made invalid against execution creditors<sup>66</sup> or against subsequent purchasers in good faith,<sup>67</sup>

62—In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re Lyon, 7 N. B. R. 182, Fed. Cas. No. 8644; Sawyer v. Turpin, 5 N. B. R. 339, 2 Lowell 29, Fed. Cas. No. 12410.

63—In re Grainger, 160 Fed. 69, 20 A. B. R. 166.

64—G. O. XXVIII.

65—Press Post Printing Co. v. Landon Printing & Pub. Co., 2 N. B. N. R. 774; In re Leigh Bros., 1 N. B. N. 526, 96 Fed. 806, aff'g 1 N. B. N. 425, 2 A. B. R. 606; In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 Fed. 326; Contra, In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; In re Ohio Co-op. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re Perkins, 155 Fed. 237, 19 A. B. R. 134; Unitytype Co. v. Long, 143 Fed. 315, 16 A. B. R. 282, aff'g 136 Fed. 989, 14 A. B. R. 668; In re Press Post Prtg. Co., 134 Fed. 998, 13 A. B. R. 797; Bradley, Alderson & Co.

v. McAfee, 149 Fed. 254, 17 A. B. R. 495; In re Franklin Lumber Co., 147 Fed. 852, 17 A. B. R. 443; In re Runn Hdwe. & Furn. Co., 132 Fed. 719, 13 A. B. R. 147.

66—In re Carpenter, 125 Fed. 841, 11 A. B. R. 147; In re Wilcox & Howe Co., 70 Conn. 224; Cash Register Co. v. Woodbury, 70 Conn. 321; In re American Mach. Works, 174 Fed. 805, 23 A. B. R. 483.

67—In re Hess, 138 Fed. 954, 14 A. B. R. 635; In re Smith & Shuck, 132 Fed. 301, 13 A. B. R. 103; In re Tweed, 131 Fed. 355, 12 A. B. R. 648; In re Faulkner, 181 Fed. 981, 25 A. B. R. 416; Liquid Carbonic Co. v. Quick, 182 Fed. 603, 25 A. B. R. 394; Contra, In re American Mach. Works, 174 Fed. 805, 23 A. B. R. 483; In re Frazier, 117 Fed. 746, 9 A. B. R. 21; In re Garcewich, 115 Fed. 87, 8 A. B. R. 149; In re Howland, 109 Fed. 869, 6 A. B. R. 495.

if not recorded, would be invalid as against the trustee who would be entitled to the property as against the vendor, though the vendee would not have been.<sup>68</sup> The matter was finally settled by the supreme court in the case of *York Manufacturing Company v. Cassell*,<sup>69</sup> in which case it was held that the trustee was not an attaching creditor or subsequent purchaser in good faith, but merely stood in the shoes of the bankrupt and could only avoid conditional sale contracts which the bankrupt himself could have avoided, and that the vendor was entitled to possession upon default as against the trustee though the contract was not recorded, where such recording was essential only to validate it as against creditors filing liens prior to its filing. This construction was adopted and applied in subsequent decisions of the lower courts.<sup>70</sup> It was to obviate the effect of the decision in the *York Manufacturing Company* case that section 47a (2) was amended by the act of June 25, 1910, by inserting the words, "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and, also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Under it, the trustee has the same right as a creditor holding a lien by legal or equitable proceedings, or as judgment creditor holding an execution duly returned unsatisfied,<sup>71</sup> and

68—*In re Legg*, 1 N. B. N. 420, 96 Fed. 326, 2 A. B. R. 805, citing and disapproving *In re McKay*, 1 N. B. N. 133, 1 A. B. R. 292; *In re Rabenau*, 118 Fed. 471, 9 A. B. R. 180.

69—*York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 15 A. B. R. 633, rev'g 135 Fed. 52, 14 A. B. R. 52. And see, *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986, 11 A. B. R. 709.

70—*In re Walsh Bros.*, 195 Fed. 576, 28 A. B. R. 243; *In re Hutchins Co.*, 179 Fed. 864, 24 A. B. R. 647; *In re Bailey*, 176 Fed. 628, 23 A. B. R. 876; *York Mfg. Co. v. Brewster*, 174 Fed. 566, 23 A. B. R. 474; *John Deere Plow*

*Co. v. Anderson*, 174 Fed. 815, 23 A. B. R. 480; *In re Bement*, 172 Fed. 98, 22 A. B. R. 616, rev'g 158 Fed. 885, 20 A. B. R. 317; *In re Atlanta News Pub. Co.*, 160 Fed. 519, 20 A. B. R. 193; *In re Dunlop*, 156 Fed. 545, 19 A. B. R. 361; *In re Cavagnaro*, 143 Fed. 668, 16 A. B. R. 320.

71—*In re Farmers' Supply Co.*, 196 Fed. 990, 28 A. B. R. 535; *In re Nelson*, 191 Fed. 233, 27 A. B. R. 272; *In re Kreuger*, 199 Fed. 367, 27 A. B. R. 623; *In re Gehris-Herbine Co.*, 188 Fed. 502, 26 A. B. R. 470; *In re Franklin Lumber Co.*, 187 Fed. 281, 26 A. B. R. 37; *In re Dancy Hardware & Furniture Co.*, 198 Fed. 336, 28 A. B. R. 444.



if any creditor under the local statute can obtain priority over an unfiled or unrecorded instrument by levy of attachment or execution, the trustee in bankruptcy, under the amendment, has all the rights and remedies of such creditor.<sup>72</sup> It is not necessary that there should, in fact, have been such lien creditors when the petition was filed.<sup>73</sup>

While it is held that the trustee is not an innocent purchaser,<sup>74</sup> and cannot, in his own right, avoid a conditional sale contract filed before the bankruptcy<sup>75</sup> yet clearly an unrecorded chattel mortgage or conditional sale contract may be void as against the trustee though valid as between the parties, since the trustee occupies the position of a subsequent lien holder without notice.<sup>76</sup>

Under the amendment the trustee may attack a contract, in form of a bailment, and offer such evidence as will throw light upon the negotiations, between the parties, disclosing its true meaning to be otherwise. The mere form of the agreement does not bind him, as it might the bankrupt.<sup>77</sup>

The "rights, remedies and powers with which the trustee is vested under 47a (2) arise as of the date of the commencement of the bankruptcy proceedings, and hence he cannot recover from a vendor under an unrecorded conditional sale contract

72—In re Farmers' Co-operative Co. of Barlow, 202 Fed. 1008, 30 A. B. R. 190.

73—In re Farmers' Co-operative Co. of Barlow, 202 Fed. 1008, 30 A. B. R. 190; In re Dancy Hardware & Furniture Co., 198 Fed. 336, 28 A. B. R. 444; In re Calhoun Supply Co., 189 Fed. 537, 26 A. B. R. 528; In re Bozemoire, 189 Fed. 236, 26 A. B. R. 494.

74—The amendment of 1910 does not constitute the trustee an innocent purchaser, but merely puts him in the position of a creditor who has reduced his claim to judgment. In Ohio a conditional sale contract being valid as to all but innocent purchasers, is valid as against the trustee, though not recorded until within four months of bankruptcy. In re Superior Drop Forge & Mfg. Co., 208 Fed. 813, 31 A. B. R. 455.

75—Big Four Implement Co. v. Wright, 207 Fed. 535, 31 A. B. R. 125.

Conditional sale contract held valid as

to trustee though filed only a few days before bankruptcy. John Deere Plow Co. v. Edgar Farmer Store Co., 143 N. W. 194, 31 A. B. R. 156.

76—Townsend, Leaphart & Meetze v. Ashpoo Fertilizer Co., 212 Fed. 97, 31 A. B. R. 682; Millikin v. Second Nat. Bank, 206 Fed. 14, 30 A. B. R. 477, rev'g 200 Fed. 455, 29 A. B. R. 613; Augusta Grocery Co. v. Southern Moline Plow Co., 213 Fed. 786, 31 A. B. R. 677.

Unfiled conditional sale contract is, since the amendment to section 47a (2), absolutely void as against a trustee representing, in part, creditors who have, subsequent to the execution of the contract and prior to its filing, extended credit to the bankrupt. In re Johnson, 212 Fed. 311, 31 A. B. R. 579.

77—In re Franklin Lumber Co., 187 Fed. 281, 26 A. B. R. 37; In re Gaglione & Son, 200 Fed. 81, 28 A. B. R. 694.

property which has been reclaimed by the latter prior to bankruptcy though within four months thereof,<sup>78</sup> though it is held that, where, under the state law, the lien of an execution creditor is superior to the rights of a vendor under a conditional sale contract, the trustee becomes subrogated to the rights of the creditor holding such lien, and may avoid the transfer of the property by the bankrupt to the conditional vendor prior to bankruptcy.<sup>79</sup>

The amendment of 1910 may be invoked to avoid a conditional sale made prior to its passage, where the petition in bankruptcy is filed after such passage.<sup>80</sup>

The date of the delivery of the contract is to be considered as the date of the contract within the meaning of statutes providing for their recordation within a certain time from their date.<sup>81</sup>

### § 775. — Effect of record.

Property in which the title, by written contract, remains in the vendor until the stipulated price is paid, all of the requirements of the law being fully complied with,<sup>82</sup> does not pass to the trustee.

A conditional sale of chattels, where transfer of title is contemplated at the time of reservation of title in the vendor, is invalid, whether filed or not.<sup>83</sup>

### § 776. Contracts of bankrupt.

Bankruptcy, where there is no fraud, does not disturb contracts or equities growing out of them,<sup>84</sup> and the trustee may

78—*Hart v. Emerson-Brantingham Co.*, 203 Fed. 60, 30 A. B. R. 218.

79—*Rock Island Plow Co. v. Beardon*, 222 U. S. 354, 56 L. ed. 231, 27 A. B. R. 492, aff'g 168 Fed. 654, 22 A. B. R. 26.

80—*Holt v. Henley*, 193 Fed. 1020, 27 A. B. R. 578, aff'g 190 Fed. 871, 27 A. B. R. 178.

81—*In re Gosch*, 126 Fed. 627, 12 A. B. R. 149, rev'g 121 Fed. 602, 9 A. B. R. 610.

82—*In re Lyon*, 7 N. B. R. 182, Fed. Cas. No. 8644; *Sawyer v. Turpin*, 5 N. B. R. 339, 2 Low. 29, Fed. Cas. No. 12410.

83—*In re Walters-Colver Co.*, 206 Fed. 845, 30 A. B. R. 763.

84—*In re Boschelli*, 183 Fed. 864, 25 A. B. R. 528. But see, *In re National Mercantile Agency*, 11 A. B. R. 451.

An obligee in the bankrupt's bond for a deed has an equitable interest in the land which the deed covers which the bankruptcy court will recognize. *In re Peasley*, 137 Fed. 190, 14 A. B. R. 496.

A railroad company making advancements to the bankrupt in anticipation of the delivery of coal in pursuance to contract is entitled to demand from the trustee a delivery of coal to cover the advances made. *Hurley v. Atchison*, T.

elect to adopt or reject contracts entered into by the bankrupt prior to the commencement of the proceedings.<sup>85</sup> A contract which has been assumed by a receiver in bankruptcy, in the absence of any negative intention by the trustee, must be deemed to have been ratified and confirmed by him.<sup>86</sup>

Money due bankrupt under contract is properly paid to the trustee,<sup>87</sup> and where the trustee completes a contract undertaken by the bankrupt he is entitled to the balance due thereon even though claims have been filed against such balance by subcontractors and materialmen, it appearing that the latter have filed their claims in the bankruptcy court and have not intervened in mandamus proceedings instituted by the trustee to recover the balance due.<sup>88</sup>

There are, however, certain classes of property which may be in the bankrupt's possession, or under his control, by virtue of some contract, which should not be classed as an asset and would not pass to the trustee, as, for instance, where bankrupt has possession of property for certain purposes, the title to which is in another;<sup>89</sup> or a business conducted in bankrupt's name, but which is the bona fide property of another.<sup>90</sup> Nor can the trustee take title to contracts for purely personal service or those involving trust or confidence. The personal confidence which precludes the transfer of rights arising out of a contract to the trustee must be involved in the nature of the rights themselves. It is not ordinarily involved in the right to receive moneys due or to grow due under a contract and this right is generally assignable without the consent of the other party.<sup>91</sup> Accordingly, the right of an insurance agent to receive renewal commissions accruing since the adjudication of such agent passes to his trustee.

& S. F. R. Co., 213 U. S. 126, 53 L. ed. 729, 22 A. B. R. 17, aff'g 153 Fed. 503, 18 A. B. R. 396.

85—Corbett v. Riddle, 209 Fed. 811, 31 A. B. R. 330; In re Sterne & Levi, 26 A. B. R. 535; In re Big Cahaba Coal Co., 190 Fed. 900, 26 A. B. R. 910.

86—In re Niagara Radiator Co., 164 Fed. 102, 21 A. B. R. 55.

87—In re Cramond, 145 Fed. 966, 17 A. B. R. 22.

88—Ford v. State Board of Education, 166 Mich. 658, 27 A. B. R. 236.

89—In re Noakes, 1 N. B. R. 164, Fed. Cas. No. 12281; In re Pusey, 7 N. B. R. 45, Fed. Cas. No. 11478; In re Cohn, 2 N. B. R. 299, 98 Fed. 75, 3 A. B. R. 421.

90—In re Beardsley, 1 N. B. R. 121, Fed. Cas. No. 1184.

91—In re Wright, 157 Fed. 544, 18 L. R. A. (N. S.) 193, 19 A. B. R. 454, aff'g 151 Fed. 361, 18 A. B. R. 198, rev'g 16 A. B. R. 778.

Where the trustee elects to complete a contract, the proceeds of which were assigned by the bankrupt prior to the adjudication, the assignee is entitled to such proceeds.<sup>92</sup> In case the trustee refuses to assume the performance of a contract, the contractual rights and liabilities of the parties remain unaffected by the bankruptcy.<sup>93</sup>

A trustee may sue on a written contract, entered into between the bankrupt and another to recover a debt alleged to be due the bankrupt thereunder,<sup>94</sup> but he cannot sue on a contract of the bankrupt, a corporation, which is void because of its failure to comply with the local statutes as to registration.<sup>95</sup>

### § 777. Corporate records.

Corporate records and stock books of a bankrupt corporation pass to its trustee.<sup>96</sup>

### § 778. Crops.

The trustee of a bankrupt, who schedules a farm with growing crops, is vested with the title to the real estate, which carries the growing crops, unless exempt under the state law.<sup>97</sup> The rule is not changed because bankrupt is only a tenant under a contract reserving to the landlord, as rent, a share of the crops raised on the land, and the crops were immature and unsevered when the petition was filed.<sup>98</sup> But bankrupt may be allowed a reasonable compensation for the care and labor bestowed on them from the adjudication, and the proceeds of any part of such crops sold will take the place of such part.<sup>99</sup>

Crops not sown at the time of the adjudication do not pass to the trustee in bankruptcy,<sup>1</sup> and a mortgagee of real estate, with

92—*In re DeLong Furn. Co.*, 188 Fed. 686, 26 A. B. R. 469.

93—*In re Schierrmann*, 2 N. B. N. R. 118; *In re Big Cahaba Coal Co.*, 190 Fed. 900, 26 A. B. R. 910.

94—*Babbitt v. Burgess*, 7 N. B. R. 561, 2 Dill. 169, Fed. Cas. No. 693.

95—*Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340, 28 A. B. R. 152.

96—*Babbitt v. Dutcher*, 216 U. S. 102, 54 L. ed. 402, 23 A. B. R. 519.

97—*Spencer v. Lowe*, 29 A. B. R. 877; *In re Eastman*, 2 N. B. N. R. 86; *In re*

*Barrow*, 3 N. B. N. R. 95, 98 Fed. 582, 3 A. B. R. 414; *In re Daubner*, 1 N. B. N. 520, 3 A. B. R. 368, 96 Fed. 805; *In re Coffman*, 1 N. B. N. 402, 1 A. B. R. 530, 93 Fed. 422.

98—*In re Koester*, 15 Ohio Fed. Dec. 257, 17 A. B. R. 391; *In re Barrow*, 3 N. B. N. R. 95, 98 Fed. 582, 3 A. B. R. 414.

99—*In re Barrow*, 98 Fed. 582, 3 N. B. N. R. 95, 3 A. B. R. 414.

1—*Bank of Nez Perce v. Pindel*, 193 Fed. 917, 28 A. B. R. 69.

condition broken before the institution of bankruptcy proceedings, is entitled to all the product of the premises unharvested as against the trustee.<sup>2</sup>

### § 779. Equitable titles.

The equity of the receiver or trustee in bankruptcy to a fund in the hands of a debtor of the bankrupt is equal to the equity of a creditor of the bankrupt holding an order of which the debtor has no knowledge.<sup>3</sup>

Real property actually occupied by an adverse claimant who claims the equitable title thereto is "not in the custody of the bankruptcy court," though the legal title is in the bankrupt. Hence the rights of the trustee in relation thereto are only those of a judgment creditor holding an execution duly returned unsatisfied and, if under the state law, the title of such creditor, without a previous attachment, is inferior to those of the equitable owner, the trustee takes no title to the property.<sup>4</sup>

Equitable liens and assignments, against property of the estate are treated elsewhere.<sup>5</sup>

### § 780. Exempt property.

See chapter XXIV.

### § 781. Fixtures.

Whether the bankrupt, as lessee, or his trustee, is entitled to fixture depends upon the intention of the parties.<sup>6</sup>

The presumption is that trade fixtures on premises leased by the bankrupt belong to him, and in the absence of clear language in the lease that they shall become the property of the landlord

2—In re Bruce, 16 N. B. R. 318, 9 Ben. 236, Fed. Cas. No. 2045. But see, In re Hosie, 206 Fed. 789, 30 A. B. R. 83.

3—In re The Leader, 190 Fed. 624, 26 A. B. R. 668.

4—Clark v. Snelling, 205 Fed. 240, 30 A. B. R. 50, aff'g 202 Fed. 259, 29 A. B. R. 818.

Real estate in the possession of an equitable owner thereof who purchased the same from bankrupt more than ten years before bankruptcy is not in the

custody of the trustee within the meaning of section 47a as amended. Id.

One who has purchased real property from the bankrupt a long time prior to bankruptcy and has been in possession thereof ever since the purchase has title superior to that of the trustee, though no actual conveyance was ever made, and may compel a conveyance from the trustee. Id.

5—See *post*, § 908.

6—In re Rodgers & Hite, 143 Fed. 594, 16 A. B. R. 401.

at the expiration of the lease, they will pass to the trustee of the tenant.<sup>7</sup> However, fixtures, which by the terms of the lease are to remain for the benefit of the lessor do not pass to the lessee's trustee.<sup>8</sup>

Where a lessee buys certain fixtures under a conditional sale contract and his landlord guarantees payment thereon, the trustee of the latter is estopped to distrain on the fixtures for his unpaid rent, the fixtures not having been paid for.<sup>9</sup>

Where the bankrupt was in possession of real property as vendee under a contract to purchase, any fixtures annexed to the property are presumed to have been annexed with the intention of making them part of the realty unless the vendor has given his consent to removal or has failed to perform his contract to convey.<sup>10</sup>

### § 782. Property fraudulently transferred.

### § 783. — Statutory provision.

By section 67e of the act it is provided, "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing

7—In re Howard Laundry Co., 203 Fed. 445, 30 A. B. R. 167.

8—In re Bahl's Ice Cream & Baking Co., 195 Fed. 986, 28 A. B. R. 139.

9—In re Boschelli, 183 Fed. 864, 25 A. B. R. 528.

10—In re Rodgers & Hite, 143 Fed. 594, 16 A. B. R. 401.

of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.”<sup>11</sup>

The object of this section is to carry out the main purpose of bankruptcy legislation, viz., the equal distribution of the bankrupt's property among his creditors, and supplements the provision as to voidable preferences,<sup>12</sup> which should be consulted in connection herewith. It provides that all liens acquired during the four months prior to the commencement of the bankruptcy proceedings whether by the act of the bankrupt or through legal proceedings against him except as against a purchaser in good faith for a valuable consideration shall be void

11—By the Act of February 5, 1903, this subdivision was amended by the insertion at the end thereof the words “For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.”

Analogous provision of Act of 1867. “Sec. 14. . . . That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title of all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings. . . . And all the property conveyed by the bank-

rupt in fraud of his creditors . . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee.”

The Act of 1867 provided that all property conveyed by the bankrupt in fraud of his creditors should, in virtue of the adjudication of bankruptcy and the appointment of an assignee, vest at once in such assignee. It will be observed therefore that the present act includes all the former act did and in addition makes null and void transfers made subsequent to the passage of the act and within four months of the filing of the petition with intent to defraud creditors and all transfers made within such four months and while insolvent which are held null and void by the laws of the locality in which the property transferred is situated. Thus there are three classes. Those that the trustee as representative of the creditors is entitled to have set aside and which are identical with those referred to in the former act and the two additional classes just named.

12—Sec. 60b, Act of 1898.

or the trustee subrogated to the rights of the holder of the same, as may be most for the interest of the estate. All liens invalid for want of compliance with some prescribed requisite, as record or the like, by the state laws as against creditors, shall be void against the estate and the trustee is subrogated to the rights of the creditors to protect their rights against any lien created or attempted to be created by the debtor.

#### § 784. — Transfers must be subsequent to act.

It should be observed that the conveyances, transfers, assignments or incumbrances avoided by this subdivision must be subsequent to the passage of the bankruptcy law;<sup>13</sup> and hence if made prior to its enactment with intent to prefer, but in the absence of such knowledge on the part of the creditor they are not void under the bankruptcy law nor at common law. If they are not contrary to the state statutes or are not annulled by proceedings taken under a state law within the time limited thereby, the property cannot be recovered from the creditor by the debtor's trustee.<sup>14</sup> It by no means follows that, because a bona fide debt was created before the passage of the act, a mortgage or lien of any kind could be given after its passage to secure such debt, so as to avoid the effect of bankruptcy proceedings.<sup>15</sup>

#### § 785. — What constitutes a transfer.

The term "transfer" includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security,<sup>16</sup> or a change of beneficiaries in an insurance policy.<sup>17</sup> A fraudulent transfer or conveyance as used in the law, is a transfer of title in fraud of creditors, the transferor usually retaining the beneficial interest.<sup>18</sup>

13—In re Brown, 1 N. B. N. 240, 91 Fed. 358; In re Meyers, 1 N. B. N. 293, 1 A. B. R. 347.

14—In re Terrill, 100 Fed. 778, 4 A. B. R. 145.

15—In re Sievers, 91 Fed. 366, 369, 1 N. B. N. 68, 1 A. B. R. 117.

16—Sec. 1 (25), Act of 1898. *Spencer v. Nekemoto*, 24 A. B. R. 517.

17—*South Side Trust Co. v. Wilmarth*, 199 Fed. 418, 29 A. B. R. 29.

18—In re Musto, 2 N. B. N. R. 577.



**§ 786. — Rights of trustee in general.**

If, for any reason, title of property affected by a fraudulent conveyance reverts in the bankrupt at the time of filing a petition, it will pass to the trustee;<sup>19</sup> or if such conveyance is declared fraudulent and void by a state court, he may claim the property subject to any valid liens against it.<sup>20</sup> He may set aside a fraudulent conveyance though the bankrupt could not; or bring an action to reach equities beyond legal remedies. He may avoid any transfer by the bankrupt which any creditor might have avoided,<sup>21</sup> thus subrogating him to the rights of creditors, as against liens and transfers, which exist at the time of the bankruptcy.<sup>22</sup>

**§ 787. — Validity of transfers determined by local law.**

The validity of a conveyance alleged to be fraudulent depends upon the state law.<sup>23</sup> The question whether the bankrupt was insolvent at the time of a transfer made more than four months prior to bankruptcy, so as to render the same presumptively fraudulent and within the provisions of section 70a must be determined by the state law.<sup>24</sup> Hence, the question whether the exempt property of the bankrupt is to be considered in determining such insolvency is a question of local law.<sup>25</sup>

The question whether any conveyance was in fact made with intent to defraud creditors when passed upon by the state court is not a federal question.<sup>26</sup>

19—In re Brown, 91 Fed. 358, 1 N. B. N. 240, 1 A. B. R. 107; see In re Tollett, 105 Fed. 425, 5 A. B. R. 305.

20—In re Lesser, 100 Fed. 433, 2 N. B. N. R. 599, 3 A. B. R. 815.

21—Bush v. Export Storage Co., 136 Fed. 918, 14 A. B. R. 138; In re McNamara, 2 N. B. N. R. 341, citing In re Leland, Fed. Cas. No. 8230; Bradshaw v. Klein, Fed. Cas. No. 1790; In re Collins, Fed. Cas. No. 3007; Cook v. Whipple, 55 N. Y. 150; Southard v. Benner, 72 N. Y. 424; In re Metzger, Fed. Cas. No. 9510; In re Duncan, Fed. Cas. No. 4131; Barker v. Barker, Fed. Cas. No. 986; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94.

22—In re New York Economical Printing Co., 110 Fed. 514, 6 A. B. R. 615.

23—Parker v. Sherman, 201 Fed. 155, 29 A. B. R. 862; In re East End Mantel & Tile Co., 202 Fed. 275, 29 A. B. R. 793; In re Schoenfield, 190 Fed. 53, 27 A. B. R. 64; First Nat. Bank of Pittsburgh v. Guarantee Title & Trust Co., 178 Fed. 187, 24 A. B. R. 330.

24—Underleak v. Scott, 117 Minn. 136, 28 A. B. R. 926.

25—Underleak v. Scott, 117 Minn. 136, 28 A. B. R. 926.

26—Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n.

### § 788. — Transfer need not be within four months.

Section 67e is limited to transfers invalid under the act when made within the four month period.<sup>27</sup> However, section 70e includes fraudulent conveyances which are such under the common law, by statute law, and by any other recognized rule of law other than the special provisions of the bankruptcy statute, and under it the trustee may avoid any transfer which the creditors of the bankrupt might have avoided,<sup>28</sup> while under section 47a (2) as amended in 1910, as to all property not in the custody of the bankruptcy court, he shall be deemed a judgment creditor holding an execution duly returned unsatisfied, and accordingly, a fraudulent transfer made more than four months prior to bankruptcy, as well as one made thereafter, may be set aside or the proceeds recovered as against all but bona fide purchasers for value.<sup>29</sup>

### § 789. — Intent of bankrupt.

The provision saving conveyances to purchasers in good faith and for a present fair consideration prevents such conveyances from being declared void by the act, although made by the bankrupt with an intent to hinder, delay, or defraud his creditors. But the act does not dispense with the necessity of showing that the bankrupt had the actual intent to hinder, delay or defraud creditors,<sup>30</sup> at the time of the transfer.

The statute being in the disjunctive, an intent to defraud need not be shown if there is an intent to hinder or delay,<sup>31</sup> though it has been held that the security given for a present loan is not avoided by the fact that it actually hinders or delays creditors unless it was given with an actual intent to defraud such creditors and the recipient had actual or legal notice of that purpose.<sup>32</sup>

27—*Bush v. Export Storage Co.*, 136 Fed. 918, 14 A. B. R. 138.

28—*Underleak v. Scott*, 117 Minn. 136, 28 A. B. R. 926.

29—*Corey v. Blackwell Lumber Co.*, 24 Idaho 642, 31 A. B. R. 135; *In re Downing*, 192 Fed. 683, 27 A. B. R. 309; *State Bank of Chicago v. Cox*, 143 Fed. 91, 16 A. B. R. 32; *Bush v. Export Storage Co.*, 136 Fed. 918, 14 A. B. R. 138.

30—*Lumpkin v. Foley*, 204 Fed. 372, 29 A. B. R. 673; *Van Iderstine v. Na-*

*tional Discount Co.*, 227 U. S. 575, 57 L. ed. 652, 29 A. B. R. 478, *aff'g* 174 Fed. 518, 23 A. B. R. 345; *In re Thomas*, 199 Fed. 214, 29 A. B. R. 945; *Underleak v. Scott*, 117 Minn. 136, 28 A. B. R. 926; *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1; *Meservey v. Roby*, 198 Fed. 844, 28 A. B. R. 529; *In re Bloch*, 142 Fed. 674, 15 A. B. R. 748.

31—*In re Hughes*, 183 Fed. 872, 25 A. B. R. 556.

32—*Powell v. City Bank*, 178 Fed. 609, 24 A. B. R. 316.

**§ 790. — Participation of transferee in fraud.**

The present law is more prohibitive than the act of 1867, for no reasonable belief of insolvency or fraud on the law by the person receiving the preferences is necessary to avoid it. The purpose and intent of the bankrupt alone governs, and if contrary to the act, is sufficient to defeat the transfer except as to purchasers in good faith and for a present fair consideration.<sup>33</sup>

**§ 791. — Insolvency.**

The insolvency of the bankrupt at the time of the transfer is not an essential element of a fraudulent transfer.<sup>34</sup>

**§ 792. — Adequacy of consideration not decisive.**

A sale cannot be attacked solely on the ground of inadequacy of price.<sup>35</sup> While a voluntary conveyance is presumptively fraudulent as to existing creditors, it is not conclusively so.<sup>36</sup> And, conversely, if not withstanding a bona fide indebtedness and an adequate consideration for the transfer, there was an intent on the part of the debtor to hinder, delay or defraud his creditors, in which intent the transferee shared, and of which he had notice, the transfer is fraudulent.<sup>37</sup>

**§ 793. — Preference not necessarily fraudulent.**

Every preferential transfer must to some extent hinder and delay creditors, but it is not necessarily a fraudulent conveyance. A preferential transfer may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance.<sup>38</sup> If such transfer is free from actual or constructive fraud, and from any purpose to affect other creditors injuriously beyond the neces-

33—McKey v. Smith, 255 Ill. 465, 28 A. B. R. 864; In re Hill, 140 Fed. 984, 15 A. B. R. 499; Bush v. Export Storage Co., 136 Fed. 918, 14 A. B. R. 138; In re Moody, 134 Fed. 628, 14 A. B. R. 272; In re Pease, 129 Fed. 446, 12 A. B. R. 66; In re McLam, 97 Fed. 922, 3 A. B. R. 245, 1 N. B. N. 402; contra, Jacobs v. Van Sickle, 127 Fed. 62, 11 A. B. R. 470, aff'g 123 Fed. 340, 10 A. B. R. 519.

34—Spencer v. Nekemoto, 24 A. B. R. 517.

35—In re Shaw, 19 N. B. R. 512, Fed. Cas. No. 12716.

36—Underleak v. Scott, 117 Minn. 136, 28 A. B. R. 926.

37—Allen v. Gray, 63 Misc. (N. Y.) 219, 21 A. B. R. 828; In re Pease, 129 Fed. 446, 12 A. B. R. 66.

38—Van Iderstine v. National Discount Co., 227 U. S. 575, 57 L. ed. 652, 29 A. B. R. 478, aff'g 174 Fed. 518, 23 A. B. R. 345.

sary effect of the security or preference, it is valid and cannot evidence such intent to hinder, delay, or defraud creditors as will make it void under section 67e.<sup>39</sup>

### § 794. — Transfers held invalid.

When transfers are made to defeat the operation of the law they are absolutely void so far as they in any manner stand in the way of enforcing its provisions, where proceedings are instituted within the prescribed time, although they may be valid between grantor and grantee.<sup>40</sup> A conveyance by an insolvent to one creditor of property sufficient to pay his debt in full should be set aside, and that there is an excess which the creditor pays in cash is immaterial;<sup>41</sup> or a transfer of securities by an insolvent bank as collateral for a loan consisting in part of the lender's deposit;<sup>42</sup> or of stock to an indorser to secure his indorsement on certain acceptances used to secure a creditor;<sup>43</sup> or of a claim against the debtor for a cash discount on an account for goods previously sold;<sup>44</sup> or where one buys commercial paper and within four months of the bankruptcy takes mortgage security therefor;<sup>45</sup> or a lease by an insolvent to a creditor as part of a scheme to give such creditor an advantage over others.<sup>46</sup>

A conveyance absolute on its face in which the grantor secretly reserves the right to possess and occupy for a limited period under a parol agreement as part of the consideration is void;<sup>47</sup> or a sale by an insolvent owner to a broker of goods placed with him for sale on commission;<sup>48</sup> or a deed of trust by a corpora-

39—*In re Thomas*, 199 Fed. 214, 29 A. B. R. 945; *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513; *Sargent v. Blake*, 160 Fed. 57, 17 L. R. A. (N. S.) 1040, 20 A. B. R. 115; *In re Robertshaw Mfg. Co.*, 133 Fed. 556, 13 A. B. R. 409. But see, *In re Hill*, 140 Fed. 984, 15 A. B. R. 499.

40—*Stevenson v. McLaren*, 14 N. B. R. 403; *In re O'Bannon*, 2 N. B. R. 6, Fed. Cas. No. 10394; *In re Tomes*, 19 N. B. R. 36, Fed. Cas. No. 1457; *In re Byrne*, 1 N. B. R. 122, Fed. Cas. No. 2270.

41—*Johnson v. Wald*, 1 N. B. N. 325, 93 Fed. 640, 2 A. B. R. 84.

42—*In re Cobb*, 1 N. B. N. 557, 96 Fed. 821, 3 A. B. R. 129.

43—*Crooks v. Bank*, 3 A. B. R. 238, rev'g 1 N. B. N. 530.

44—*In re Eggert*, 2 N. B. N. R. 390, 98 Fed. 843, 3 A. B. R. 541.

45—*In re Glassburner*, 2 N. B. N. R. 634.

46—*Carter v. Hobbs*, 1 N. B. N. 529, 94 Fed. 108, 2 A. B. R. 224, s. c. 1 N. B. N. 191, 92 Fed. 594, 1 A. B. R. 215; see *Robinson v. White*, 1 N. B. N. 513, 97 Fed. 33, 3 A. B. R. 88.

47—*Lukins v. Aird*, 2 N. B. N. R. 27, 24 Wall. 78.

48—*Avery v. Hackley*, 11 N. B. R. 241, 20 Wall. 407.

tion to secure *ultra vires* notes,<sup>49</sup> or a deed of trust directing the trustee to sell the property and pay the debts according to the state law, as it takes from the creditors the right to have the estate settled in accordance with the bankruptcy law;<sup>50</sup> or a conveyance to one creditor of what would otherwise under the provisions of the act go to all;<sup>51</sup> or where a banker sells a sight draft and next day gives the holder collateral security for it;<sup>52</sup> or a voluntary conveyance as to subsequent creditors, although there are no existing debts if it be shown by facts and circumstances that it was made with an actual intent to defraud them.<sup>53</sup>

A transfer in consideration of a promise to marry is void where the promisee is incapable of entering into the marriage relation.<sup>54</sup>

A transfer of property in consideration of which the transferee expressly agrees to devise and bequeath the estate transferred in trust for the use of the transferrer, made with intent on the part of the transferrer to hinder creditors is voidable.<sup>55</sup>

A transfer may be voidable though made by the bankrupt through a third person.<sup>56</sup>

A transfer of accounts for a past consideration, or even for a present inadequate consideration, where the circumstances as well as the books and instruments themselves indicate that the transfer was not intended to be absolute, but was merely to keep the assets from other creditors, and as security to the assignee, is void, especially where the bankrupt has retained control of the accounts.<sup>57</sup> So, an executory contract to set aside certain book accounts to the payment of a creditor's claim is not effective where there has been no appropriation of the same *pro tanto*, by transferring them or otherwise, in such manner as to take them out of the hands of the assignor and authorize the debtors on

49—*American Wood Working Mach. Co. v. Norment*, 157 Fed. 801, 19 A. B. R. 679.

50—*Rumsey & Sikemier Co. v. Novelty Mach. Co.*, 2 N. B. N. R. 128, 99 Fed. 699, 3 A. B. R. 704.

51—*In re McLam*, 1 N. B. N. 402, 97 Fed. 922, 3 A. B. R. 245.

52—*Merchants' Nat. Bank v. Cook*, 16 N. B. R. 391, 95 U. S. (5 Otto) 342, 24 L. ed. 412.

53—*Smith v. Kehr*, 7 N. B. R. 97, 2 Dill. 50, Fed. Cas. No. 13071; *Beecher v. Clark*, 10 N. B. R. 385, Fed. Cas. No. 1223.

54—*Hosmer v. Tiffany*, 115 App. Div. (N. Y.) 303, 17 A. B. R. 318.

55—*Clowe v. Seavey*, 31 A. B. R. 830.

56—*In re Schacht Motor Car Co.*, 31 A. B. R. 624.

57—*Jackson v. Sedgwick*, 189 Fed. 508, 26 A. B. R. 836.

the accounts to pay them directly to the assignee.<sup>58</sup> But, successive assignments of accounts by the bankrupt by way of security, in pursuance of a contract under which advances were made to enable the bankrupt to get goods on the faith of his undertaking that the accounts should be assigned are not fraudulent per se.<sup>59</sup>

The fiction of legal corporate entity cannot be so applied by the bankrupt as to work a fraud on a part of his creditors, or hinder and delay them in the collection of their claims, and assets of a corporation, whose stock is owned almost entirely by the bankrupt, and which is maintained to facilitate the business of the bankrupt and acts as its agent may be regarded as assets of the bankrupt for the purposes of administration.<sup>60</sup> A lease of property of the bankrupt to another corporation in pursuance to a plan of reorganization adopted by the bondholders and directors has been held fraudulent.<sup>61</sup>

### § 795. — Sales out of due course.

A conveyance or mortgage by the bankrupt is presumptively fraudulent if of his entire property or stock of goods<sup>62</sup> or of the whole with a colorable exception, made as a security for a pre-existing debt,<sup>63</sup> or otherwise out of the usual course of business.<sup>64</sup> A transfer of his stock in trade to a creditor in consideration, inter alia, of the payment of an overdraft of insolvent for which the creditor had verbally become responsible is void.<sup>65</sup>

58—In re Wilson, 194 Fed. 564, 27 A. B. R. 867.

59—Greedy v. Dockendorff, 231 U. S. 513, 58 L. ed. 339, 31 A. B. R. 407.

60—In re Rieger, 157 Fed. 609, 19 A. B. R. 622.

61—In re Medina Quarry Co., 179 Fed. 929, 24 A. B. R. 769.

62—Lumpkin v. Foley, 204 Fed. 372, 29 A. B. R. 673; In re Lipman, 201 Fed. 169, 29 A. B. R. 139; In re Calvi, 185 Fed. 642, 26 A. B. R. 206; Matter of Rosenberg, 22 A. B. R. 900; Houck v. Christy, 152 Fed. 612, 18 A. B. R. 330; Johnston v. Forsyth Mercantile Co., 155 Fed. 268, 19 A. B. R. 48; Dokken v. Page, 147 Fed. 438, 17 A. B. R. 228; In re Knopf, 146 Fed. 109, 17 A. B. R. 48, 144 Fed. 245, 16 A. B. R. 432; In re

Moody, 134 Fed. 628, 14 A. B. R. 272; Norton v. Billings, 4 Fed. 623; Keating v. Keefer, 5 N. B. R. 133, Fed. Cas. No. 7635.

But see, Shelton v. Price, 174 Fed. 891, 23 A. B. R. 431, holding that the purchase of a stock of goods and fixtures in bulk is not prima facie fraudulent, but is merely a circumstance reflecting upon the bona fides of the transaction.

63—Rison v. Knapp, 4 N. B. R. 114, 1 Dill. 186, Fed. Cas. No. 11861; Carpenter v. Karnow, 193 Fed. 762, 28 A. B. R. 21.

64—And see, Dean v. Davis, 212 Fed. 88, 31 A. B. R. 808.

65—Goldman v. Smith, 1 N. B. N. 160, 93 Fed. 182, 1 A. B. R. 266.

## § 796. — Want of record or delivery.

Whether a conditional sale, chattel mortgage, or pledge of personal property is valid as against the general creditors of the vendor, mortgagor, or pledgor, or his trustee in bankruptcy, must be determined by the local laws of the state where the transaction was had,<sup>66</sup> or the property situated.<sup>67</sup> So the validity of a sale of a shifting stock of goods or other personal property of a transitory nature left in possession of the seller is to be determined by the local laws.<sup>68</sup>

The bankruptcy act does not abrogate state statutes of fraud but, if under state laws a sale by the bankrupt is void for want of delivery followed by an actual and continuing change of possession, or of record, or other reason, and vests no title in the vendee, the trustee is entitled to the property.<sup>69</sup> Mere failure to record an instrument is not conclusive evidence of fraudulent intent, but an agreement between parties to withhold the instrument from record may nevertheless be a circumstance of great weight in determining the good faith of the parties.<sup>70</sup>

66—See *ante*, §§ 769, 787. First Nat. Bank of Pittsburgh v. Guarantee Title & Trust Co., 178 Fed. 187, 24 A. B. R. 330.

67—In re Nuckols, 201 Fed. 437, 29 A. B. R. 867.

68—In re Schoenfeld, 190 Fed. 53, 27 A. B. R. 64.

69—In re East End Mantel & Tile Co., 202 Fed. 275, 29 A. B. R. 793; In re Harrington, 29 A. B. R. 690; In re Burlage Bros., 169 Fed. 1006, 22 A. B. R. 410; In re Fitzgerald, 188 Fed. 763, 26 A. B. R. 710; In re G. & K. Trunk Co., 176 Fed. 1007, 23 A. B. R. 914; In re Gilligan, 152 Fed. 605, 23 A. B. R. 668; Pontiac Buggy Co. v. Skinner, 158 Fed. 858, 20 A. B. R. 206; In re Schlessel, 18 A. B. R. 434; Marden v. Phillips, 3 N. B. N. R. 46, 103 Fed. 196, 4 A. B. R. 566; In re Taylor, 1 N. B. N. 480, 95 Fed. 956; Murray v. Joseph, 146 Fed. 260, 16 A. B. R. 704; In re Taylor, 1 N. B. N. 480, 95 Fed. 956; In re Leigh Bros., 1 N. B. N. 526, 96 Fed. 806, aff'g 1 N. B. N. 425, 2 A. B. R. 606; Press Post Printing Co. v. Landon Printing & Pub. Co., 2 N. B. N. R. 774; In re Booth, 2 N. B. N. R.

377, 98 Fed. 975; In re Legg, 96 Fed. 326, 1 N. B. N. 420, 2 A. B. R. 805; Massey v. Allen, 7 N. B. R. 401, 17 Wall. 351; Edmondson v. Hyde, 7 N. B. R. 1, 2 Sawy. 205, Fed. Cas. No. II. 4285; In re Eldridge, 4 N. B. R. 162, Fed. Cas. No. 12610; Potter v. Coggeshall, 4 N. B. R. 19, Fed. Cas. No. 11322; In re Collins, 12 N. B. R. 379, 12 Blatch. 548, Fed. Cas. No. 3007; Schulze v. Bolting, 17 N. B. R. 167, 8 Biss. 174, Fed. Cas. No. 12489; but see In re Bozeman, 1 N. B. N. 479, 2 A. B. R. 809; In re Ohio Co-op. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; Hadden v. Dooley, 92 Fed. 274; Barker v. Smith, 12 N. B. R. 474, 2 Wood 87, Fed. Cas. No. 986; but see In re Kindt, 101 Fed. 107, rev'g 2 N. B. N. R. 369, 4 A. B. R. 148.

70—Davis v. Hanover Savings Fund Society, 210 Fed. 768, 31 A. B. R. 368; In re Hickerson, 162 Fed. 345, 20 A. B. R. 682.

Brother's withholding deed from record held a badge of fraud. Peterson v. Mettler, 198 Fed. 938, 29 A. B. R. 158.

If a transfer made by the bankrupt is recorded within the four-month period it is a question of fact whether it was done with intent to defraud or give a preference and a transfer made with this intent may be set aside if recorded within the statutory period.<sup>71</sup> A conveyance prior to the four-month period but recorded within the period, the local law making such conveyance effective from the time of record as to subsequent purchasers and all creditors, is void,<sup>72</sup> or a deed not at first fraudulent but which becomes so by being concealed.<sup>73</sup> So, where mortgages are originally fraudulent, possession taken by the mortgagee before adjudication does not validate them.<sup>74</sup>

Under the 1910 amendment to section 47a the trustee is regarded as a subsequent lienholder or creditor without notice, and may avoid an unrecorded conditional sale contract or mortgage though the same be valid as between the parties.<sup>75</sup>

### § 797. — Conveyances to relatives.

A husband out of debt may settle upon his wife or children such portion of his estate as he pleases, if done in good faith, and not to defraud subsequent creditors;<sup>76</sup> but when largely indebted he cannot make a voluntary donation, or even a voluntary conveyance, to them, to the prejudice of his creditors,<sup>77</sup> and, where

71—*In re McKane*, 155 Fed. 674, 19 A. B. R. 103.

72—*Thornhill v. Link*, 8 N. B. R. 521, Fed. Cas. No. 13993.

Lien of chattel mortgage filed within four month period held prior to that of the trustee. *In re Jacobson & Perrill*, 200 Fed. 812, 29 A. B. R. 603.

73—*Barker v. Smith*, 12 N. B. R. 474, 2 Woods 87, Fed. Cas. No. 986.

74—*Schaupp v. Miller*, 206 Fed. 575, 30 A. B. R. 699.

Bill of sale absolute, but intended as mortgage, executed more than four months prior to bankruptcy is valid though possession is taken within the four months period, where under the state law, recording was unnecessary. *Coggan v. Ward*, 215 Mass. 13, 31 A. B. R. 844.

75—*Townsend v. Ashepoo Fertilizer Co.*, 212 Fed. 97, 31 A. B. R. 682. *Milikin v. Second Nat. Bank*, 206 Fed. 14,

30 A. B. R. 477, rev'g 200 Fed. 455, 29 A. B. R. 613; *Augusta Grocery Co. v. Southern Moline Plow Co.*, 213 Fed. 786, 31 A. B. R. 677; *In re Nuckols*, 201 Fed. 437, 29 A. B. R. 867.

A mortgage given by the bankrupt for a valid consideration and effective as between the parties thereto, which is withheld from record so as not to affect the mortgagor's credit is fraudulent. *National Bank of Athens v. Shackelford*, 208 Fed. 677, 31 A. B. R. 464.

76—*In re Jones*, 9 N. B. R. 556, 6 Biss. 68, Fed. Cas. No. 7444; *Sedgwick v. Place*, 5 N. B. R. 168, 5 Ben. 184, Fed. Cas. No. 12620.

77—*Henkel v. Seider*, 163 Fed. 553, 20 A. B. R. 773; *In re Coffey*, 19 A. B. R. 148; *Kehr v. Smith*, 10 N. B. R. 49, 20 Wall. 31; *In re Welsh*, 1 N. B. N. 533, 100 Fed. 65, 3 A. B. R. 93; *Pratt v. Curtis*, 6 N. B. R. 139, Fed. Cas. No. 11375; *In re Grahs*, 1 N. B. N. 164, 1 A. B. R.



a debtor conveys property to his wife without consideration and with intent to defraud, it should be set aside.<sup>78</sup> All transactions between the bankrupt and his wife shortly before bankruptcy ought to be subject to the closest scrutiny by the court.<sup>79</sup> A transfer of practically all of the bankrupt's property to relatives on eve of bankruptcy is presumptively fraudulent.<sup>80</sup>

Proof that the bankrupt conveyed property to his wife and soon afterwards embarked into a new enterprise is, however, not sufficient to show fraud,<sup>81</sup> nor is the bare fact that the transferee, a niece of the bankrupt, did not demand or expect payment of her claim conclusive of fraud.<sup>82</sup>

A conveyance by a husband, in embarrassed circumstances, of his real estate to trustees for the use of his wife, in consideration of property and money of hers which he had converted to his own use, the wife to have no power of disposition over the property during her life, and not by will without the consent, reserved to the grantor and trustees, is void.<sup>83</sup> If one commences a settlement on his wife with an honest intent, as by buying a lot, but continues the same project with a fraudulent intent, as by building a house and furnishing it, the whole transaction will be set aside.<sup>84</sup> If a debtor mortgage his stock in trade to a relative who immediately forecloses, the property being bid in by a stranger, who transfers his bid to a friend of the debtor, and he ostensibly sells the property to debtor's wife, the transfer to the wife will be held to be merely colorable and void.<sup>85</sup>

A loan by an insolvent father to his son, who makes a gift of the amount of the loan to his mother, by the purchase of a house in her name, is a fraud upon the father's creditors;<sup>86</sup> and

465; *Antrim v. Kelly*, 4 N. B. R. 189, Fed. Cas. No. 404; *In re Antisdel*, 18 N. B. R. 289, Fed. Cas. No. 490; *In re Skinner*, 97 Fed. 190, 3 A. B. R. 163.

78—*In re Snodgrass*, 209 Fed. 325, 31 A. B. R. 601; *Thomas v. Fletcher*, 153 Fed. 226, 18 A. B. R. 623; *In re Skinner*, 97 Fed. 190, 3 A. B. R. 163.

79—*In re Grandy & Son*, 146 Fed. 318, 17 A. B. R. 206.

The burden of proof is upon the wife of the bankrupt to show the bona fides of a transfer made to her by the bankrupt shortly before bankruptcy. *Woodford v. Rice*, 207 Fed. 473, 30 A. B. R. 455.

80—*Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. 295, 17 A. B. R. 257.

81—*In re Foss*, 147 Fed. 790, 17 A. B. R. 439.

82—*Wright v. Sampter*, 152 Fed. 196, 18 A. B. R. 355.

83—*Fisher v. Henderson*, 8 N. B. R. 175, Fed. Cas. No. 4820.

84—*Sedgwick v. Place*, 10 N. B. R. 28, Fed. Cas. No. 12621.

85—*In re Smith*, 100 Fed. 795, 1 N. B. R. 533, 3 A. B. R. 95.

86—*In re Aldred*, 3 N. B. R. 61, Fed. Cas. No. 4328.

so is a conveyance by a father to his sons, in consideration of his support,<sup>87</sup> and a conveyance by the bankrupt to his brother-in-law for a consideration accepted as equal dollar for dollar but including the payment of two notes indorsed by the father-in-law, being a preference of the latter, is void.<sup>88</sup>

A conveyance of property held in trust by the bankrupt to his wife, the *cestui que trust*, more than four months prior to his bankruptcy will be upheld irrespective of the bankrupt's insolvency at the time.<sup>89</sup> Accordingly, the transfer by the bankrupt to his wife of property purchased with her funds and held by him in trust for her due to a mistake of the scrivener in making a deed out to him instead of to her has been held not fraudulent.<sup>90</sup>

A postnuptial settlement made in behalf of the wife of the bankrupt in consideration of her release of dower is only valid to the extent of the dower released.<sup>91</sup> While the assignment of an insurance policy by the bankrupt to his wife who knew nothing thereof has been held fraudulent;<sup>92</sup> an agreement to assign a life insurance policy in consideration of the wife's release of her dower rights has been upheld.<sup>93</sup>

The statutory trust of creditors in real estate held by the wife of a debtor, subsequently adjudged a bankrupt, inures as assets to the trustee when purchased by the bankrupt prior to the bankruptcy and paid for with his own money in fraud of creditors.<sup>94</sup>

### § 798. — Conveyance by partners.

A conveyance by one partner of his interest to the other, with intent to hinder and defeat creditors, would be void<sup>95</sup> though

87—*In re Johann*, 4 N. B. R. 143, 2 Biss. 139, Fed. Cas. No. 7331; but see *In re Cornwell*, 6 N. B. R. 305, Fed. Cas. No. 3250; *Adam v. Collier*, 122 U. S. 382, 30 L. ed. 1207.

88—*In re Taylor*, 1 N. B. R. 412; citing *Bartholow v. Bean*, 10 N. B. R. 241, 18 Wall. 635, 21 L. ed. 866; *Ahl v. Thorne*, 3 N. B. R. 118; *Scammon v. Cole*, 3 N. B. R. 393, 5 N. B. R. 257; *Graham v. Stark*, 3 N. B. R. 357; *Cookingham v. Morgan*, 5 N. B. R. 16; *Bean v. Laffin*, 10 N. B. R. 333.

89—*Phillips v. Kleinman*, 232 Pa. St. 571, 27 A. B. R. 195.

90—*Silling v. Todd*, 112 Va. 802, 27 A. B. R. 127.

91—*Moore v. Green*, 145 Fed. 472, 16 A. B. R. 648.

92—*Kirkpatrick v. Johnson*, 197 Fed. 235, 28 A. B. R. 291.

93—*In re Grandy & Son*, 146 Fed. 318, 17 A. B. R. 206.

94—*In re Mayers*, 1 N. B. R. 162, 2 Ben. 424, Fed. Cas. No. 9518.

95—*In re Rosenbaum*, 1 N. B. R. 541;

the mere fact of such transfer would not necessarily imply such an intent,<sup>96</sup> and if the succeeding partner sells in good faith to a third person the firm's entire property it is not a preference, the third person not being a creditor.<sup>97</sup> If a dissolution of partnership is made within four months before the firm is adjudged bankrupt, it will be treated as a void transfer, and the property in the hands of both partners as firm property.<sup>98</sup>

When all partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy while the partners and the partnership are insolvent does not evidence any intent to hinder delay or defraud creditors of the partnership, and is not voidable where the creditor paid has had no reasonable cause to believe a preference was intended.<sup>99</sup>

When a person soon after becoming a member of a partnership conveys real estate to his wife without consideration, and at the time owes large sums of money, both individually and as a partner, the conveyance is presumptively fraudulent.<sup>1</sup>

### § 799. — Transfer of exempt property.

A conveyance of exempted property cannot operate as a fraud upon creditors, since they would not be entitled to subject the property to the payment of their claims, if it had not been so conveyed.<sup>2</sup>

### § 800. — Trust for benefit of third persons.

If a purchaser of property, paying consideration therefor, causes it to be conveyed to another, that it may be held in trust for the benefit of third persons, and the trust fails because not in conformity to the Statute of Frauds, a trust results in favor of the purchaser.<sup>3</sup>

Burrill v. Lawry, 18 N. B. R. 367, Fed. Cas. No. 2199; In re Rudnick, 2 N. B. N. R. 975, 102 Fed. 750, 4 A. B. R. 531; In re Jones, 100 Fed. 781, 2 N. B. N. R. 193, 4 A. B. R. 141.

96—In re Munn, 7 N. B. R. 468, 3 Biss. 442, Fed. Cas. No. 9925.

97—In re Rudnick, 2 N. B. N. R. 975, 102 Fed. 750, 4 A. B. R. 531.

98—In re Head, 114 Fed. 489, 7 A. B. R. 556.

99—Sargeant v. Blake, 160 Fed. 57, 17 L. R. A. (N. S.) 1040, 20 A. B. R. 115.

1—Hull v. Hudson, 80 Atl. 674, 26 A. B. R. 725.

2—McCarty v. Coffin, 150 Fed. 307, 18 A. B. R. 148; Cowan v. Burchfield, 180 Fed. 614, 25 A. B. R. 293.

3—In re Davis, 112 Fed. 129, 7 A. B. R. 258.

### § 801. — Gifts.

The gift of an engagement ring from the bankrupt to his fiancé upon the occasion of the announcement of their engagement but within four months of bankruptcy is voidable by the trustee without proof of actual intent to defraud creditors.<sup>4</sup>

### § 802. — Bona fide transfers for a valid consideration.

The law does not prevent an insolvent from dealing with his property prior to the institution of bankruptcy proceedings, provided it is without any purpose to delay or defraud his creditors or to give a preference, and the value of the estate is not impaired.<sup>5</sup> Thus a transfer, in good faith, for a present fair consideration,<sup>6</sup> or a grant or conveyance to take effect upon property when it is brought into existence and comes to the grantor in fulfillment of an express agreement which is founded on good and valuable consideration<sup>7</sup> will be upheld, as also a conveyance where the creditor has a lien of greater amount than the value of the property.<sup>8</sup>

Where security is taken for a loan of money within the four month period, the present fair consideration cannot ordinarily be greater than the amount advanced, and will be held valid only as to that amount with interest.<sup>9</sup>

A conveyance, though fraudulent, is not made in contemplation of bankruptcy, where there are no other creditors and the debt is well secured.<sup>10</sup>

Sales of property in good faith for a present fair price, cannot be impeached for fraud;<sup>11</sup> though in violation of a state bulk-

4—Pollock v. Simon, 205 Fed. 1005, 30 A. B. R. 390.

Gifts from husband to wife. See *post* § 813.

5—In re Benjamin, 140 Fed. 320, 15 A. B. R. 351; Clark v. Iselin, 11 N. B. R. 337, 21 Wall. 360, 22 L. ed. 568.

6—Shelton v. Price, 174 Fed. 891, 23 A. B. R. 431; In re Schacht Motor Car Co., 31 A. B. R. 624; Meserve v. Roby, 198 Fed. 844, 28 A. B. R. 529; Lovell v. Newman & Son, 192 Fed. 753, 27 A. B. R. 746; Vollmer v. Plage, 186 Fed. 598, 26 A. B. R. 590.

Pre-existing indebtedness is a valuable

consideration. In re Schacht Motor Car Co., 31 A. B. R. 624.

7—Barnard v. N. & W. R. R., 14 N. B. R. 469, 4 Cliff. 351, Fed. Cas. No. 1007.

8—Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, Fed. Cas. No. 2521.

9—In re Sawyer, 130 Fed. 384, 12 A. B. R. 269.

10—In re Johann, 4 N. B. R. 143, 2 Biss. 139, Fed. Cas. No. 7331.

11—In re Strenz, 8 Fed. 311; Sedgwick v. Wormser, 7 N. B. R. 186, Fed. Cas. No. 12636.

sales law,<sup>12</sup> or a sale of a portion of debtor's property made in good faith to raise money to discharge a debt, or to pay the costs of contemplated bankruptcy proceedings;<sup>13</sup> or if there be no fraudulent intention, the bankrupt's continuance, though insolvent, to sell at retail, and endeavor to effect, if possible, a compromise with his creditors.<sup>14</sup> The sufficiency of consideration is a question for the jury.<sup>15</sup>

While a mortgagee who makes no effort to determine whether the mortgagor may make a transfer which will not be in violation of the act, is not a purchaser in good faith, yet unless the mortgagee knows of the purpose of the mortgagor or is in such atmosphere as would lead a reasonably prudent man to inquire, or that good conscience would impel him to investigate, he will be protected as a *bona fide* purchaser under 67e.<sup>16</sup>

The purchaser from a first vendee must, in order to invalidate his title, be affected by notice of or participation in the original fraud; that is, must have been a purchaser without valuable consideration or *mala fide*;<sup>17</sup> and a purchaser with notice, who acquires title from a purchaser who formerly acquired the property by fraud, takes no better title than his vendor had.<sup>18</sup>

The transfer of real property, conveyed to the bankrupt by mistake, to the equitable owner thereof is not a fraudulent transfer.<sup>19</sup>

An attorney who collects in full a note of the bankrupt with knowledge of his bankruptcy and pays the proceeds over to his client acts as agent merely and cannot be compelled to pay over to the trustee an amount equivalent to that collected.<sup>20</sup>

The trustee has no standing to attack a conveyance to a third party made upon the payment of a consideration by the bankrupt.<sup>21</sup>

12—Gorham v. Buzzell, 178 Fed. 596, 24 A. B. R. 440.

13—Tiffany v. Lucas, 8 N. B. R. 49, 15 Wall. 410, 21 L. ed. 198; In re Keefer, 4 N. B. R. 126, Fed. Cas. No. 7636.

14—In re Munger, 4 N. B. R. 90, Fed. Cas. No. 9923.

15—Montgomery v. McNicholas, 138 Fed. 956, 15 A. B. R. 93.

16—Lumpkin v. Foley, 204 Fed. 372, 29 A. B. R. 673.

17—Babbitt v. Walbrun, 6 N. B. R. 359, Fed. Cas. No. 694.

18—Harrell v. Beall, 9 N. B. R. 49, 17 Wall. 590, 21 L. ed. 692; see Beall v. Harrell, 7 N. B. R. 400, Fed. Cas. No. 1163.

19—Young v. Allen, 207 Fed. 318, 30 A. B. R. 261; Silling v. Todd, 112 Va. 802, 27 A. B. R. 127.

20—In re Martin & Co., 167 Fed. 236, 20 A. B. R. 705.

21—London v. Epstein, 138 App. Div. (N. Y.) 513, 24 A. B. R. 557.

### § 803. — Substitution of securities.

The act does not forbid the giving of other or different security within the four-month period to replace securities previously given, if such security is equal in value to the one replaced.<sup>22</sup>

### § 804. — Evidence of fraudulent intent.

In an action to set aside a conveyance by an insolvent debtor, on the ground of fraud, such fraud must be proved, not assumed,<sup>23</sup> though cases may arise where the intent will be inferred from the circumstances of the transaction.<sup>24</sup> The questions of intent, motive, and good faith are questions of fact<sup>25</sup> to be determined from a consideration of all the surrounding circumstances,<sup>26</sup> unless they appear conclusively from the face of the instrument.<sup>27</sup> If a transaction is susceptible to two presumptions, one of innocence and one of guilt, the former must prevail.<sup>28</sup>

In determining whether a given transaction is made in the ordinary and usual course of business of a party, the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation.<sup>29</sup> A sale or conveyance by a bankrupt out of the usual and ordinary course of business is presumptively fraudulent,<sup>30</sup> but this presumption may be rebutted by evidence aliunde to be produced by the vendee.<sup>31</sup>

22—*In re Cutting*, 145 Fed. 388, 16 A. B. R. 751.

23—*Campbell v. Waite*, 16 N. B. R. 93, 9 Ben. 166, Fed. Cas. No. 2374; *Crump v. Chapman*, 15 N. B. R. 571, 1 Hughes 183, Fed. Cas. No. 3455.

24—*Lumpkin v. Foley*, 204 Fed. 372, 29 A. B. R. 673; *Gattman v. Honea*, 12 N. B. R. 493, Fed. Cas. No. 5271.

25—*Thomas v. Fletcher*, 153 Fed. 226, 18 A. B. R. 623.

26—*Little v. Alexander*, 12 N. B. R. 134, 21 Wall. 500, 22 L. ed. 625; *In re Larkin*, 168 Fed. 100, 21 A. B. R. 711.

27—*Underleak v. Scott*, 117 Minn. 136, 28 A. B. R. 926.

28—*Murray v. Joseph*, 146 Fed. 260, 16 A. B. R. 704.

29—*Rison v. Knapp*, 4 N. B. R. 114, Fed. Cas. No. 11861.

30—*Lewis v. Julius*, 212 Fed. 225, 31 A. B. R. 515; *In re Jacob L. Barthelme*, 11 A. B. R. 67; *Sedgwick v. Place*, 5 N. B. R. 168, 5 Ben. 184, Fed. Cas. No. 12620; but see, *Houck v. Christy*, 152 Fed. 612, 18 A. B. R. 330; *Bentley v. Young*, 210 Fed. 202, 31 A. B. R. 506.

31—*Norton v. Billings*, 4 Fed. 623;

## § 806. Future contingent interests.

The title of the bankrupt as of the date of the adjudication vests in the trustee to all property which he might have transferred or which might have been levied upon prior to the filing of the petition. A bare possibility or mere expectation of acquiring property does not constitute property or title to property; nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. If the uncertainty or contingency be such as relates to the person, and not merely to the event, and he who is to take remains unascertained by name, designation or description, no given individual while so unascertained can be held to have a property right to or in the subject matter of the gift or limitation. But if he has no claim or title absolute or defeasible, vested or contingent, but merely an expectation of an estate or interest, in the future, then there is nothing in him to pass to the trustee. One may have a right in or to a future contingency. But it cannot be affirmed of any one that he has either a contingent right or a right in or to a contingency unless the person of whom the affirmation is made is ascertained by name, designation or description. Thus a fund being left to bankrupt's mother in trust for her use during life with power of disposing the fund by will, and in the event she fails to exercise the power, then to the testators surviving next of kin, no interest of the bankrupt would pass to the trustee prior to her death.<sup>35</sup>

The title of the trustee extends to the interest of a bankrupt in an estate, vested before the bankruptcy, although such interest is undetermined,<sup>36</sup> but not to inchoate interests which he possessed at the time the petition was filed which could not be

Babbitt v. Walbrun, 4 N. B. R. 30, 1 Dill. 19, Fed. Cas. No. 694; Rison v. Knapp, 4 N. B. R. 114, Fed. Cas. No. 11861; Collins v. Bell, 3 N. B. R. 587, Fed. Cas. No. 3010; U. S. v. Baker, 13 N. B. R. 88, Fed. Cas. No. 14584; In re Sims, 19 N. B. R. 57, Fed. Cas. No. 12889; Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. No. 17325; In re

Deane, 2 N. B. R. 29, Fed. Cas. No. 3700; Walbrun v. Babbitt, 2 N. B. R. 1, 16 Wall. 577, 21 L. ed. 489; In re Langley, 1 N. B. R. 155.

35—In re Wetmore, 108 Fed. 520, 3 N. B. N. R. 143, 6 A. B. R. 210.

36—In re Mosier, 112 Fed. 138, 7 A. B. R. 268.

alienated or disposed of by him or levied on and sold or otherwise subjected to his debts,<sup>37</sup> as a grant of public lands which had been declared forfeited, although subsequent to bankruptcy proceedings had been restored.<sup>38</sup> A future contingent in personal property may be alienable and pass to the trustee interest.<sup>39</sup>

Interests under wills, see post section 835.

### § 807. Good Will.

The practice and good will of a bankrupt physician cannot be sold by his trustee.<sup>40</sup>

### § 808. Property of husband and wife.

#### § 809. — In general.

In bankruptcy proceedings the bankruptcy of the husband in no wise affects the wife or her property and vice versa, and the proper way of reaching property in the hands of the one not bankrupt, alleged to have been conveyed in fraud, in those states where the wife is not a competent witness, is by a bill of discovery,<sup>41</sup> if the examination afforded by the bankruptcy law is insufficient. Where a married woman engages in business on her own account in a state where she is required to file a certificate to make her a feme sole trader,<sup>42</sup> and neglects to do so, her property employed in such business, may be attached by her husband's creditors and, if so attached within four months of the bankruptcy proceedings, the trustee takes title thereto.<sup>43</sup> Where, however, through mistake or fraud the husband is vested with title to real estate inherited by the wife, he will be held to be trustee for his wife and it will not be liable for his debts.<sup>44</sup> In some states the products of a wife's land conveyed

37—In re Harris, 1 N. B. N. 384, 2 A. B. R. 359; In re Pease, 2 N. B. N. R. 1108, 4 A. B. R. 578; Keegan v. King, 96 Fed. 758, 3 A. B. R. 79; In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 Fed. 326; but see Carter v. Hobbs, 1 N. B. N. 191, 92 Fed. 599, 1 A. B. R. 215; In re Gutwillig, 1 N. B. N. 40, 90 Fed. 481, 1 A. B. R. 78; In re Abraham, 1 N. B. N. 281, 93 Fed. 767, 779, 2 A. B. R. 266; In re Clute, 1 N. B. N. 386, 2 A. B. R. 376; In re Becker, 2 N. B. N. R. 245, 98 Fed. 407, 3 A. B. R. 412.

38—In re Hansen, 107 Fed. 252, 5 A. B. R. 747.

39—Clowe v. Seavey, 31 A. B. R. 830.

40—In re Myers, 208 Fed. 407, 31 A. B. R. 24.

41—In re Fowler, 1 N. B. N. 265, 1 A. B. R. 555, 93 Fed. 417.

42—Pub. Stat. Mass. c. 147, par. 11.

43—In re Hammond, 98 Fed. 845, 3 A. B. R. 466.

44—In re Anderson, 23 Fed. 482.



to her separate use by deed without limitation, and occupied by her husband according to his marital rights, are assets belonging to his estate in bankruptcy.<sup>45</sup>

Where there has been no consummated conversion of the wife's separate estate, the husband's trustee cannot get the legal title without a decree for its conveyance to him; and the same rule applies where the conversion has been consummated by fraud.<sup>46</sup> If a bankrupt, while insolvent, purchases articles of luxury for his wife, though they are not appropriated to her individual use, and she attempts to hold them against his trustee, the bankrupt must answer the trustee's petition.<sup>47</sup> The question whether stock purchased with money borrowed on the joint note of husband and wife and issued to her, can be impounded for the benefit of the husband's estate, can be determined only in a direct proceeding between the proper parties.<sup>48</sup> The trustee is not entitled to possession of a note of a fraudulent grantee made payable to the wife of the bankrupt in pursuance of a scheme to defraud creditors, the note having no validity as against the bankrupt or his estate.<sup>49</sup> Where a bankrupt, when solvent and not contemplating bankruptcy, conveys lands to his wife, reserving to himself a power of revocation and also power to appoint to other uses, and several years later is adjudged a bankrupt, it has been held that the trustee cannot recover such lands;<sup>50</sup> though the contrary has been held when the conveyance was not recorded until after the petition had been filed. The mere application of a trustee to have property of a wife delivered to him as her husband's trustee, alleging, but submitting no proof, that she holds the property in her name as a cloak against her husband's creditors, will be denied.<sup>51</sup>

A wife, entitled on divorce to one-third of husband's personal property, who has merely commenced an action for divorce, cannot enjoin his trustee as to the disposition of such one-third.<sup>52</sup>

45—In re Rooney, 109 Fed. 601, 6 A. B. R. 478.

46—In re Campbell, 17 N. B. R. 4, 3 Hughes 276, Fed. Cas. No. 2348.

47—In re Pierce, 15 N. B. R. 449, 7 Biss. 426, Fed. Cas. No. 11139.

48—Fellows v. Freudenthal, 102 Fed. 731, 4 A. B. R. 490.

49—In re Logan, 28 A. B. R. 543.

50—Jones v. Clifton, 18 N. B. R. 125, Fed. Cas. No. 7453.

51—Driggs v. Russell, 3 N. B. R. 39, Fed. Cas. No. 4084.

52—Hawk v. Hawk, 102 Fed. 679, 2 N. B. R. 940, 4 A. B. R. 436.

### § 810. — Joint estate.

The fact that the bankrupt is jointly interested in an estate with another, will not defeat the title of his trustee in bankruptcy to such interest. The trustee becomes vested with the title of the husband on his bankruptcy where he invests his wife's money in realty in her name until he accumulates property by his skill and energy;<sup>53</sup> or a one-half interest less the amount of homestead right where husband and wife build jointly on land acquired by the wife with their joint funds;<sup>54</sup> or he may sue to recover the reversionary interest of the husband in property fraudulently conveyed to his wife.<sup>55</sup>

While the bankrupt's interest in an estate by the entirety passes to his trustee, the trustee can have no present right to possession as against the wife of the bankrupt, and the bankruptcy court will not restrain an attempted conveyance thereof by the bankrupt and his wife after the institution of the bankruptcy proceedings.<sup>56</sup> Where bankrupt and his wife held real estate as an entirety and she obtained a divorce subsequent to the bankruptcy, if the joint tenancy was thereby transformed into a tenancy in common, the bankrupt's interest has been held to be after acquired property and would not pass to the trustee.<sup>57</sup> In Idaho, the increase of stock purchased by the wife of the bankrupt with her separate property becomes community property and is exempt.<sup>58</sup>

### § 811. — Dower.

The bankruptcy law provides that the death of the bankrupt pending the proceedings shall in no wise affect the right of dower and allowances fixed by the law of the state where the bankrupt resides.<sup>59</sup> Accordingly in case of the husband's death after filing the petition, lands owned by him at the time of filing

53—*Muirhead v. Aldridge*, 14 N. B. R. 249, Fed. Cas. No. 9904; comp. *In re Fitchard*, 2 N. B. N. R. 1075, 103 Fed. 742, 4 A. B. R. 609.

54—*Johnson v. May*, 16 N. B. R. 425, Fed. Cas. No. 7397.

55—*In re Peltasohn*, 16 N. B. R. 265, 4 Dill. 107, Fed. Cas. No. 10912; *In re Griffith*, 1 N. B. N. 546, citing *Howell v. Jones*, 7 Pickle 402; *Flatt v. Stadler &*

*Co.*, 16 Lea 371; *Rouhs v. Hooke*, 3 Lea 302.

56—*In re Beihl*, 197 Fed. 870, 28 A. B. R. 310.

57—*In re Benson*, 16 N. B. R. 377, 8 Biss. 116, Fed. Cas. No. 1328.

58—*Bank of Nez Perce v. Pindel*, 193 Fed. 917, 28 A. B. R. 69.

59—Section 8, Act of 1898. See Chapter XI.

will pass to the trustee subject to the wife's right of dower.<sup>60</sup> This right is not divested by proceedings in bankruptcy,<sup>61</sup> nor by a sale thereunder,<sup>62</sup> but she is entitled to her one-third of the real estate or of an equitable interest of her husband which passed to the trustee.<sup>63</sup> If she joins in a mortgage with him, her dower can be barred only by a sale under the power contained in the mortgage.<sup>64</sup>

Where a conveyance is set aside as an unlawful preference or is surrendered by the creditor, the land becomes again subject to the wife's dower;<sup>65</sup> and she is not estopped from claiming it by having joined in the deed.<sup>66</sup> A reasonable support has been allowed a wife in preference to the husband's creditors, out of the rents and profits of realty conveyed to her by him through a third person without consideration, where they are her only means of support.<sup>67</sup>

In states where a lien creditor can issue execution and by a sale of the real property divest the wife of dower, the right of the trustee to real property is superior to that of the wife claiming dower.<sup>68</sup>

The bankrupt's interest in an annuity received by her in lieu of her dower rights passes to her trustee.<sup>69</sup>

## § 812. — Curtesy.

The interest of a husband as tenant by the curtesy in his wife's real estate during her life time, and after issue born, is not a power or such property as will pass to the husband's trustee in bankruptcy in the absence of a state law to the contrary,<sup>70</sup>

60—In re Hester, 5 N. B. R. 285, Fed. Cas. No. 6437.

61—In re Angier, 4 N. B. R. 199, Fed. Cas. No. 388.

62—In re Shaeffer, 105 Fed. 352, 5 A. B. R. 248; Porter v. Lazear, 109 U. S. 84, 27 L. ed. 865; contra, Kelly v. Strange, 3 N. B. R. 2, Fed. Cas. No. 7276. But see, In re Hays, 181 Fed. 674, 24 A. B. R. 669.

63—Walford v. Noble, 19 N. B. R. 440; In re Slack, 111 Fed. 523, 7 A. B. R. 121.

64—In re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1068.

65—In re Detert, 11 N. B. R. 293,

Fed. Cas. No. 3829; McFarland v. Goodman, 11 N. B. R. 134.

66—Coxe v. Wilder, 7 N. B. R. 241, 2 Dill. 45, Fed. Cas. No. 3308, rev'g 5 N. B. R. 443, Fed. Cas. No. 3309.

67—Clark v. Hezekiah, 24 Fed. 663; In re Brandt, 5 Biss. 217, Fed. Cas. No. 1811.

68—In re Freedman, 29 A. B. R. 135, aff'd 31 A. B. R. 53.

69—In re Burtis, 188 Fed. 527, 26 A. B. R. 680.

70—In re Russell, 14 Ohio Fed. Dec. 364, 13 A. B. R. 24; Hesseltine v. Prince, 1 N. B. N. 528, 95 Fed. 802, 2 A. B. R.

as in Tennessee where it does pass to the trustee subject to the statutory right of the husband and wife to continue to hold the land during her life.<sup>71</sup> If a wife mortgages her realty to secure money to pay her husband's debts, in excess of his estate by the curtesy, and he and she unite in a general assignment of all his property, expressly reserving hers, on the death of the wife and the sale of her realty, if a sum is realized greater than the incumbrances, the wife's heirs or representatives are entitled to the fund.<sup>72</sup>

### § 813. — Gifts.

A gift from husband to wife, not made in prejudice of creditors, evidenced by a deed duly executed and recorded, is valid, though not supported by any consideration other than the marital relation.<sup>73</sup> A gift by bankrupt to his wife before adjudication, and not in contemplation of bankruptcy, of funds used in improving her separate estate, does not vest him with such an interest therein as would pass to the trustee.<sup>74</sup> Money saved by the wife of the bankrupt from an allowance for household expenses ordinarily belongs to the estate, but circumstances may be such as to raise a presumption of a valid gift from the bankrupt to his wife.<sup>75</sup>

### § 814. Fire insurance policies.

An adjudication terminates bankrupt's interest in his estate and his interest in insurance policies thereon ceases. If at the time of his adjudication a building owned by him is covered by a policy of insurance, providing that transfer or change of title, or assignment without the company's written consent will avoid it, and the building is burned after adjudication, the transfer, being by operation of law, does not avoid the policy, and the trustee can recover.<sup>76</sup> Where the property is destroyed in the interim

600, citing *Lynde v. McGregor*, 13 Allen 182, 184; *Walsh v. Young*, 110 Mass. 396, 399.

71—*In re McKenna*, 9 Fed. 27.

72—*Shippen v. Robbins' Appeal*, 15 N. B. R. 533.

73—*Savage v. Savage*, 141 Fed. 346, 15 A. B. R. 599, certiorari denied 201 U. S. 646, 50 L. ed. 904.

74—*In re Wyatt*, 2 N. B. R. 94, Fed. Cas. No. 18106.

75—*In re Simon*, 197 Fed. 102, 28 A. B. R. 616.

76—*Starkweather v. Ins. Co.*, 4 N. B. R. 110, Fed. Cas. No. 13308; comp. *In re Carow*, 4 N. B. R. 178, Fed. Cas. No. 2426; *In re Hamilton*, 2 N. B. R. 557, 102 Fed. 683, 4 A. B. R. 543.

between the adjudication and the appointment and qualification of the trustee, the bankrupt may recover on the policy, since when the trustee is appointed there is no property in existence to which the title in the trustee can vest.<sup>77</sup>

Where the bankrupt agreed with a mortgagee of a portion of his property to insure such property, and because of the inconvenience of separating his insurance in different policies insures property covered by the mortgage and property not so covered, the mortgagee is not entitled to the insurance on property on which he has no lien.<sup>78</sup>

Where contrary to the terms of a conditional sale contract under which property has been delivered to him, the bankrupt insures the property in his own name rather than in the name of his vendor, and the property is destroyed within four months of bankruptcy, an equitable lien in favor of the vendor will attach to the proceeds, which may be enforced after bankruptcy though the contract has not been recorded.<sup>79</sup>

Where a fire insurance policy provides that the same shall be void if any change in title occurs, other than by the death of the bankrupt, whether such change is due to legal process or otherwise, the appointment and qualification of a trustee in bankruptcy avoids the policy though the appointment of a receiver in bankruptcy has been noted on the policy, and the trustee was not liable for premiums becoming due after his qualification.<sup>80</sup>

Proceeds of insurance taken out by a fraudulent transferee are not proceeds of conveyed or transferred goods and do not belong to the estate. This is on the theory that the fraudulent transferee has title, and therefor an insurable interest in the property and that when he insures it, a personal contract is made between him and the insurer.<sup>81</sup>

77—*Gordon v. Mechanics' & Traders' Ins. Co.*, 120 La. Ann. 441, 22 A. B. R. 649.

78—*In re Holmes Lumber Co.*, 189 Fed. 178, 26 A. B. R. 119.

79—*In re Zitron*, 203 Fed. 79, 30 A. B. R. 172.

Brandenburg—38

80—*In re Hibbler Mach. Supply Co.*, 192 Fed. 741, 27 A. B. R. 612.

81—*Lewis v. Julius*, 212 Fed. 225, 31 A. B. R. 515.

## § 815. Life insurance policies.

### § 816. — Cash surrender value as affecting right of trustee.

Section 70a (5) of the act provides that any policy of insurance held by a bankrupt, having a cash surrender value payable to himself, his estate or personal representatives, passes to his trustee for the benefit of the estate, unless within thirty days after the ascertainment of its surrender value, the bankrupt pays or secures to the trustee the sum so ascertained, in which event he can continue to hold, own and carry such policy free from the claims of his creditors.

If a policy is not exempt under the state law, it passes to the trustee, subject only to the right of the bankrupt to redeem it upon paying its surrender value,<sup>82</sup> as provided in the proviso in the foregoing section.

The decisions are not uniform as to what policies pass to the trustee under that proviso. One line of decisions favors the view that only policies having a cash surrender value are intended to pass to the trustee.<sup>83</sup> The other conceding that the proviso deals with this class of policies maintains that, although by its terms the policy has no cash surrender value, if it has a large actual value, and is assignable or transferable by its terms, it will pass to the trustee<sup>84</sup> who may hold it for the benefit of the estate if the bankrupt does not die within the period for which issued, or turn it over to the party to whom payable in case of death, if he does die.<sup>85</sup>

The first of these views was adopted by the supreme court in a recent decision<sup>86</sup> in which it is said: "Life insurance policies

<sup>82</sup>—In re Moore 173 Fed. 679, 23 A. B. R. 109; In re Whelpley, 169 Fed. 1019, 22 A. B. R. 433; In re Welling, 113 Fed. 189, 7 A. B. R. 340; In re Slingluff, 106 Fed. 154, 5 A. B. R. 76.

<sup>83</sup>—Gould v. N. Y. L. Ins. Co., 132 Fed. 927, 13 A. B. R. 233; In re Josephson, 121 Fed. 142, 9 A. B. R. 345; Morris v. Dodd, 110 Ga. 606, 50 L. R. A. 33, 78 Am. St. Rep. 129, 5 A. B. R. 76; In re Buelow, 98 Fed. 86, 3 A. B. R. 389.

<sup>84</sup>—In re Orear, 178 Fed. 632, 30 L. R. A. (N. S.) 990, 24 A. B. R. 343; In re Hettling, 175 Fed. 65, 23 A. B. R. 161; Clark v. Equitable Life Assurance

Soc., 143 Fed. 175, 16 A. B. R. 137; In re Phelps, 15 A. B. R. 170; In re Coleman, 136 Fed. 818, 14 A. B. R. 461; In re Welling, 113 Fed. 189, 7 A. B. R. 340; In re Slingluff, 106 Fed. 154, 5 A. B. R. 76; In re Becker, 106 Fed. 54, 5 A. B. R. 438. See also, Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 14 A. B. R. 94, rev'g 113 Fed. 141, 7 A. B. R. 615.

<sup>85</sup>—In re Slingluff, 106 Fed. 154, 5 A. B. R. 76; In re Welling, 113 Fed. 189, 7 A. B. R. 340.

<sup>86</sup>—Burlingham v. Crouse, 228 U. S.

are a species of property and might be held to pass under the general terms of subdivision 5, section 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. . . . This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. . . . Congress undoubtedly had the nature of insurance contracts in mind in passing section 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while enacting this much, that when that sum was realized to the estate, the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. . . . We think it was the purpose of congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance."

While the term "cash surrender value" is used in the statute, the evident intention of congress was that any policy held by the bankrupt in which he had such an interest as could be converted into cash for his benefit, whether in the nature of a loan or in any other guise, should pass to the trustee.<sup>87</sup> The policy need not have lapsed to make it redeemable by the bankrupt,<sup>88</sup> nor is it essential that the cash surrender value of the policy be stipulated in the policy, it being sufficient that the policy has such value by the concession or practice of the company.<sup>89</sup>

459, 57 L. ed. 920, 30 A. B. R. 6, aff'g 181 Fed. 479, 24 A. B. R. 632.

87—In re Holden, 114 Fed. 650, 7 A. B. R. 615.

88—Hiscock v. Mertens, 205 U. S. 202,

51 L. ed. 771, 17 A. B. R. 483, aff'g 142 Fed. 445, 15 A. B. R. 701.

89—Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 17 A. B. R. 483, aff'g 142 Fed. 445, 15 A. B. R. 701; Equitable

If the policy has no cash surrender value, and no value for any purpose except as it becomes valuable upon the death of the insured,<sup>90</sup> or if it has no surrender value until after the adjudication;<sup>91</sup> or if there is paid or secured to the trustee for the creditors all that the bankrupt could obtain by surrendering the policy, or if the amount loaned by the insurance company on the policy exceeds the cash surrender value at the time of the adjudication,<sup>92</sup> or if the bankrupt himself is not the contracting party with the insurance company and would not be entitled to receive the value of the policy if surrendered at the date of the adjudication,<sup>93</sup> it does not pass to the trustee.

An assignment of the insurance policy prior to bankruptcy does not enlarge the rights of the trustee.<sup>94</sup>

If a policy with a paid up value has been given as security for the endorsement of a note, negotiated by the bankrupt, the surrender value should be applied by the trustee first to such note.<sup>95</sup>

If the cash surrender value of the policy is payable to a beneficiary other than the bankrupt, who must execute any transfer assignment or surrender of said policy, it is not an asset of the bankrupt,<sup>96</sup> though where an insurance policy is held by a bankrupt, payable to the beneficiaries only in case of

Life Assur. Soc. of United States v. Miller, 185 Fed. 98, 25 A. B. R. 560.

90—In re Judson, 192 Fed. 834, 27 A. B. R. 704, aff'g 188 Fed. 702, 26 A. B. R. 775, aff'd 228 U. S. 474, 57 L. ed. 927, 46 L. R. A. (N. S.) 154, 30 A. B. R. 1; Van Kirk v. Vermont Slate Co., 140 Fed. 38, 15 A. B. R. 239; Gould v. New York Life Ins. Co., 132 Fed. 927, 13 A. B. R. 233; In re Buelow, 2 N. B. N. R. 26, 98 Fed. 86, 3 A. B. R. 389; Morris v. Dodd, 2 N. B. N. R. 823.

91—In re Young, 208 Fed. 373, 31 A. B. R. 29; contra, Equitable Life Assur. Soc. of United States v. Miller, 185 Fed. 98, 25 A. B. R. 560; In re Coleman, 136 Fed. 818, 14 A. B. R. 461.

A paid up "bond policy" made payable to the bankrupt's wife, which gives the insured the option of surrendering the policy "for its cash value" upon its

maturity, which occurs after the adjudication in bankruptcy, has no surrender value at the time of the adjudication, and does not pass to the trustee. In re Churchill, 209 Fed. 766, 31 A. B. R. 1, rev'g 198 Fed. 711, 29 A. B. R. 153.

92—Burlingham v. Crouse, 181 Fed. 479, 24 A. B. R. 632.

93—In re McDonald, 101 Fed. 239, 4 A. B. R. 92.

94—Burlingham v. Crouse, 228 U. S. 459, 57 L. ed. 920, 46 L. R. A. (N. S.) 148, 30 A. B. R. 6, aff'g 181 Fed. 479, 24 A. B. R. 632.

95—In re Weil, 2 N. B. N. R. 295; see also In re Adams, 104 Fed. 72, 2 N. B. N. R. 1034, 4 A. B. R. 696; In re Fisher, 103 Fed. 860, 4 A. B. R. 646.

96—In re Steele, 2 N. B. N. R. 281, 98 Fed. 78, 3 A. B. R. 549; In re Her-  
nich, 1 A. B. R. 713.



his death prior to its maturity, such death not having occurred when the petition is filed, the cash surrender value of such policy passes to the trustee;<sup>97</sup> since such a policy is property.<sup>98</sup>

The surrender value of a life insurance policy should be ascertained as of date of the filing of the petition, though the bankrupt dies between that date and the date of the adjudication.<sup>99</sup> In the latter event, his executor or administrator is entitled to the difference between the proceeds of the insurance policy and the cash surrender value thereof at the time of the filing of the petition.<sup>1</sup>

### § 817. — Exempt policies.

The proviso in section 70a must be construed together with section 6 of the act and cannot be held to apply to policies exempt under the state laws.<sup>2</sup> As said by the Chief Justice White, "The purpose of the proviso was to confer a benefit upon the insured

97—Equitable Life Assur. Soc. of United States v. Miller, 185 Fed. 98, 25 A. B. R. 560; In re Herr, 182 Fed. 715, 25 A. B. R. 141; In re Wolff, 165 Fed. 984, 21 A. B. R. 452; In re Dolan, 182 Fed. 949, 25 A. B. R. 145; In re Grabs, 1 N. B. N. 164, 1 A. B. R. 465; In re Holden, 114 Fed. 650, 7 A. B. R. 615.

98—Bassett v. Parsons, 140 Mass. 169; Brigham v. Home Life Ins. Co., 131 Mass. 319; New York Life Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997; New York Life Ins. Co. v. Flack, 3 Md. 341; Williams v. Heard, 140 U. S. 529, 35 L. ed. 550.

99—Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, 46 L. R. A. (N. S.) 154, 30 A. B. R. 1, aff'g 192 Fed. 834, 27 A. B. R. 704, 188 Fed. 702, 26 A. B. R. 834.

1—Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, 46 L. R. A. (N. S.) 154, 30 A. B. R. 1, aff'g 192 Fed. 834, 27 A. B. R. 704, 188 Fed. 702, 26 A. B. R. 834; Andrews v. Partridge, 228 U. S. 479, 57 L. ed. 929, 30 A. B. R. 4, rev'g 191 Fed. 325, 41 L. R. A. (N. S.) 123, 27 A. B. R. 388.

2—In re Young, 208 Fed. 373, 31 A. B. R. 29; In re Carlon, 189 Fed. 815, 27 A. B. R. 18; In re Loveland, 192 Fed.

1005, 27 A. B. R. 765; In re Johnson, 176 Fed. 591, 24 A. B. R. 277; In re Moore, 173 Fed. 679, 23 A. B. R. 109; In re Pfaffinger, 164 Fed. 526, 21 A. B. R. 255; Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 14 A. B. R. 94, rev'g 113 Fed. 141, 7 A. B. R. 615; contra, In re Boardman, 103 Fed. 783, 2 N. B. N. R. 821, 4 A. B. R. 620; In re Lange, 1 N. B. N. 44, 60, 91 Fed. 361, 1 A. B. R. 186, 189; In re Steele, 2 N. B. N. R. 281, 98 Fed. 78, 3 A. B. R. 549; see reversal, 104 Fed. 968, 5 A. B. R. 165; In re Buelow, 2 N. B. N. R. 26, 3 A. B. R. 389, 98 Fed. 86; In re Scheld, 104 Fed. 870, 5 A. B. R. 102.

Ordinary life policy payable to bankrupt's wife, having surrender value at the time of bankruptcy, is exempt under G. S., Kansas 1901 § 3463. In re Morse, 206 Fed. 350, 30 A. B. R. 917.

A twenty year endowment policy in force the greater part of that period, which is payable to the bankrupt in case he is living at the end of the period, and to his wife in case he dies prior thereto, held a mere speculative policy which passes to the estate. In re Young, 208 Fed. 373, 31 A. B. R. 29.

bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate.”<sup>3</sup> A statute exempting “all life insurance” applies to a semi-tontine fully paid up in which the wife is named as beneficiary in case she survives her husband.<sup>4</sup> So, an endowment policy providing for payment to the bankrupt’s wife in case he dies within the endowment period otherwise to the bankrupt has been held exempt.<sup>5</sup>

### § 818. — Power to change beneficiary not an asset.

The power to change a beneficiary is not property passing to the trustee,<sup>6</sup> and the fact that the wife secured a divorce from the bankrupt subsequent to the adjudication thereby giving him the right to change his beneficiary, does not vest the title in the trustee, the right to change the beneficiary not having been exercised.<sup>7</sup>

### § 819. — Policies payable to wife.

An insurance policy on a bankrupt’s life payable to his wife is her separate property.<sup>8</sup> It cannot be assigned by him,<sup>9</sup> nor surrendered to his trustee with the purpose of cutting off his wife’s interest.<sup>10</sup> Accordingly, property bought with money obtained by surrendering such policy is hers.<sup>11</sup>

A policy payable to bankrupt’s wife with no surrender value at the time of the filing of the petition does not become vested in the trustee upon the subsequent death of the bankrupt prior to his discharge.<sup>12</sup>

3—Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 14 A. B. R. 94, rev’g 113 Fed. 141, 7 A. B. R. 615.

4—Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 14 A. B. R. 94, rev’g 113 Fed. 141, 7 A. B. R. 615.

5—In re Booss, 154 Fed. 494, 18 A. B. R. 658.

6—Sanders v. Aetna Life Ins. Co., 95 S. C. 36, 31 A. B. R. 854.

7—In re Orear, 189 Fed. 888, 26 A. B. R. 521.

8—In re Johnson, 176 Fed. 591, 24 A. B. R. 277; In re Steele, 2 N. B. N. R. 281, 98 Fed. 78, 3 A. B. R. 549; Atkins

v. Equitable Life Assurance Society, 132 Mass. 395; see, In re Carlon, 189 Fed. 815, 27 A. B. R. 18.

9—In re Bear, 11 N. B. R. 46, Fed. Cas. No. 1178.

10—Central Bank of Washington v. Hume, 128 U. S. 195, 32 L. ed. 370.

11—In re Dews, 1 N. B. N. 411, 96 Fed. 181, 2 A. B. R. 283.

12—Sanders v. Aetna Life Ins. Co., 95 S. C. 36, 31 A. B. R. 854.

The fact that a bankrupt after adjudication applies for a change of beneficiary and fraudulently represents to the insurance company that he is not then in-

The trustee succeeds to interest of the bankrupt in a policy payable to his wife, if living at the bankrupt's death, and, if not, then to the bankrupt's representatives or assigns.<sup>13</sup> So, it is held that where the insured is given the option to at any time change the beneficiary, and the policy is not made payable to the wife's estate if she predecease, the policy is not the absolute property of the wife and passes to the trustee.<sup>14</sup>

Where the wife is the surviving partner of the bankrupt firm consisting of herself and deceased husband, the proceeds of a policy on his life made payable to her become part of the bankrupt estate.<sup>15</sup>

Where a policy provides for the payment of an annuity to the insured, the bankrupt, and, for the payment of an affixed sum, to his wife upon his death, the trustee is entitled only to the value of the annuity and not to the entire present surrender value of the policy.<sup>16</sup>

A bankrupt, whose wife takes out an insurance policy on her own life for his benefit, pays the premiums out of her separate estate, and dies after the adjudication, is entitled to the proceeds of such policy as against his trustee.<sup>17</sup>

Where an endowment policy payable to the wife if the bankrupt died during the term, or to himself if he survived it, was issued upon their joint application, and for several years the wife saved the policy, by paying the premiums, she had an equitable lien upon the cash surrender value for the amount so paid, and the bankrupt should assign to the trustee his interest in the surrender value, after the premiums so paid by her were deducted; or the policy should be assigned to the wife, if desired, on payment of his interest therein.<sup>18</sup>

solvent, will not enlarge the rights of the trustee, upon the death of the bankrupt prior to his discharge. *Id.*

A policy payable to the wife of the bankrupt, who was his partner and had also been adjudicated, which had no surrender value at the time of bankruptcy has been held not to belong to the trustee of the husband where prior to his discharge but subsequently to the discharge of his wife the bankrupt changed the beneficiaries in the policies and later died. *Id.*

13—*In re Coleman*, 136 Fed. 818, 14 A. B. R. 461.

14—*In re Hettling*, 175 Fed. 65, 23 A. B. R. 161; *In re White*, 174 Fed. 333, 26 L. R. A. (N. S.) 451, 23 A. B. R. 90.

15—*In re Day*, 176 Fed. 377, 23 A. B. R. 785.

16—*In re Schaefer*, 189 Fed. 187, 26 A. B. R. 340.

17—*In re Owen*, 8 N. B. R. 6, Fed. Cas. No. 10627.

18—*In re Diack*, 2 N. B. N. R. 664, 100 Fed. 770, 3 A. B. R. 723.

### § 820. — Policies for creditor's benefit.

The fact that a creditor who holds an insurance policy as security is credited with the present value thereof on his debt does not require a surrender thereof. The creditor has a right to retain the policy as security, for any balance and any premium he may pay to keep it alive, and need not surrender it unless the trustee elects to pay the debt.<sup>19</sup>

When a debtor, at his own expense, insures his life as security to a creditor, he is entitled to have the policy, if he pays the debt during his life; and, if not, upon his death, his representative is entitled to any surplus over the debt. If the insurance is effected and the premiums paid by the creditor, who afterwards proves his debt in bankruptcy and receives dividends thereon, and then upon the death of the bankrupt prior to the last dividend receives the full amount from the insurance company, after deducting premiums paid with interest, the creditor must pay to the trustee all over an amount sufficient, with the dividends and payments previously made, to pay the debt in full.<sup>20</sup>

### § 821. — Dividends.

Where the bankrupt has withdrawn the surplus at the end of the tontine period, and made his wife beneficiary of the policy, the annual dividends payable to the beneficiary do not belong to the estate of the bankrupt where they are exempt under the state law at the time of the adjudication, even though the bankrupt still has the right to change the beneficiary.<sup>21</sup>

### § 822. — Unearned premiums.

Unearned premiums on a voided policy which are returned by the insurer belong to the trustee,<sup>22</sup> but a trustee has been held not entitled to rescind a contract of insurance providing for the payment of an annuity to the bankrupt to commence in the future, and to recover the premiums paid thereon, although the bankrupt was guilty of fraud.<sup>23</sup>

19—In re Davison, 179 Fed. 750, 24 A. B. R. 460.

20—In re Newland, 9 N. B. R. 62, 7 Ben. 63, Fed. Cas. No. 10171.

21—Allen v. Central Wisconsin Trust Co., 143 Wis. 381, 25 A. B. R. 126.

22—In re Judson, 188 Fed. 702, 26 A. B. R. 775, aff'd 192 Fed. 834, 27 A. B. R. 704, 228 U. S. 474, 57 L. ed. 927, 46 L. R. A. (N. S.) 154, 30 A. B. R. 1.

23—Mutual Life Ins. Co. of New York v. Smith, 184 Fed. 1, 33 L. R. A. (N. S.)

**§ 823. — Proceeds upon death of bankrupt.**

Where the bankrupt dies before the adjudication, his executor may become entitled to the proceeds of the insurance on the bankrupt's life by tendering to the trustee the cash surrender value of the policies at the date of the filing of the petition,<sup>24</sup> but where the bankrupt dies after adjudication, none of the proceeds of a policy having no surrender value or actual value at the date of the filing of the petition pass to his trustee.<sup>25</sup> However, where the permanent disability resulting in death of the bankrupt after his adjudication existed prior to the filing of the petition, the proceeds of an insurance policy insuring him against permanent disability pass to the trustee.<sup>26</sup>

**§ 824. — Policy on life of third person.**

The interest of the bankrupt as beneficiary in an insurance policy on the life of another, which has no cash surrender value, as well as the proceeds thereof, pass to the trustee, if the policy is transferable and vested at the time of the filing of the petition.<sup>27</sup> However, the interest of the bankrupt in such policy does not pass to the trustee where not vested at the time of the filing of the petition, and where the insured dies after the adjudication the bankrupt and not his trustee is entitled to the proceeds.<sup>28</sup>

**§ 825. Rights arising out of relation of landlord and tenant.****§ 826. — Lease not terminated by bankruptcy.**

A lessee's bankruptcy does not in and of itself terminate a lease, but it becomes an asset of his estate.<sup>29</sup> A stipulation in a

439, 25 A. B. R. 768, rev'g 178 Fed. 510, 24 A. B. R. 514; see also s. c. 158 Fed. 365, 19 A. B. R. 707.

24—*Everett v. Judson*, 228 U. S. 474, 57 L. ed. 927, 46 L. R. A. (N. S.) 154, 30 A. B. R. 1, aff'g 188 Fed. 702, 26 A. B. R. 75, 192 Fed. 834, 27 A. B. R. 704; *Andrews v. Partridge*, 228 U. S. 479, 57 L. ed. 929, rev'g 191 Fed. 325, 41 L. R. A. (N. S.) 123, 27 A. B. R. 388.

25—*Gould v. New York Life Ins. Co.*, 132 Fed. 927, 13 A. B. R. 233; *Burlingham v. Crouse*, 228 U. S. 459, 57 L. ed. 920, 46 L. R. A. (N. S.) 148, 30 A. B. R. 6, aff'g 181 Fed. 479, 24 A. B. R. 632.

26—*In re Matschke*, 193 Fed. 284, 27 A. B. R. 770.

27—*In re Judson*, 188 Fed. 702, 26 A. B. R. 775, aff'd 192 Fed. 834, 27 A. B. R. 704, 228 U. S. 474, 57 L. ed. 927, 46 L. R. A. (N. S.) 154, 30 A. B. R. 1.

28—*In re Hogan*, 194 Fed. 846, 28 A. B. R. 166.

29—*Dunlap v. Goodman, etc., Co.*, (Pa. Ct. Com. Pl.) 31 A. B. R. 504; *In re Frazin & Oppenheim*, 174 Fed. 713, 23 A. B. R. 289; *In re Adams*, 134 Fed. 142, 14 A. B. R. 23; *In re Ellis*, 2 N. B. N. R. 360, 98 Fed. 967, 3 A. B. R. 564;

lease against subletting or assignment, in the absence of some provision requiring it, will not be construed as a condition but as a covenant, the breach of which does not work a forfeiture.<sup>30</sup>

While there are eminent authorities which sustain the position that, if the lease specifically so provides, the insolvency or bankruptcy of the tenant operates to cancel the lease, they are evidently under laws which materially differ from that in force in this country, for if that position be true, a tenant holding a valuable lease may be adjudged a bankrupt on the petition of his landlord, when the sole purpose of the proceedings may be to destroy the contract of lease and thereby result in profit to the bankrupt or the landlord. Having in view one of the main purposes of the bankruptcy law, which is the equitable distribution of the assets of an insolvent to his creditors, the true rule would seem to be that notwithstanding such a provision, the assignment being by operation of law, the trustee would assume the lease.<sup>31</sup> A general assignment by a lessee within four months of bankruptcy is not a breach of a covenant not to assign, and does not prevent the lease from passing to the trustee.<sup>32</sup>

### § 827. — Trustee's election.

The trustee has a reasonable time within which to elect whether he will assume the lease, and the right to assume it exists although there is the ordinary covenant against subletting or assignment by the tenant; since the transfer to the trustee in case of the tenant's bankruptcy is by operation of law and not the act of the bankrupt against which the ordinary covenant in a lease is in restraint.<sup>33</sup> If he elects to assume it, the vesting

In re Thiessen, 2 N. B. N. R. 625; Wildman v. Taylor, Fed. Cas. No. 17654; Starkweather v. Ins. Co., 4 N. B. R. 110, Fed. Cas. No. 13308; In re Pennewell, 119 Fed. 139, 9 A. B. R. 490; but see In re Brick & Schermerhorn, 12 N. B. R. 215, 8 Ben. 93, Fed. Cas. No. 1822; and see also In re Hays, Foster and Ward Co., 117 Fed. 879, 9 A. B. R. 144.

30—In re Pennewell, 119 Fed. 139, 9 A. B. R. 490; In re Gutman, 197 Fed. 472, 28 A. B. R. 643.

31—In re Frazin & Oppenheim, 174 Fed. 713, 23 A. B. R. 289; see Dol v.

Goodbehen, 3 M. & S. 353; Ouslow v. Corrie, 2 Madd. 330.

32—In re Bush, 126 Fed. 878, 11 A. B. R. 415.

33—In re Sherwood's, Inc., 210 Fed. 754, 31 A. B. R. 769; In re Scruggs, 205 Fed. 673, 31 A. B. R. 94; In re Sterne & Levi, 26 A. B. R. 535; In re Frazin & Oppenheim, 174 Fed. 713, 23 A. B. R. 289, s. c. 183 Fed. 28, 33 L. R. A. (N. S.) 745, 24 A. B. R. 903; Watson v. Merrill, 136 Fed. 359, 69 L. R. A. 719, 14 A. B. R. 453; In re Thiessen, 2 N. B. N. R. 625; In re Ellis, *supra*; In re

of the title relates back to the time of the adjudication,<sup>34</sup> and he has the same rights and obligations as the bankrupt had;<sup>35</sup> but, if he rejects it, it remains the property of the bankrupt and is binding upon the latter,<sup>36</sup> and the trustee is not liable for rent thereunder.<sup>37</sup>

The gathering of growing crops by the trustee of a tenant is an election to assume the obligations of the lease,<sup>38</sup> and an offer by the trustee to pay rentals due, within five days of the customary date of payment is sufficient to prevent a forfeiture of the lease.<sup>39</sup>

Notwithstanding the fact that the trustee assumes the lease, he is not required to remain the tenant, but the covenant against assignment is relaxed in his favor, and he may dispose of the same for the best price obtainable, and thus be relieved from further liability thereunder,<sup>40</sup> or he may sublet a part of the premises and occupy the remainder.<sup>41</sup> Where the trustee accepts a lease and sells the interest so acquired to the lessor, the guarantor of the lease is discharged from all liability accruing after the bankruptcy.<sup>42</sup>

Without assuming the lease, the trustee may occupy and use the leased premises for the estate, and, under such circumstances, reasonable compensation for such use and occupation will be chargeable to the estate, not as rent under the lease, but as costs and expenses of administration.<sup>43</sup>

Gose, 3 N. B. N. R. 840; *In re Mahler*, 3 N. B. N. R. 39, 44; see *Atkins v. Wilcox*, 3 N. B. N. R. 497; *Farnam v. Hefner*, 79 Calif. 580, s. c. 92 id. 543; *Smith v. Putnam*, 3 Pick. 221; see *In re Steedman*, 8 N. B. R. 319, Fed. Cas. No. 13330; *In re Pennewell*, 119 Fed. 139, 9 A. B. R. 490.

34—*In re Frazin & Oppenheim*, 183 Fed. 28, 33 L. R. A. (N. S.) 745, 24 A. B. R. 903.

35—*In re Montello Brick Works*, 163 Fed. 624, 20 A. B. R. 859, aff'd 167 Fed. 482, 21 A. B. R. 896.

36—See *post* § 829.

37—*In re Sterne & Levi*, 26 A. B. R. 535; *In re Criblier*, 184 Fed. 338, 25 A. B. R. 765; *In re Frazin & Oppenheim*, 183 Fed. 28, 33 L. R. A. (N. S.) 745, 24 A. B. R. 903,

38—*In re Koester*, 15 Ohio Fed. Dec. 257, 17 A. B. R. 391.

39—*In re Gutman*, 197 Fed. 472, 28 A. B. R. 643.

40—*Dol v. Goodbehen*, 3 M. & S. 353; *Onslow v. Corrie*, 2 Madd. 330.

41—*In re J. Frank Stanton Co.*, 162 Fed. 169, 20 A. B. R. 549.

42—*White v. Griffin*, 18 N. B. R. 399.

43—*In re Grignard Lithographic Co.*, 155 Fed. 699, 19 A. B. R. 101; *Bray v. Cobb*, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788; *In re Jefferson*, *supra*.

Trustee liable for reasonable rent if he occupies the premises. Rent stipulated in lease should be accepted as reasonable in the absence of clear proof of unreasonableness. *In re Sherwood's, Inc.*, 210 Fed. 754, 31 A. B. R. 769.

Where the trustee takes possession of

### § 828. — Distraint for rent and forfeiture of lease.

A landlord's right to distraint for rent in arrear must be exercised prior to adjudication to be of avail,<sup>45</sup> though it is held that the forfeiture clause in a lease may be enforced for failure of the lessee to perform his covenants after his adjudication.<sup>46</sup> A judgment of the state court against the bankrupt lessee in an action of unlawful detainer is binding upon the trustee where not appealed from within the time provided for by the state laws.<sup>47</sup>

Where notice to quit has been served upon the lessee, his subsequent adjudication and the appointment of a trustee do not abrogate the service nor necessitate reservice upon the trustee.<sup>48</sup>

### § 829. — Bankrupt's liability not released.

While there has been some diversity of opinion as to the effect of an adjudication of bankruptcy upon a lease, the weight of authority sustains the proposition that the adjudication or discharge in no wise releases the lessee from liability under the lease for rent accruing subsequent to the filing of the petition, but the lease remains a binding contract between the parties,<sup>49</sup> unless the landlord re-enters or the trustee assumes the lease, in which case the adjudication or discharge acts like any other assignment and all liability of the tenant ceases.<sup>50</sup>

property and sublets a part thereof in accordance with the terms of the lease, he is liable only for a reasonable rent of the part not sublet. *In re Stanton Co.*, 162 Fed. 169, 20 A. B. R. 549.

45—*In re Printograph Sales Co.*, 210 Fed. 567, 31 A. B. R. 539.

46—*Lindeke v. Associates Realty Co.*, 146 Fed. 630, 17 A. B. R. 215.

47—*In re Van Da Grift Motor Car Co.*, 192 Fed. 1015, 27 A. B. R. 474.

48—*Lindeke v. Associates Realty Co.*, 146 Fed. 630, 17 A. B. R. 215.

49—*Witthaus v. Zimmerman*, 91 App. Div. (N. Y.) 202, 11 A. B. R. 314; *In re Ells*, 2 N. B. N. R. 360, 98 Fed. 967, 3 A. B. R. 564; disagreeing with *In re Jefferson*, 1 N. B. N. R. 288, 93 Fed. 948, 951, 2 A. B. R. 206; *In re Schierman*, 2 N. B. N. R. 118; *In re Rhoads*, 2 N. B. N. R. 301, 98 Fed. 399, 3 A. B. R. 380; *In re Gose*, 3 N. B. N. R. 840; *In re*

*Washburn*, 11 N. B. R. 66, Fed. Cas. No. 17211; *In re Laurie*, 4 N. B. R. 7; *White v. Griffing*, 18 N. B. R. 399; *In re Ten Eyck*, 7 N. B. R. 26, Fed. Cas. No. 13829; *In re Webb*, 6 N. B. R. 302, Fed. Cas. No. 17315; *Ex p. Houghton*, 1 Low. 554, Fed. Cas. No. 6225.

A lease remains in force after bankruptcy, as between the landlord and his bankrupt tenant, though the trustee of the latter has elected not to continue it for the benefit of the estate. *In re Sapinsky & Sons*, 206 Fed. 523, 30 A. B. R. 416.

50—*In re Koester*, 15 Ohio Fed. Dec. 257, 17 A. B. R. 391; *In re Houghton*, 1 Lowell 554, 12 Fed. Cas. No. 584; *Savory v. Stocking*, 4 Cush. 667; *Treadwell v. Marden*, 123 Mass. 390; *In re Mahler*, 2 N. B. N. R. 70; *In re Sallignon*, 2 N. B. N. R. 660; *In re Frankel*, 2 N. B. N. R. 840; *In re Curtis*, 33 So. 125, 9 A. B.



**§ 830. — Trustee or receiver as trespasser.**

A receiver or trustee entering under a lease cannot ordinarily be regarded as a trespasser,<sup>51</sup> but where the lease under which the trustee is in possession of premises is cancelled at the suit of the lessor, the trustee will be regarded as a trespasser during the time of his occupation of the premises.<sup>52</sup>

**§ 831. — Injunction against landlord.**

Where immediate vacation of the premises will cause unnecessary loss and embarrassment to the estate, the landlord may be restrained from interfering with the trustee's possession.<sup>53</sup>

**§ 832. — Fixtures.**

See ante, section 781.

**§ 833. — Recovery of payments and deposits.**

A deposit made by a lessee to be held by his landlord as security for the faithful performance of the covenants of the lease will ordinarily be regarded as one of indemnity against loss, and the trustee in bankruptcy of the lessee is entitled to a return of so much thereof as is not needed to make good the defaults upon the covenants.<sup>54</sup>

A payment made by a bankrupt to secure the extension of the term of his lease should be repaid to the trustee where the term of the original lease had not expired when bankruptcy intervened, since such payment is without consideration.<sup>55</sup>

**§ 834. — Bankruptcy of lessor.**

Where a lease is made for a term of years and is transferred to a creditor to secure a debt, and the lessor becomes bankrupt, the trustee takes the estate subject to such lease,<sup>56</sup> and takes the movable property found upon such premises subject to the rights of all other persons.

R. 286; contra, *In re Jefferson*, 93 Fed. 951, 2 A. B. R. 206; *Bray v. Cobb*, 100 Fed. 270, 3 A. B. R. 788; *In re Hays*, 117 Fed. 879, 9 A. B. R. 144.

51—*In re Rubel*, 166 Fed. 131, 21 A. B. R. 566.

52—*In re St. Louis & Kansas Coal Co.*, 168 Fed. 934, 22 A. B. R. 56.

53—*In re Schwartzman*, 167 Fed. 399, 21 A. B. R. 885.

54—*In re Sherwood's, Inc.*, 210 Fed. 754, 31 A. B. R. 769.

55—*In re Abrams*, 200 Fed. 1005, 29 A. B. R. 590.

56—*Meador v. Everett*, 10 N. B. R. 421, Fed. Cas. No. 9376.

### § 835. Legacies—Wills—Inheritance.

Any interest which the bankrupt may have in a decedent's estate, whether as a legacy or otherwise, which is vested at the time of the filing of the petition, passes to the trustee for the benefit of the creditors.<sup>57</sup> The unpaid balance of a legacy passes to the trustee, and the bankruptcy court may summarily order the bankrupt to execute a transfer of such legacy, or the executor may be ordered to pay it to the trustee.<sup>58</sup> Property inherited by the bankrupt prior to the filing of the petition, although on the same day, would pass to the trustee, notwithstanding the fact that fractions of a day are not ordinarily considered.<sup>59</sup> Property thus acquired after the filing of the petition, although prior to the adjudication, remains the bankrupt's.<sup>60</sup>

Where under the state law, an insolvent who contests his father's last will, may abandon or settle the contest at any stage of the proceedings upon any terms he pleases, his subsequent adjudication in bankruptcy will not give the trustee any cause of action growing out of such settlement or abandonment, unless it be to recover any sum the bankrupt may have received and afterwards transferred in derogation of the bankruptcy law.<sup>61</sup>

Where a bankrupt under a will takes merely a future contingent interest, which is not vested or alienable, it is not such an interest as would pass to the trustee,<sup>62</sup> nor where it is subject to be divested by the happening of a contingency men-

57—Legacy vesting in bankrupt prior to filing of petition passes. *In re McKenna*, 137 Fed. 611, 15 A. B. R. 4.

Trustee entitled to the bankrupt's share in his mother's estate though the same is not determined by the surrogate court until after the commencement of the bankruptcy proceedings, the decree of such court fixing his rights as of a date prior to the commencement of the proceedings. *McNaboe v. Marks*, 51 Misc. (N. Y.) 207, 16 A. B. R. 767.

Interest of the bankrupt under her father's will, the latter having died after the adjudication of the bankrupt, does not pass. *In re Woods*, 133 Fed. 82, 13 A. B. R. 240.

The trustee, under 47a (2) as amended, may maintain an action to reach surplus

income to which the bankrupt is entitled under a will. *In re Morris*, 204 Fed. 770, 30 A. B. R. 319; contrary rule prior to 1910, see *Butler v. Baudouine*, 84 App. Div. (N. Y.) 215, aff'd 177 N. Y. 530, 16 A. B. R. 238n; but see, *In re Baudouine*, 101 Fed. 574, 3 A. B. R. 651.

58—*In re May*, 3 N. B. N. R. 128, 5 A. B. R. 1.

59—*In re Stoner*, 3 N. B. N. R. 423; *In re Pettit*, 1 Ch. Div. 478.

60—*In re Wetmore*, 108 Fed. 520, 3 N. B. N. R. 143, 6 A. B. R. 210; *In re Braentigan*, 3 N. B. N. R. 461.

61—*Edington v. Masson*, 177 Fed. 209, 24 A. B. R. 183.

62—*In re Gardner*, 106 Fed. 670, 5 A. B. R. 432; *In re Ehle*, 109 Fed. 625, 6 A. B. R. 476,

tioned in a will as by the death of the bankrupt before the property is divisible, he being merely one of a class to which he may or may not belong on the vesting of the gift.<sup>63</sup> If the interest which the bankrupt takes is vested or if it be such as would be alienable under the laws of the state, it would pass to the trustee,<sup>64</sup> and upon this question a decision of the state court in a suit between the trustee and an adverse claimant is conclusive upon the bankruptcy court.<sup>65</sup>

The trustee has no title to an interest under a will, which gives the trustee absolute discretion which he is not obliged to exercise in favor of the bankrupt.<sup>66</sup>

An adjudication in bankruptcy does not revoke the bankrupt's will, but if at the time of his death he has any assets upon which it would operate, it would be of as much force and effect as though bankruptcy had not intervened.<sup>67</sup>

### § 836. Property in partnership cases.

### § 837. — Partnership property.

Whether property is partnership or individual property is purely a question of intention of the partners, to be inferred from their actions and the surrounding circumstances.<sup>68</sup> In the

63—In re Hoadley, 2 N. B. N. R. 704, 101 Fed. 233, 3 A. B. R. 780; In re Ehle, 109 Fed. 625, 6 A. B. R. 476.

64—In re Twaddell, 3 N. B. N. R. 752, 110 Fed. 145, 6 A. B. R. 539; In re St. John, 3 N. B. N. R. 114, 105 Fed. 234, 5 A. B. R. 190; In re Wood, 98 Fed. 972, 3 A. B. R. 572.

Where there is a devise to one for life and at her decease to her surviving children, and after the death of the testator and before that of the beneficiary, one of such children was adjudged a bankrupt, his interest, being vested and alienable, passes to his trustee in bankruptcy. In re Twaddell, 110 Fed. 145, 6 A. B. R. 539; In re McHarry, 111 Fed. 498, 7 A. B. R. 83; In re Haslett, 116 Fed. 680.

Where a will bequeathed a sum to trustees, with directions to apply the income for the benefit of a daughter of the testator during her life, the principal on her death to be divided between the tes-

tator's two sons, who were named, the interest taken by the sons in the trust fund, under the statutes of certain states, is a vested remainder which is alienable; and, on the bankruptcy of one of the sons while the life estate is still outstanding, will pass to his trustee, as assets. In re St. John, 105 Fed. 234, 3 N. B. N. R. 120, 5 A. B. R. 190.

65—In re Seavey, 195 Fed. 825, 27 A. B. R. 373.

66—In re Wetmore, 102 Fed. 290, 4 A. B. R. 335, s. c. 99 Fed. 703, 3 A. B. R. 700; In re Hoadley, 2 N. B. N. R. 704, 100 Fed. 233, 3 A. B. R. 780; Nicholas v. Eaton, 13 N. B. R. 421, 91 U. S. (1 Otto) 716, 23 L. ed. 254.

67—Charman v. Charman, 14 Ves. 580.

68—Art. on Part., 17 Am. & Eng. Enc. of Law, p. 945; Burleigh v. Foreman, 130 Fed. 13, 12 A. B. R. 88, rev'g 118 Fed. 348, 9 A. B. R. 237.

absence of express agreement, attention must be paid to the "source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with."<sup>69</sup>

The rule stated by Lindley in his work on Partnership, is that it is for the partners to determine by agreement amongst themselves what shall be the property of them all, and what shall be the separate property of some one or more of them, and by agreement they may convert what is the joint property of all into the separate property of some one or more of them and vice versa, though this would not be true if made within four months of the bankruptcy of the firm or one of its members, and it was shown that the purpose was to hinder, delay, defraud or prefer one class of creditors over another. Whatever, at the commencement of a partnership is thrown into the common stock, and whatever has, from time to time during the continuance of a partnership been added thereto, or obtained by means thereof, whether directly by purchase, or circuitously by employment in trade, belongs to the firm and in case of bankruptcy its status could not be changed.<sup>70</sup> Property originally owned by one partner and used in the business of the partnership, may be joint or separate as the partners agree, in writing or by parole, and the general intent of the partnership will be carried out.<sup>71</sup>

An adjudication against a partnership in an involuntary proceeding is not conclusive as to the title to partnership assets upon the trustee of a partner not permitted to intervene in the proceedings.<sup>72</sup>

In law, real estate owned by members of a firm is held as tenants in common, but it is presumptively firm property if purchased with partnership funds,<sup>73</sup> although the title stands in the name of a member,<sup>74</sup> and the intent to consider it a partnership asset may be shown by evidence<sup>75</sup> or implied from the fact that the losses are to be sustained by the firm assets, and the

69—Lindley on Part., 329.

70—In re Swift, 118 Fed. 348, 9 A. B. R. 237, rev'd 130 Fed. 13, 12 A. B. R. 88.

71—Lindley on Part., 323.

72—Manson v. Williams, 213 U. S. 453, 53 L. ed. 869, 22 A. B. R. 22, aff'g 153 Fed. 525, 18 A. B. R. 674.

73—Osborn v. McBride, 16 N. B. R. 22, 3 Saw. 590, Fed. Cas. No. 10593.

74—In re Groetzinger, 127 Fed. 814, 11 A. B. R. 723, aff'g 110 Fed. 366, 6 A. B. R. 399.

75—In re Farmer, 18 N. B. R. 207, Fed. Cas. No. 4650.

profits are to augment the capital,<sup>76</sup> and out of which firm creditors are entitled to priority of payment even against individual creditors having judgments operating as liens upon the individual partner's interests.<sup>77</sup> As between the creditors of a firm and a member thereof, real estate is assets of the firm, although the legal title is allowed to stand in the name of such member, where the consideration moves from the firm.<sup>78</sup>

An insolvent firm's property is a trust fund for the payment of the firm's creditors, and the rule, supported by the weight of authority is that individual partners cannot claim individual exemptions out of it.<sup>79</sup> A partnership is not entitled to retain toward the payment of its debts, the surplus arising from securities held by one partner for his debt.<sup>80</sup>

A partner or joint adventurer who has advanced all the money for the purchase of property for himself and bankrupt has a lien on such of the property as has been delivered to him.<sup>81</sup>

### § 838. — Individual property.

By individual property or estate, or separate estate, is meant that property in which each partner is separately interested to the exclusion of the other partners at the time of the bankruptcy.<sup>82</sup>

Where, upon the dissolution of a partnership, one partner takes the accounts and notes of the firm and the other the stock in trade, to which he adds, and with which he continues the business, the stock in the hands of the latter, upon the subsequent bankruptcy of the former, will be held primarily liable for his individual debts.<sup>83</sup> The classification in the schedule as partnership assets of real estate held by partners as tenants in com-

76—*Hiscoek v. Jaycox*, 12 N. B. R. 507, Fed. Cas. No. 6531.

77—*Marrett v. Murphy*, 11 N. B. R. 131, Fed. Cas. No. 9103.

78—*In re Groetzing*, 110 Fed. 366, 6 A. B. R. 399, *aff'd* 127 Fed. 814, 11 A. B. R. 723.

79—*In re Lentz*, 2 N. B. N. R. 190, 97 Fed. 486; *In re Stevenson*, 1 N. B. N. 531, 93 Fed. 789, 2 A. B. R. 230; *In re Camp*, 1 N. B. R. 142, 1 A. B. R. 165, 91 Fed. 745; *In re Grimes*, 1 N. B. N. 339, 94 Fed. 800, 2 A. B. R. 160, 1 N. B. N. 426, 2 A. B. R. 610, 1 N. B. N. 516, 96

Fed. 529, 2 A. B. R. 730; *In re Duguid*, 2 N. B. N. R. 607, 100 Fed. 274, 3 A. B. R. 794; *In re Friedrich*, 100 Fed. 284, 3 A. B. R. 801; *In re Wilson*, 101 Fed. 571, 4 A. B. R. 260. For a full discussion, see *post* Chapter XXIV.

80—*Sparhawk v. Drexel*, 12 N. B. R. 450, Fed. Cas. No. 13204.

81—*In re Kessler & Co.*, 174 Fed. 906, 23 A. B. R. 391.

82—*In re Lowe*, 11 N. B. R. 221, Fed. Cas. No. 8564.

83—*In re Montgomery*, 3 N. B. R. 109, 3 Ben. 567, Fed. Cas. No. 9727.

mon, will not convert the individual partner's separate property into firm property, in derogation of the rights of separate creditors, but the real estate is an asset of the individual partners.<sup>84</sup>

Buildings built with partnership funds by one partner on his own property become part of the realty and such partner's separate property,<sup>85</sup> but although real estate stands in the name of a member, if it be in fact firm property, the unsecured individual creditors of such member have no claim upon the proceeds.<sup>86</sup> The assets of a business conducted by the bankrupt under a firm name will be held to pass to his trustee, where no partnership in fact exists.<sup>87</sup>

### § 839. — Conversion of joint estate into separate estate and vice versa.

It may be generally stated that partners may convert that which was partnership property into the separate property of an individual partner, or vice versa, by agreement amongst themselves.<sup>88</sup> "The nature of the property may be thus altered by any agreement to that effect, for neither a deed nor even a writing is absolutely necessary."<sup>89</sup> But so long as the agreement is dependent upon an unperformed condition, so long will the ownership of the property remain unchanged.<sup>90</sup> Since the creditors of an individual have no lien on his property and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the firm property to enable them to prevent it from disposing of it to whomsoever it chooses.<sup>91</sup> Accordingly it has frequently been held that agreements made between partners converting firm property into the separate estate of one or more of its members, and vice versa are, unless fraudulent, binding, not only as between the partners themselves, but also on their joint and on their respective several

84—*In re Zugg*, 16 N. B. R. 280, Fed. Cas. No. 18222.

85—*In re Parks*, 9 N. B. R. 270, Fed. Cas. No. 10765.

86—*In re Groetzinger*, 110 Fed. 366, 6 A. B. R. 399, *aff'd* 127 Fed. 814, 11 A. B. R. 723.

87—*In re Gibson*, 191 Fed. 665, 27 A. B. R. 401.

88—*Lindley on Part.*, p. 334; *ex parte Ruffin*, 6 Ves. 119; *ex parte Williams*, 11 id. 3; *ex parte Fell*, 10 id. 348.

89—*Pilling v. Pilling*, 3 De G. J. and Sm. 162; *ex parte Williams*, 11 Ves. 3.

90—*Ex parte Wheeler*, Buck. 25.

91—*Wilcox v. Kell*, 11 Ohio 394; *White v. Parish*, 20 Tex. 688.

creditors, and that in the event of bankruptcy the trustee must give effect to such agreement.<sup>92</sup>

In case of the bankruptcy of the firm or an individual member thereof, since the act confines each class of creditors to the corresponding estate, separate creditors to the separate estate and joint creditors to the joint estate, any agreement changing the situation of property, if within four months of the bankruptcy, would be regarded as a transfer to hinder, delay and defraud, or prefer one class of creditors over the other. For this reason the foregoing rule stated would probably fall in a proceeding under the present law.

### § 840. — Title and rights of trustee.

The same rule applies with reference to the title of the trustee to partnership property, as to that of individuals.

The trustee of a bankrupt firm takes all the firm's property with like right, title, power and authority as the firm had, but subject to any valid lien existing thereon.<sup>93</sup> The actual interest of the trustee of a bankrupt partner is the bankrupt's proportion of the surplus, which may be either sold to the other partner, or an accounting be had,<sup>94</sup> or, if the remaining partner continues the business without a settlement, the trustee may take an interest.<sup>95</sup>

If a partnership is adjudged bankrupt, the assets of the partnership and of its members are brought into the bankruptcy administration,<sup>96</sup> and the court may, by summary order, compel the individual partners to transfer their property to the trustee,<sup>97</sup> or, if prior to the adjudication, one of the individual partners makes an assignment for the benefit of his creditors, the assignee may be required by summary order to transfer to the trustee all the property so coming to him.<sup>98</sup> The trustee of a

92—Lindley on Part. 335; *ex parte* Ruffin, 6 Ves. 119; *ex parte* Williams, 11 Ves. 3.

93—In *re* Leland, 5 N. B. R. 222, 5 Ben. 168, Fed. Cas. No. 8228; In *re* Temple, 17 N. B. R. 345, 4 Sawy. 62, Fed. Cas. No. 13825.

94—Section 5L, Act of 1898. *Ex p.* Motion, L. R. 9 Ch. 192.

95—*Ex p.* Finch, 1 Dea. & Ch. 274; *Ex p.* Freeman, Id. 464.

96—Francis v. McNeal, 186 Fed. 481, 26 A. B. R. 555, *aff'd* 228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244; In *re* Duke & Son, 28 A. B. R. 195.

97—In *re* Latimer, 174 Fed. 824, 23 A. B. R. 388.

98—In *re* Stokes, 106 Fed. 312, 6 A. B. R. 262.

partnership may administer the separate estate of non-adjudicated members,<sup>99</sup> especially with the latter's consent,<sup>1</sup> and it is held that an alleged partner is not entitled to a jury trial of the issue of whether he is in fact a member of a bankrupt partnership for the purpose of determining whether his estate may be administered.<sup>2</sup> In discussing this rule the supreme court, in the case of *Francis v. McNeal*,<sup>3</sup> says, "It would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. (Section 5f.) Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. . . . If the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy."

Where less than all the members of a partnership, but not the partnership, have been adjudged bankrupt, the trustee is elected by joint and separate creditors and takes the bankrupt partners' individual assets and their proportionate share of the surplus of the firm's assets, but has nothing to do with the partnership estate unless by consent of the partners not adjudged bankrupt,<sup>4</sup>

99—*In re Samuels & Lesser*, 207 Fed. 195, 30 A. B. R. 293; *In re Duke & Son*, 199 Fed. 199, 29 A. B. R. 93; *contra*, *In re Bertenshaw*, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 19 A. B. R. 577.

1—*Francis v. McNeal*, 228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244, *aff'g* 186 Fed. 481, 26 A. B. R. 555.

2—*In re Samuels & Lesser*, 207 Fed. 195, 30 A. B. R. 293.

3—228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244, *aff'g* 186 Fed. 481, 26 A. B. R. 555.

4—Section 5L, Act of 1898; *New York Inst. for Deaf & Dumb v. Crockett*, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233;

*Ludvigh v. Umstadter*, 148 Fed. 319, 17 A. B. R. 774; *In re Junck & Balthazard*, 169 Fed. 481, 22 A. B. R. 298; *Francis v. McNeal*, 186 Fed. 481, 26 A. B. R. 555, *aff'd* 228 U. S. 695, 57 L. ed. 1029, L. R. A. 1915 E 706, 30 A. B. R. 244; *Mills v. Fisher & Co.*, 159 Fed. 897, 16 L. R. A. (N. S.) 656, 20 A. B. R. 237; *American Steel & Wire Co. v. Coover*, 27 Okla. 131, 25 A. B. R. 58; *Ludowici Roofing Tile Co. v. Pa. Inst. for Blind*, 116 Fed. 661; 8 A. B. R. 739; *In re Mereur*, 116 Fed. 655, 8 A. B. R. 275; *In re Polidori*, 2 N. B. N. R. 945; *In re Wilcox*, 1 N. B. N. 286, 494, 94 Fed. 84, 2 A. B. R. 117; *In re Blair*, 2 N. B. N. R. 364, 99 Fed. 76, 3 A. B. R. 588; *In re Meyer*, 98



although the bankruptcy court will require the partners not adjudged bankrupt to settle the business expeditiously, or consent to the administration of the partnership assets in bankruptcy.<sup>5</sup>

A creditor of a partner may proceed against him individually, though the partnership estate is being administered by a probate court, and it has been held in such case that the court of bankruptcy has complete jurisdiction over the case, and jurisdiction over the partnership estate, provided such court will surrender possession of the assets to the trustee.<sup>6</sup>

If a secret partner keeps silent and allows the partnership assets to be administered in bankruptcy, he will be held to have consented.<sup>7</sup>

The trustee of one partner will be subrogated to the rights of the creditors of another partner to the extent that their claims against the latter have been satisfied by the sale of the property of the former.<sup>8</sup>

The trustee has the same right to the property of a bankrupt partner as in the case of any individual, and may recover from a solvent partner, what is due under the articles of copartnership.<sup>9</sup> A trustee of a partner who seizes goods belonging to the partnership will not be charged with interest thereon.<sup>10</sup> Where a firm after giving a mortgage is dissolved, one of the partners taking its assets and assuming its debts, and bankruptcy proceedings are instituted against him, in the course of which the property is sold, the balance, after paying the mortgage, should be retained by the trustee.<sup>11</sup>

### § 841. Patents and copyrights.

The trustee is vested with the interest owned by the bankrupt at the time of adjudication in patents already issued and in

Fed. 976, 3 A. B. R. 559, aff'g 1 N. B. N. 304, 92 Fed. 896, 1 A. B. R. 565.

5—Section 5h, Act of 1898; *Mills v. Fisher & Co.*, 159 Fed. 897, 20 A. B. R. 237; *In re Meyer*, 98 Fed. 976, 3 A. B. R. 550; *In re O'Brian*, 2 N. B. N. R. 312.

6—See *In re Pierce*, 2 N. B. N. R. 979, 102 Fed. 977, 4 A. B. R. 489; *In re Daggett*, 8 N. B. R. 433, Fed. Cas. No. 3536.

7—*In re Rushmore*, 24 A. B. R. 55;

*In re Harris*, 2 N. B. N. R. 863, 4 A. B. R. 132.

8—*In re Mason*, 1 N. B. N. 331, 2 A. B. R. 60.

9—*Wilkins v. Davis*, 15 N. B. R. 60, 2 Lowell 511, Fed. Cas. No. 17664.

10—*In re Hudson Clothing Co.*, 148 Fed. 305, 17 A. B. R. 826.

11—*In re Sanderlin*, 109 Fed. 857, 6 A. B. R. 384.

force, or allowed, whether as patentee, assignee of the patent or part thereof, or holder of rights acquired under a patent to a third person, such as licenses or manufacturing rights; but he does not take the interest of the bankrupt in a patentable invention, or in a pending application for a patent.<sup>12</sup>

While the title to patents and the like vests in the trustee by operation of law without any order of court, a certified copy of the decree of adjudication,<sup>13</sup> together with a certified copy of the order approving the bond of the trustee, should be filed in the Patent or Copyright Office, as the case may be, as evidence of the title of the trustee to such patents or copyrights.<sup>14</sup> If one holds a lien on bankrupt's letters patent as security, the court may order them sold jointly by the trustee and the lien-holder, and the proceeds will be deposited pending settlement of the respective claims.<sup>15</sup>

A copyright which has been transferred to the bankrupt by an absolute and unqualified assignment thereof passes to his trustee,<sup>16</sup> but where a contract whereby a copyright was assigned to the bankrupt involves personal trust and confidence, the rights thereunder do not pass to the trustee, and the assignor may reclaim the copyrights so assigned.<sup>17</sup>

### § 842. Payments and deposits.

Money paid to the bankrupt under mistake of fact may be recovered from the trustee.<sup>18</sup> An exception to the rule that money paid under a mistake of law cannot be recovered is made in case of such payments to a trustee in bankruptcy.<sup>19</sup>

Payments made by a stockholder upon a subscription to stock upon express condition that like subscriptions should be made by all stockholders will be returned to him in toto where the condition has not been complied with.<sup>20</sup>

12—In re McDonald, 101 Fed. 239, 4 A. B. R. 92; In re Dann, 129 Fed. 495, 12 A. B. R. 27.

Patents, as well as applications therefor pass to the estate. In re Myers-Wolf Mfg. Co., 205 Fed. 289, 30 A. B. R. 572; In re Cantelo Mfg. Co., 185 Fed. 276, 26 A. B. R. 57.

13—Sec. 47c, Act of Feb. 5, 1903.

14—Sec. 21e, Act of July 1, 1898.

15—In re Columbia Metal Works, 3 N. B. R. 18, Fed. Cas. No. 3039.

16—In re Howley-Dresser Co., 132 Fed. 1002, 13 A. B. R. 94.

17—In re McBride & Co., 132 Fed. 285, 12 A. B. R. 81.

18—In re Berry & Co., 147 Fed. 208, 16 A. B. R. 564; In re Berry & Co., 147 Fed. 208, 17 A. B. R. 491.

19—Carpenter v. Southworth, 165 Fed. 428, 21 A. B. R. 390.

20—In re North Carolina Car Co., 127 Fed. 178, 11 A. B. R. 488.

No payment by or to a bankrupt subsequent to the bankruptcy in relation to transactions anterior thereto is valid, though made or received bona fide or without notice.<sup>21</sup>

The trustee of the estate of a bankrupt vendee may sue to recover from the vendor the amount of the purchase price paid where, after bankruptcy, the vendor repudiates his contract by refusing to convey the property and by leasing it to a third party.<sup>22</sup>

Money obtained by the bankrupt through grossly false and fraudulent representations may be recovered notwithstanding the money was to be used in a gambling venture and the depositors were apprised of this fact.<sup>23</sup>

Like any other assets of the bankrupt, funds deposited in a bank or stock therein pass to the trustee on the adjudication.<sup>24</sup> The trustee of a bankrupt depositor has been held entitled to funds in the bankrupt's name as against the payee in a check presented prior to adjudication, payment of which was withheld because of rumors of bankruptcy.<sup>25</sup>

A trustee may have set aside any conveyance to a bank in fraud of creditors, and deposits made by one subsequently becoming bankrupt become a part of the assets of the estate and will be turned over to the trustee. Hence, where a sheriff having made a levy and sale of the bankrupt's property after the title had passed to the trustee, deposited the proceeds with the judgment creditor, a bank, and received a certificate of deposit instead of a receipt, or where a bank as creditor, collects money due the bankrupt, and gives the same to the sheriff who applies it on the bank's judgment, it constitutes a fraudulent preference and may be recovered by the trustee.<sup>26</sup> Where a bank receives

21—*Mays v. Bank*, 4 N. B. R. 147; *In re Hayden*, 7 N. B. R. 192, Fed. Cas. No. 6257; *Babbett v. Burgess*, 7 N. B. R. 561, 4 Dill. 169, Fed. Cas. No. 693; *Duffield v. Horton*, 16 N. B. R. 59; s. c. 19 N. B. R. 13; *Booth v. Meyer*, 14 N. B. R. 575.

While the payment by the bankrupt, after the filing of the petition, of a debt previously incurred, is unauthorized, yet if the payment is one to which the creditor was entitled as against the trustee, the court may refuse the petition of the

trustee seeking to recover the payment. *Toof v. City Nat. Bank*, 206 Fed. 250, 30 A. B. R. 79.

22—*Durham v. Wick*, 210 Pa. St. 128, 14 A. B. R. 385.

23—*In re Arnold & Co.*, 133 Fed. 789, 13 A. B. R. 320.

24—*In re Ransford*, 194 Fed. 658, 28 A. B. R. 78.

25—*In re Grive*, 151 Fed. 711, 18 A. B. R. 202.

26—*Traders' Nat. Bk. v. Campbell*, 6 N. B. R. 353, 14 Wall. 87.

a deposit after it is insolvent, of which fact its officers have knowledge, the fraud avoids the implied contract and prevents the money becoming the bank's property and the trustee is entitled to it,<sup>27</sup> and the same is true of drafts and checks deposited for collection, but which had not been collected when the bank closed its doors, notwithstanding they were endorsed to the bank without qualification; or that on the day of such deposits drafts equal to the whole deposit were purchased, which were subsequently returned unpaid, as such purchase formed a separate transaction,<sup>28</sup> and the deposit might therefore be reclaimed. But the original pledgor of a certificate of stock, wrongfully deposited as collateral by a pledgee, may follow the fund received by the bank into the hands of the trustee of the pledgee, and recover the proceeds of his stock, less his indebtedness to the bankrupt.<sup>29</sup>

To entitle a depositor in a bankrupt bank to a return of his deposits it is essential that the bank was insolvent at the time the deposits were made, that the bank knew that fact and that the depositor did not.<sup>30</sup>

A depositor in a bankrupt bank is entitled to funds in its hands as against other creditors only so far as his deposits are capable of identification,<sup>31</sup> and where his specie deposit has been appropriated by the bankrupt, he can only come in *pari passu* with other creditors,<sup>32</sup> unless the deposit was procured through the fraud of the latter.<sup>33</sup> A banker's liability is not fiduciary, but that of an ordinary debtor, and his trustee will not pay out of the bank's funds a note and interest, because deposited for collection simply, the customer's account being overdrawn at the time the proceeds were credited on the bank's books,<sup>34</sup> but the banker is not entitled to a deposit, for which the depositor simultaneously draws a check in payment of a draft which the banker issued, though insolvent, and aware it would be dis-

27—*Richardson v. New Orleans Deb. Redemp. Co.*, 102 Fed. 780, 52 L. R. A. 67; same *v. New Orleans Coffee Co.*, Id. 785.

28—*Richardson v. New Orleans Coffee Co.*, 102 Fed. 785.

29—*In re Hutchinson*, 113 Fed. 202; *In re Swift*, 108 Fed. 212.

30—*In re Stewart*, 178 Fed. 463, 24 A. B. R. 474.

31—*In re Nichols*, 166 Fed. 603, 22 A. B. R. 216.

32—*In re King*, 9 N. B. R. 140; *In re Hosie*, 7 N. B. R. 601, Fed. Cas. No. 6711.

33—*In re Stewart*, 178 Fed. 463, 24 A. B. R. 474.

34—*In re Bank of Madison*, 9 N. B. R. 184, 5 Biss. 515, Fed. Cas. No. 890.

honored, but such depositor is entitled to have the funds returned before the payment of other claims.<sup>35</sup>

The bank is entitled to funds as against the purchaser from it of a check upon another bank, not presented until after the drawer's bankruptcy, when payment was refused, and such purchaser is not entitled to priority of payment;<sup>36</sup> or to the deposit with a bank, as agent for another for clearing house purposes, under an arrangement requiring the latter's deposit to be sufficient to meet its checks received at the clearing house.<sup>37</sup>

### § 843. Personal privileges, licenses and memberships.

A seat in a stock exchange, as well as the profits on stock transactions therein pass to the trustee subject to the rules of the exchange.<sup>38</sup> The same is true of any other license, right or privilege, which the bankrupt might have transferred by any means prior to filing his petition.<sup>39</sup> A performance by the bankrupt of the conditions or formalities necessary to the transfer will be ordered by the court.<sup>40</sup>

In the case of a seat in a stock exchange where the articles of membership provide that it may be sold in case there is no

35—Richardson v. Coffee Co., 102 Fed. 785.

36—In re Smith, 12 N. B. R. 459, Fed. Cas. No. 12990.

37—Phelan v. Bank, 16 N. B. R. 308, 4 Dill. 88, Fed. Cas. No. 11069.

38—In re Gregory, 174 Fed. 629, 27 L. R. A. (N. S.) 613, 23 A. B. R. 270; Wrede v. Clark, 132 App. Div. (N. Y.) 293, 21 A. B. R. 821, rev'g 61 Misc. 530, 21 A. B. R. 170; In re Hurlbutt, Hatch & Co., 135 Fed. 504, 13 A. B. R. 50; Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 9 A. B. R. 277; In re Gaylord, 111 Fed. 717, 7 A. B. R. 195; In re Hutchinson, 8 A. B. R. 382; see In re Swift, 118 Fed. 348, 9 A. B. R. 237, rev'd 130 Fed. 13, 12 A. B. R. 88.

Although the bankrupt's seat in a stock exchange is property passing to the trustee, it can become available to the trustee only in the manner provided for by the terms of the contract under which it is obtained. In re Currie, 185 Fed. 263, 26 A. B. R. 345.

39—Sec. 70a (5) Act of 1898.

40—In re Page, 2 N. B. N. R. 1069, 102 Fed. 746, 4 A. B. R. 467; In re Becker, 2 N. B. N. R. 241, 245, 98 Fed. 407, 3 A. B. R. 412; In re May, 3 N. B. N. R. 128; In re Emrich, 2 N. B. N. R. 656, 101 Fed. 231, 4 A. B. R. 89; In re Brodbine, 1 N. B. N. 279, 326, 93 Fed. 643, 2 A. B. R. 53; Sparkhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915; Id. v. Ackley, Id.; In re Fisher, 1 N. B. N. 206, 1 A. B. R. 557; aff'd 2 N. B. N. R. 221, 98 Fed. 89; aff'd 103 Fed. 860, 51 L. R. A. 292, citing In re Ketchum, 51 Fed. 840; Hyde v. Woods, 94 U. S. (4 Otto) 523, 24 L. ed. 264; Fish v. Fiske, 154 Mass. 302; In re Warder, 10 Fed. 275; s. c. 15 Fed. 789; In re Gallagher, 19 N. B. R. 224, 16 Blatch. 410, Fed. Cas. No. 5197; Shearman v. Bingham, 3 Cliff. 552, Fed. Cas. No. 12672; Lathrop v. Drake, 91 U. S. (1 Otto) 516, 23 L. ed. 414; Goodall v. Tuttle, 7 N. B. R. 193; In re Sievers, 91 Fed. 366; Ex p. Butler, 1 Atk. 210.

unsettled contract or claim against him by any other member of the exchange, arising out of the business of the exchange, the seat will pass to the trustee after the satisfaction of such claim, or the court may order that the seat be sold by the trustee for the benefit of the estate, in which event the prior right of members of the exchange to any claim held by them will be passed upon by the court and first paid from the proceeds.<sup>41</sup> In the case of the expulsion of a member, the seat would pass to the trustee, where the constitution of the organization does not provide for the forfeiture of the money value of the membership in such case.<sup>42</sup>

Whether a liquor license issued to the bankrupt becomes an asset of the estate depends upon the question of whether it is regarded as property under the state law. In those states where it is regarded as a salable privilege, and transferable property of the bankrupt, it passes to the trustee,<sup>43</sup> while in those states where it is not regarded as a contract or property right, but as a mere permit to do what otherwise would be an offense, it does not pass.<sup>44</sup>

The trustee is entitled to the money realized from the bankrupt's liquor license as against the equitable assignee thereof where the policy of the state prohibits assignments thereof.<sup>45</sup> A liquor license granted to the bankrupt after his adjudication does not belong to the estate.<sup>46</sup> If the bankrupt and another hold a liquor license, the court of bankruptcy has no jurisdiction to pass on the rights of such other party in a summary proceeding, but the trustee may file a bill in equity, or take other steps, to realize the bankrupt's interest.<sup>47</sup>

Where the bankrupt holds title to a patented article subject to restrictions contained in a license to sell the same, the trustee is bound by the restrictions.<sup>48</sup>

41—Page v. Edmunds, *supra*; In re Hutchinson, *supra*.

42—In re Gaylord, *supra*.

43—In re May, 5 A. B. R. 1; In re Baumbblatt, 153 Fed. 485, 18 A. B. R. 720.

Liquor license and right to renewal is asset. In re Doyle & Son, 209 Fed. 1, 31 A. B. R. 571, rev'g 205 Fed. 543, 30 A. B. R. 58; In re Wiesel & Knaup, 173 Fed. 718, 23 A. B. R. 59.

44—In re Keller, 16 A. B. R. 727; In re Olewine, 125 Fed. 840, 11 A. B. R. 40.

45—In re Flaherty, 184 Fed. 962, 25 A. B. R. 943.

46—Whitlock's License, 39 Pa. Super. Ct. Rep. 34, 22 A. B. R. 262.

47—In re Brodbine, 1 N. B. N. 279, 326, 93 Fed. 643, 2 A. B. R. 53.

48—In re Spitzel & Co., 168 Fed. 156, 21 A. B. R. 729.

### § 844. Property purchased prior to bankruptcy.

The test of the trustee's title to property alleged to have been purchased by the bankrupt is whether title passed at the time of the filing of the petition.<sup>49</sup>

Goods sold to the bankrupt in the ordinary course of business cannot be reclaimed by the vendor,<sup>50</sup> especially where the contract has not been rescinded prior to bankruptcy.<sup>51</sup>

An arrangement whereby the bankrupt, after adjudication, returns property to one from whom he had purchased it, in satisfaction of the unpaid purchase price will not defeat the trustee's title.<sup>52</sup> The trustee is entitled to property purchased by the bankrupt in good faith from one holding the same under an unrecorded conditional sale contract.<sup>53</sup>

Where a party by fraudulently concealing his insolvency and his intent not to pay for goods or property, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover his property,<sup>54</sup> even though he has filed

49—In re Planett Mfg. Co., 157 Fed. 916, 19 A. B. R. 729.

50—In re Johnson, 208 Fed. 164, 30 A. B. R. 787.

A vendor selling goods to the bankrupt five months prior to bankruptcy but who has failed to rescind the sale, cannot reclaim the goods on the ground of fraud.

51—Becker Co. v. Gill, 206 Fed. 36, 30 A. B. R. 429.

52—In re Connelly, 204 Fed. 479, 30 A. B. R. 340.

53—In re Builders' Lumber Co., 148 Fed. 244, 17 A. B. R. 449.

54—Kellogg-Mackey-Cameron Co. v. Curtice, 162 Mo. App. 124, 28 A. B. R. 906; In re Appel Suit & Cloak Co., 198 Fed. 322, 28 A. B. R. 818; In re Sol. Aarons & Co., 193 Fed. 646, 28 A. B. R. 399; Halsey v. Diamond Distilleries Co., 191 Fed. 498, 27 A. B. R. 333; In re Bendall, 183 Fed. 816, 25 A. B. R. 698; In re Spann, 183 Fed. 819, 25 A. B. R. 551; Gillespie v. Piles & Co., 178 Fed. 886, 44 L. R. A. (N. S.) 1, 24 A. B. R. 502; Haywood Co. v. Pittsburgh Industrial Iron Works, 163 Fed. 799, 19 A. B. R. 780; Openhym & Sons v. Blake, 157

Fed. 536, 19 A. B. R. 639; In re Levi & Picard, 148 Fed. 654, 16 A. B. R. 756; Standard Varnish Works v. Haydock, 143 Fed. 318, 16 A. B. R. 286; Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993; Turner v. Ward, 154 U. S. 618, 23 L. ed. 391; In re Weil, 111 Fed. 897, 7 A. B. R. 90; In re Gany, 103 Fed. 930; In re Epstein, 109 Fed. 876; Bloomingdale v. Rubber Mfg. Co., 114 Fed. 1016, 8 A. B. R. 74; In re Hamilton Furniture & Carpet Co., 117 Fed. 774, 9 A. B. R. 65; Oil Co. v. Hawkins, 74 Fed. 395, 33 L. R. A. 739; In re O'Connor, 114 Fed. 777, 9 A. B. R. 18.

To entitle vendor to rescind and reclaim (1) bankrupt must have been insolvent at time of purchase (2) bankrupt must have concealed insolvency (3) false and fraudulent representations must have been made with intent to deceive and defraud and to induce vendors to sell and deliver goods to bankrupt, with intent not to pay for them. In re Marengo Co. Merc. Co., 199 Fed. 474, 29 A. B. R. 46.

Where, under the laws of the state, the rights of a defrauded vendor prevail

his claim in the bankruptcy court as for goods sold and delivered.<sup>55</sup> While mere knowledge of insolvency on the part of the debtor is not sufficient to set aside a sale made to him,<sup>56</sup> it is not essential that the financial statement by the bankrupt shall have been made with intent not to pay, to authorize a rescission, provided it was fraudulent.<sup>57</sup> Nor is it necessary that the false representation should be the sole and exclusive consideration for the credit, only that it was the material consideration without which the credit would not have been given;<sup>58</sup> thus the representations made to a commercial agency of the financial standing of the purchaser, if false, would hardly by itself be sufficient to warrant a rescission of the sale and a recovery of the property, but in connection with the representations made to the vendor or his agent, it would be.<sup>59</sup> The subsequent discovery of the insolvency of the debtor through bankruptcy proceedings will not be permitted as an excuse for a creditor to rescind the sale, but actual fraudulent representation in obtaining the property must be shown by the creditor, and the disaffirmance of the contract must have been promptly made.<sup>60</sup> Prior to the amendment of 1910, the trustee took no better title than the bankrupt, in property thus obtained by the bankrupt. Accordingly the defeasible title of the bankrupt which could be determined by a prompt disaffirmance of the contract by the vendor passed to the trustee.<sup>61</sup>

over the claims of a lien creditor, goods fraudulently obtained from a vendor by the bankrupt do not pass to the estate. In re Gold, 210 Fed. 410, 31 A. B. R. 18.

Where under state law vendor is not entitled to rescind where property fraudulently obtained has been transferred to an innocent purchaser for a valuable consideration, or a lien has been acquired thereon for a valuable consideration, no right to reclaim from estate of buyer exists. In re Whatley Bros., 199 Fed. 326, 29 A. B. R. 64.

55—In re Stewart, 178 Fed. 463, 24 A. B. R. 474.

But see, Standard Varnish Works v. Haydock, 143 Fed. 318, 16 A. B. R. 286.

56—In re Berg, 183 Fed. 885, 25 A. B. R. 170.

57—Ellet-Kendall Shoe Co. v. Ward, 187 Fed. 982, 26 A. B. R. 114; In re Epstein, 109 Fed. 874, 6 A. B. R. 60, and cases cited; In re O'Connor, 114 Fed. 777, 7 A. B. R. 428; Contra, In re Levi v. Picard, 155 Fed. 262, 17 A. B. R. 430.

58—In re Gany, 103 Fed. 930.

59—In re Appel Suit & Cloak Co., 198 Fed. 322, 28 A. B. R. 818; In re Hamilton Furniture & Carpet Co., *supra*; In re Weil, *supra*; In re Epstein, *supra*.

Property sold to bankrupt in reliance upon his rating with a commercial agency to which the bankrupt has made a false report may be recovered by the vendee. In re Johnson, 208 Fed. 164, 30 A. B. R. 787.

60—In re Sweeney, 168 Fed. 612, 21 A. B. R. 866.

61—Donaldson v. Farwell, *supra*.



Where goods are obtained through misrepresentation by a firm, composed of several members, a return of the goods or their proceeds will be valid, as against the trustee of two of the creditors, if the goods have not lost their identity.<sup>62</sup> But it is not in harmony with the purpose of the bankruptcy act, which is to secure equality between creditors, to permit all creditors who sold goods to a bankrupt, which they can identify, to rescind the sales and reclaim the goods on the ground of fraud, where other creditors having an equal right to a rescission, cannot enforce it because their goods were disposed of. Clear proof of fraudulent representations is required.<sup>63</sup>

### § 845. Rents and profits.

#### § 846. — In case of mortgage.

Rents and profits arising from a bankrupt's estate after bankruptcy and collected by the trustee, belong to the general estate, and not to the mortgagee, notwithstanding the mortgagee's security is insufficient, the mortgage itself not pledging them by its terms, and no proceedings having been taken to sequester them as by obtaining the appointment of a receiver before bankruptcy or by direct application to the bankruptcy court afterward,<sup>64</sup> or by foreclosure.<sup>65</sup>

If the mortgagee purchases mortgaged property at a foreclosure sale subject to the taxes then due and the property remains in the possession of the trustee during the redemption period and the latter collects the rents, the mortgagee is not entitled to be reimbursed out of such rents, for taxes due on the property when sold;<sup>66</sup> nor is a second mortgagee entitled, the

62—*Montgomery v. Bucyrus Mach. Wks.*, 14 N. B. R. 193, 92 U. S. 257, 23 L. ed. 656.

63—*In re Murphy-Barbee Shoe Co.*, 11 A. B. R. 428; *In re O'Connor*, 112 Fed. 666, 7 A. B. R. 428.

64—*In re Chase*, 133 Fed. 79, 13 A. B. R. 294; *In re Cass*, 6 A. B. R. 721; *In re Dole*, 110 Fed. 926, 7 A. B. R. 21; but see *In re Sink*, 2 N. B. N. R. 645; comp. *In re Snedaker*, 4 N. B. R. 43; *In re Ellis*, 107 Mass. 1; *Foster v. Rhodes*, 10 N. B. R. 533, Fed. Cas. No. 4981; *Hays v.*

*Dickinson*, 15 Id. 350; *In re Bennett*, 12 Id. 257, 2 Hughes 156, Fed. Cas. No. 1313; *In re Torchia*, 188 Fed. 207, 26 A. B. R. 579.

65—The trustee has the right to the rents and profits upon property mortgaged until the mortgagee asserts his right of entry and forecloses his lien and bars the equity of redemption. *In re Hasie*, 206 Fed. 789, 30 A. B. R. 83.

66—*In re Hollenfeltz*, 1 N. B. N. 503, 94 Fed. 629, 2 A. B. R. 499; *In re Veitch*, 101 Fed. 251, 4 A. B. R. 112.

first consenting, to take and hold the mortgaged property to foreclose his mortgage, as against the trustee, nor to appropriate the rents and profits to the payment of his debt.<sup>67</sup>

An agreement by a mortgagor to collect the rents from the mortgaged property, which was in his possession, and to pay the same to the mortgagee on the mortgage debt, does not make him the agent of the mortgagee to collect such rents, nor give to the mortgagee right to such as are uncollected or have not been paid over at the time the mortgagor is adjudged a bankrupt.<sup>68</sup>

### § 847. — In case of fraudulent conveyance.

A tenant of a fraudulent vendee or mortgagee in possession after bankruptcy may offset against his liability for rent, such amounts as have been paid by him for taxes, interest and repairs.<sup>69</sup>

A decree of a state court in a suit by the trustee to set aside an alleged fraudulent conveyance and for an accounting for rents and profits cannot be reopened in the bankruptcy court, and any amount paid by the defendant therein under the decree of the state court cannot be recovered from the trustee.<sup>70</sup>

### § 848. — In case of general assignment.

Profits realized in the operation of the bankrupt's business by the general assignee for creditors do not pass to the trustee.<sup>71</sup>

### § 849. — Building and loan association.

Generally, upon the bankruptcy of a member of a building and loan association the right to impose and collect fines ceases. Such bankruptcy does not, however, operate as a voluntary withdrawal, so as to give the association the right to retain the profits theretofore actually earned and duly credited. But the trustee of the bankrupt estate is not entitled to credit for profits or interest on the dues paid for the time between the last apportionment and credit of profits and the bankruptcy.<sup>72</sup>

67—Hutchins v. Iron Wks., 8 N. B. R. 458, Fed. Cas. No. 6952.

68—In re Dole, 110 Fed. 926, 7 A. B. R. 21.

69—In re Chase, 133 Fed. 79, 13 A. B. R. 294.

70—In re Chase, 133 Fed. 97, 13 A. B. R. 294.

71—Gill v. Bell's Knitting Mills, 128 App. Div. (N. Y.) 691, 21 A. B. R. 282.

72—In re Davis, 180 Fed. 148, 25 A. B. R. 1.

**§ 850. Property sold prior to bankruptcy.**

Whether property sold by the bankrupt prior to his adjudication nevertheless passes to his trustee, depends upon whether the sale has been completed by delivery or not.<sup>73</sup>

**§ 851. Stocks, bonds and other securities.**

Any stock, bonds or other securities of the bankrupt having a transferable value upon his adjudication become a part of the assets of the estate for the benefit of creditors, title to which passes to the trustee without the necessity of transfer unless in a foreign corporation, in which event the necessary assignment must be made by the bankrupt.

The trustee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of bankruptcy proceedings;<sup>74</sup> and he is entitled to the surplus over and above the amount necessary to liquidate the debt, where the security of a creditor is reduced to money,<sup>75</sup> and to any and all securities held for the debt where a secured creditor proves his claim as unsecured and thereby relinquishes his right to the securities.<sup>76</sup>

A creditor cannot be compelled to part with or surrender his security because he has received a dividend, or as a condition of receiving a dividend, after crediting the present value of the security as determined by arbitration or by litigation, as the court directs.<sup>77</sup>

**§ 852. Property held in trust by bankrupt.**

The possession by a bankrupt of assets, though by a defeasible title, makes a sufficient title for his trustee, until it shall be successfully disputed,<sup>78</sup> but a trustee takes no title to property

73—A sale of hops by the bankrupt held fully consummated before bankruptcy where prior to the adjudication the hops had been boiled, and had been inspected, accepted and branded by the purchaser, though not removed from the bankrupt's premises. *Williamson v. Richardson*, 205 Fed. 245, 30 A. B. R. 559.

74—*Sparhawk v. Drexel*, 12 N. B. R. 450, Fed. Cas. No. 13204.

75—*In re Newland*, 9 N. B. R. 62, 7 Ben. 63, Fed. Cas. No. 10171.

76—*In re Granger*, 8 N. B. R. 30, Fed. Cas. No. 5684.

77—*In re Davison*, 179 Fed. 750, 24 A. B. R. 460.

78—*In re Cobb*, 1 N. B. N. 557, 3 A. B. R. 129, 96 Fed. 821; *In re Beal*, 2 N. B. R. 178, 1 Lowell 323, Fed. Cas. No. 1156.

held by a bankrupt merely in trust, although if the trust be coupled with an interest, he is vested with such interest.<sup>79</sup>

Trustees and receivers in bankruptcy take the assets of the bankrupt, in the absence of fraud, subject to all equitable liens in favor of third persons to the extent that such assets have been augmented by the wrongful act of the bankrupt.<sup>80</sup>

Accordingly, trust funds which have been fraudulently diverted or appropriated by the bankrupt can be recovered from the receiver or trustee whenever such funds are capable of identification,<sup>81</sup> or, if they have been intermingled with the general funds of the estate so as to render their identification impossible, the court of bankruptcy will decree their restitution to the cestui que trust if the unlawful appropriation of the trust funds resulted in increasing the assets of the estate.<sup>82</sup> Where the funds in the hands of the bankrupt at all times exceeded the amount of such trust funds the cestui que trust is entitled to the amount of the fund though it cannot be specifically identified in the hands of the trustee,<sup>83</sup> but, if, at any time after the misappropriation of the funds and mingling them with those of the bankrupt, all money is withdrawn, including that wrongfully commingled, the equities are lost, although moneys from other sources are subsequently placed in the same place.<sup>84</sup> Or if a

79—Walker v. Siegel, 12 N. B. R. 394, Fed. Cas. No. 17085. Checks sent to automobile manufacturers by their selling agent in advance of a delivery of the machines held a trust fund. In re Lindsley & Co., 185 Fed. 684, 25 A. B. R. 239.

80—In re Dunn & Co., 193 Fed. 212, 28 A. B. R. 127. And see Parker v. Bates, 203 Fed. 294, 30 A. B. R. 198; Gage Lumber Co. v. McElowney, 207 Fed. 255, 30 A. B. R. 251.

The amendment of June 25, 1910, to section 47a does not make the receiver or trustee a bona fide purchaser entitling him to hold property received by the bankrupt in trust and misappropriated and commingled with other funds by the bankrupt. In re Dunn & Co., 193 Fed. 212, 28 A. B. R. 127.

81—Welch v. Polley, 177 N. Y. 117, 11 A. B. R. 215, rev'g 86 App. Div. 260; In re Taft, 133 Fed. 511, 13 A. B. R. 417;

In re McIntyre, 185 Fed. 96, 26 A. B. R. 51; Block v. Rice, 167 Fed. 693, 21 A. B. R. 691; In re Dunn & Co., 193 Fed. 212, 28 A. B. R. 127; In re McGehee, 166 Fed. 928, 21 A. B. R. 656.

The cestui que trust of property held by the bankrupt as trustee may follow and retake it from the possession of the trustee in bankruptcy, whether such property remains in the original form or in some other substituted form, so long as it is ascertained to be the same product or the proceeds thereof. In re Dorr, 21 A. B. R. 752.

82—In re Dunn & Co., 193 Fed. 212, 28 A. B. R. 127.

83—In re Royea, 143 Fed. 182, 16 A. B. R. 141.

84—In re Dunn & Co., 193 Fed. 212, 28 A. B. R. 127. And see In re T. A. McIntyre & Co., 181 Fed. 960, 25 A. B. R. 93.

part of the funds so commingled is withdrawn, and the fund reduced to a smaller amount than the trust fund, the latter must be regarded as dissipated except as to this balance. Sums subsequently added to the fund from other sources cannot be subjected to the equitable claim of the cestui que trust.<sup>85</sup>

Where a bankrupt converts a trust fund but later substitutes another fund to make good that converted, the substituted fund is impressed with precisely the same trust as the original fund.<sup>86</sup>

Where goods wrongfully converted by the bankrupt are commingled with his property, the lien of the owner attaches to the entire mass to which his property can be traced.<sup>87</sup>

If the bankrupt purchases merchandise with the trust funds, it is unnecessary to show that the identical merchandise passed into the hands of the trustee, for if the merchandise is commingled with the bankrupt's general stock the lien will apply to a general stock or the proceeds thereof, whether money, credits, or other property, forming a part of the general assets of the estate.<sup>88</sup>

Money due from the bankrupt as trustee, and which cannot be distinguished from other moneys in his possession, or which is due from him only because he has used trust funds for his own purposes, or otherwise misapplied them, cannot be considered as property held in trust by the bankrupt.<sup>89</sup> If money is given another to invest or as security which he misappropriates, so that it does not remain in specie, on his becoming bankrupt the cestui que trust cannot claim the money from the trustee and can only come in *pari passu* with the other creditors.<sup>90</sup>

Where the bankrupt made investments after the receipt of a trust fund, it will be presumed that they were made with other

85—*In re Dunn & Co.*, 193 Fed. 212, 28 A. B. R. 127.

86—*In re City Bank of Dowagiac*, 186 Fed. 250, 25 A. B. R. 236.

87—*Smith v. Township of Au Gres*, 150 Fed. 257, 9 L. R. A. (N. S.) 876, 17 A. B. R. 745; *Erie R. Co. v. Dial*, 140 Fed. 689, 15 A. B. R. 559. See *In re Brunsing, Tolle & Postel*, 169 Fed. 668, 22 A. B. R. 129.

88—*In re Brunsing, Tolle & Postel*, 169 Fed. 668, 22 A. B. R. 129.

89—*In re Dorr*, 196 Fed. 292, 28 A. B. R. 505; *In re Kearney*, 167 Fed. 995,

21 A. B. R. 721; *In re Richard*, 2 N. B. R. 1029, 104 Fed. 792; *Hosmer v. Jewett*, 6 Ben. 208, Fed. Cas. No. 6713. See, also, *In re Marsh*, 116 Fed. 396, 8 A. B. R. 576, *In re Mulligan*, 116 Fed. 715, 9 A. B. R. 8.

90—*In re See*, 209 Fed. 172, 31 A. B. R. 360; *In re Faneway*, 4 N. B. R. 26; *Ungewitter v. Von Sachs*, 3 N. B. R. 178, 4 Ben. 167, Fed. Cas. No. 14343; *In re Swift et al.*, 5 A. B. R. 232; see *In re Richard*, 2 N. B. R. 1029, 104 Fed. 792.

than trust funds and no lien will attach thereto where it is not shown that at the time the investments were made there was not enough cash remaining to repay the trust fund.<sup>91</sup>

Where bonds illegally issued by a city were sold by the bankrupt and the proceeds applied to the establishment of a factory upon which the city was given a mortgage, it was held that the city was not entitled to priority as against general creditors, nor was it entitled to possession of the property, the other assets of the bankrupt being insufficient to pay its debts.<sup>92</sup>

Where a creditor has received from his debtor money, under circumstances which are entirely lawful, it is free from all trust and claim on behalf of the cestui que trust, unless it be shown that the creditor knew of the trust, and passes to the creditor's trustee.<sup>93</sup>

One claiming the right to recover a sum from a trustee on the ground that it was a trust fund held by the bankrupt, has the burden of proving that such fund was in some form a part of the bankrupt's estate, when it passed into the hands of the trustee,<sup>94</sup> subject to the qualification that when trust property is traced into a new form in the hands of the bankrupt or his trustee, it will be presumed that it entered exclusively into the new form, and if, as a matter of fact other property is also represented, the burden is on the trustee to show what proportion such other property bears to whole property and what he cannot distinguish will be considered trust property.<sup>95</sup>

### § 853. Property held in trust for bankrupt.

Whether the income and profits of a fund held in trust for the benefit of the bankrupt pass to his trustee depends upon whether under the laws of the state where the trust was created the interest of the beneficiary is inalienable or not.<sup>96</sup> The

91—*In re City Bank of Dowagiac*, 186 Fed. 413, 25 A. B. R. 276.

92—*In re Manistee Watch Co.*, 197 Fed. 455, 28 A. B. R. 316.

93—*White v. Jones*, 6 N. B. R. 175, Fed. Cas. No. 17550.

94—*In re Leigh*, 208 Fed. 486, 31 A. B. R. 379; *In re Acheson Co.*, 170 Fed. 427, 22 A. B. R. 338; *In re Kearney*, 167 Fed. 995, 21 A. B. R. 721; *In re Marsh*, 116 Fed. 396, 8 A. B. R. 576.

The burden of showing that his property has been wrongfully mingled in a mass of the property of the bankrupt is upon the owner; but when this is done the burden shifts to the trustee. *Smith v. Mottley*, 150 Fed. 266, 17 A. B. R. 863, rev'g 143 Fed. 407, 16 A. B. R. 226.

95—*In re Dorr*, 21 A. B. R. 752.

96—*In re McKay*, 143 Fed. 671, 16 A. B. R. 238; *McNaboe v. Marks*, 51 Misc. (N. Y.) 207, 16 A. B. R. 767.

trustee, ordinarily, has no title to the income, or any aliquot part thereof, derived from a sum deposited in trust, such income to be applied to the support of the cestui que trust and his wife, and for the maintenance and education of their children, the annuity and principal sum being declared to be inalienable by the grantees, and not subject to their debts or control,<sup>97</sup> and where property is left in trust to the use of a person with power of appointment, and, even if the power of appointment be not exercised, the person who would take thereafter remained uncertain until the death of the former, the latter takes no estate during the life of the former that can pass to his trustee in bankruptcy.<sup>98</sup> The surplus income of a trust fund beyond the sum necessary for the support of the beneficiary passes to the trustee in bankruptcy of the beneficiary.<sup>99</sup>

Any property, in which there is a secret trust for the bankrupt's benefit no matter how much covered up, passes to the trustee.<sup>1</sup> Hence where land is sold under a deed of trust and bid in by the secured creditor for enough to cover his debt and the amount of a superior lien, and conveyed to him without collecting the bid, there is a resulting trust in favor of the original owner which might be subjected in equity to his debts and therefore passes to his trustee in bankruptcy.<sup>2</sup>

Trusts under a will, see ante, section 835.

### § 854. Claims against the United States.

There is considerable distinction between the character of the various claims which arise against the government, which distinction necessarily determines whether they do or do not pass to the trustee in bankruptcy. In the first place, such claims as are choses in action upon which a suit can be maintained as a matter of legal right and which arise out of a contract, express or implied, and for which the government is liable, if there be a jurisdiction to hear and determine the same, and in which there is no element of a donation in the payment ultimately

97—*Durant v. Ins. Co.*, 16 N. B. R. 324, Fed. Cas. No. 4188.

98—*In re Wetmore*, 108 Fed. 520, 6 A. B. R. 210.

99—*Brown v. Barker*, 68 App. Div. (N. Y.) 592, 8 A. B. R. 450.

1—*In re Quackenbush*, 102 Fed. 282,

2 N. B. N. R. 964, 4 A. B. R. 274; *In re Berner*, 2 N. B. N. R. 268; *In re Hoffman*, 2 N. B. N. R. 969, 102 Fed. 979, 4 A. B. R. 331.

2—*In re Dunavant*, 1 N. B. N. 542, 3 A. B. R. 41, 96 Fed. 542.

made,<sup>3</sup> pass in bankruptcy and may be prosecuted by the trustee or by the purchaser in bankruptcy proceedings.<sup>4</sup>

Secondly, the title to what is known as abandoned and captured property not having been divested by capture, and being a claim for the proceeds in the treasury;<sup>5</sup> or a right to recover a portion of the sum awarded by the tribunal of arbitration at Geneva when paid, which constituted a national fund, in which there was a moral obligation on the part of the government to do justice to those who had suffered in property,<sup>6</sup> or a claim for a part of the award made by the Spanish and American Claims Commission, or for property taken by the army in states which had not seceded, but for which there would be a right of action, if brought within the statutory period, are causes of action which pass to the trustee, although no jurisdiction existed at the time in which such claims could be prosecuted.

Third. A mere expectancy, such as a claim founded on no legal right known to courts of law or equity, but which is an appeal to the clemency of congress for the redress of an injury, where there is no obligation on the part of the government, and the granting of relief is purely a matter of legislative discretion, cannot be regarded as property and does not pass in bankruptcy.<sup>7</sup>

By the Federal law all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and all powers of attorney, or orders, for receiving payment of any such claim or of any part or share thereof, are absolutely null and void, unless executed after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof,<sup>8</sup> and where the bankrupt assigns a claim against the United States before the allowance thereof and the issuance of a warrant for the payment thereof, the assignee is not entitled to the proceeds.<sup>9</sup> Although, therefore, a claim

3—*Phelps v. McDonald*, 99 U. S. (9 Otto) 298, 25 L. ed. 473.

4—*McKay's Case*, 27 C. Cls. R. 422; *Burk's Case*, 13 Id. 241; *Campbell's Case*, 28 Id. 512.

5—*Klein v. U. S.* 13 Wall. 128, 20 L. ed. 519; *Erwin v. U. S.*, 19 N. B. R. 172, 97 U. S. (7 Otto) 392, 24 L. ed. 1065.

6—*Williams v. Heard*, 140 U. S. 529, 35 L. ed. 550.

7—*Campbell's Case*, 28 C. Cls. R. 512; *Dockery's Case*, 26 C. Cls. R. 148; *Heard v. Sturgis*, 146 Mass. 545; *Taft v. Marisly*, 120 N. Y. 474; *Brooks v. Ahrens*, 68 Md. 212; *Kingsbury v. Mattocks*, 81 Me. 310; *Estate of Moore*, 26 C. Cls. R. 254; *Heirs of Emerson v. Hall*, 13 Peters R. 409, 415.

8—U. S. Rev. Stat. 3477.

9—*Guarantee Title & Trust Co. v.*



against the government is not assignable, it will pass to the trustee, if of one of the classes indicated above, the bankruptcy proceedings constituting an assignment by law which is valid.<sup>10</sup>

A government award made to the bankrupt after his adjudication for information given prior thereto passes to his trustee.<sup>11</sup>

### § 855. Wages.

Wages or salary due the bankrupt at the date of the filing of the petition belong to the trustee in the absence of a claim of exemption,<sup>12</sup> but wages earned after adjudication become the property of the bankrupt,<sup>13</sup> clear of any claim of a creditor holding an assignment thereof executed prior to the filing of the petition.<sup>14</sup> It has been held that the trustee is entitled to have the compensation apportioned between himself and the bankrupt in proportion to the value of the services rendered before and after the bankruptcy, where the bankrupt, under a general contract, has rendered partial service, but has not completed the contract, prior to filing the petition, but subsequently fulfills the same; unless the contract is contingent upon full performance of the services.<sup>15</sup>

The earnings of a minor son who has been emancipated by his father, do not pass to the trustee of the latter;<sup>16</sup> nor is a relinquishment by a parent of his rights to the future earnings of a minor child fraudulent as to creditors though the parent be insolvent at the time.<sup>17</sup>

First Nat. Bank of Huntingdon, 185 Fed. 373, 26 A. B. R. 85; Nat. Bank of Commerce of Seattle v. Downie, 218 U. S. 345, 54 L. ed. 1065, 25 A. B. R. 199, aff'g 161 Fed. 839, 20 A. B. R. 531.

10—Phelps v. McDonald, 16 N. B. R. 217, 99 U. S. (9 Otto) 298, 25 L. ed. 473; s. c. 19 N. B. R. 187; Erwin v. U. S. 19 N. B. R. 172, 97 U. S. (7 Otto) 392, 24 L. ed. 1065.

11—In re Ghazal, 174 Fed. 809, 23 A. B. R. 178, rev'g 163 Fed. 602, 20 A. B. R. 807.

12—In re Driggs, 171 Fed. 897, 22 A. B. R. 621.

13—In re Harrington, 200 Fed. 1010, 29 A. B. R. 666; Leitch v. Northern Pac. Ry. Co., 95 Minn. 35, 14 A. B. R. 409;

In re Karns, 148 Fed. 143, 16 A. B. R. 841; In re Lineberry, 183 Fed. 338, 25 A. B. R. 164; In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168.

14—In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168; In re West, 128 Fed. 205, 11 A. B. R. 782; contra, Mollin v. Wenkam, 209 Ill. 252, 13 A. B. R. 210; Citizens Loan Ass'n v. Boston & Maine R. Co., 196 Mass. 528, 14 L. R. A. (N. S.) 1025, 124 Am. St. 584, 19 A. B. R. 650.

15—In re Jones, 4 N. B. R. 114, Fed. Cas. No. 7448.

16—In re Dunavant, 1 N. B. R. 542, 96 Fed. 542, 3 A. B. R. 41.

17—Merrill v. Hussey, 101 Me. 439, 16 A. B. R. 816.

## CHAPTER XXII

### LIENS

- § 856. Valid liens recognized.
- § 857. Comparison of acts of 1898 and 1867.
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- § 914. Materialman's or mechanic's lien.
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- § 916. Liens held by officers of bankrupt corporation.
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- § 922. — In general.
- § 923. — Reclamation.
- § 924. — Stoppage in transitu.

### § 856. Valid liens recognized.

When not prohibited by the bankruptcy act, liens and preferences are entitled to the same protection from the bankruptcy courts as other legal rights;<sup>1</sup> and whatever is treated as a valid levy and a valid and subsisting lien by the state laws and courts will be so treated by the bankruptcy courts provided it is not in conflict with the provisions of the bankruptcy act.<sup>2</sup>

The declaration in *Mueller v. Nugent*,<sup>3</sup> that the filing of the

1—*Barron v. Morris*, 14 N. B. R. 371, Fed. Cas. No. 1055.

2—In *re Yoké Vitrified Brick Co.*, 180 Fed. 235, 25 A. B. R. 18; In *re Hersey*, 171 Fed. 1004, 22 A. B. R. 863; *Crim v. Woodford*, 136 Fed. 34, 14 A. B. R. 302; *Gardner v. Cook*, 7 N. B. R. 346, Fed. Cas. No. 5226; In *re Bigelow*, 1 N. B. R. 202, 2 Ben. 469, Fed. Cas. No. 1395; In *re Roseberry*, 16 N. B. R. 340, 8 Biss. 112, Fed. Cas. No. 12052; In *re Burt & Towne*, 13 N. B. R. 137, 12 Blatch. 252, Fed. Cas. No. 2209; *The "Home,"* 18

N. B. R. 557, Fed. Cas. No. 6657; *Ex p. Tremont Nail Co.*, 16 N. B. R. 448, Fed. Cas. No. 14168; In *re Coan Carriage Mfg. Co.*, 12 N. B. R. 203, 6 Biss. 315, Fed. Cas. No. 2915; In *re Mitchell*, 8 N. B. R. 47, Fed. Cas. No. 9657; *Armstrong v. Rickey*, 2 N. B. R. 150, Fed. Cas. No. 546.

Valid liens recognized though not recorded. In *re Lane Lumber Co.*, 210 Fed. 82, 31 A. B. R. 792.

3—184 U. S. 1, 46 L. ed. 405.

petition in bankruptcy is a caveat to all the world, has no application to those holding substantial claims antedating the filing, to liens upon or titles to property claimed as property of the bankrupt. In the absence of proper proceedings to make such claimants parties to the bankruptcy proceedings they are strangers thereto and their claims are unaffected thereby.<sup>4</sup> If the property of a bankrupt is subject to valid liens which exceed in value the estate encumbered by them, there is no necessity for the exercise of the powers of the bankruptcy court.<sup>5</sup>

### § 857. Comparison of acts of 1898 and 1867.

The provision in section 67d is much broader than that in the act of 1867, since that applied only to mortgages, while this applies to any liens. No distinction is made between the different kinds of liens, whether given by the laws of the United States or of the different states or by the act of the parties, but each is recognized and respected according to its dignity. Whenever the creditor has the right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, he has a lien on such property for the security of the debt.<sup>6</sup> All valid liens which exist on a bankrupt's property when the proceedings in bankruptcy are commenced are preserved and will be respected by the bankruptcy court, and enforced and allowed to be paid out of the proceeds of the property on which they are liens.<sup>7</sup>

### § 858. Nature and validity of liens determined by state law.

The courts of bankruptcy follow the state law in ascertaining the validity and priority of liens against the property of the bankrupt. If under the state law the lien is valid against the trustee it is valid against him under the bankruptcy law and vice versa.<sup>8</sup> The Bankruptcy Act, however, recognizes the State Law

4—In re Rathman, 183 Fed. 913, 25 A. B. R. 246.

5—McKean v. Rackey, 3 McLean, 235, Fed. Cas. No. 8891; In re Dillard, 9 N. B. R. 8, 2 Hughes 190, Fed. Cas. No. 3912; see also In re Lambert, 2 N. B. R. 138, Fed. Cas. No. 8026; Mattock v. Farrington, 2 Hask. 331, Fed. Cas. No. 9298.

6—Meeks v. Whatley, 10 N. B. R. 498.

7—In re Grinnell, 9 N. B. R. 35, 7 Ben. 42, Fed. Cas. No. 5830.

8—In re United States Lumber Co., 206 Fed. 236, 30 A. B. R. 682; In re Dancy Hardware & Furniture Co., 198 Fed. 336, 28 A. B. R. 444; Holt v. Crucible Steel Co. of America, 224 U. S. 262, 56 L. ed. 756, 27 A. B. R. 856, aff'g 174 Fed. 385, 23 A. B. R. 302; Rode & Horn

only to the extent of giving effect to valid liens thereunder existing at the date of the filing of the petition.<sup>9</sup>

If the filing of suit or notice is merely to enforce a perfected lien, the limitation within which such filing must be done is governed by the *lex fori* in the state courts and does not apply to the bankruptcy court, which gives one year in which to file claims.<sup>10</sup>

Whether an instrument is a deed of trust or a chattel mortgage must be determined by the laws of the state where the property is situated.<sup>11</sup>

### § 859. Rights of trustee in general.

Prior to the amendment of June 25, 1910, to section 47, subdivision "a" (2) of the act, it was held that the trustee could not acquire a better title than the bankrupt had, except as to property which had been transferred contrary to the provisions of the law. He took the estate subject to all liens and equitable assignments valid as against the bankrupt,<sup>12</sup> and subject to incumbrances other than such as were void for want of record or for other reasons would not have been valid liens as against

*v. Phipps*, 195 Fed. 414, 27 A. B. R. 827; *Detroit Trust Co. v. Pontiac Savings Bank*, 196 Fed. 29, 27 A. B. R. 821; *Sturdivant Bank v. Schade*, 195 Fed. 188, 27 A. B. R. 673, rev'g 189 Fed. 636, 26 A. B. R. 916; *In re Ottenwess & Huxoll*, 193 Fed. 851, 27 A. B. R. 579; *In re Jackson Brick & Tile Co.*, 189 Fed. 636, 26 A. B. R. 915; *Ritchie County Bank v. McFarland*, 183 Fed. 715, 24 A. B. R. 893, aff'g 174 Fed. 859, 23 A. B. R. 530; *In re McDonald*, 173 Fed. 99, 23 A. B. R. 51, aff'g 21 A. B. R. 358; *In re Hickerson*, 162 Fed. 345, 20 A. B. R. 682; *In re Barker*, 20 A. B. R. 674; *Moore v. Green*, 145 Fed. 472, 16 A. B. R. 648; *Morgan v. First Nat. Bank of Mannington*, 145 Fed. 466, 16 A. B. R. 639; *In re Rogers & Woodward*, 132 Fed. 560, 13 A. B. R. 75; *Deland v. Miller & Cheney Bank*, 119 Iowa 368, 11 A. B. R. 744; *In re Cozart*, 3 N. B. R. 126, Fed. Cas. No. 3313; *contra: In re O'Callaghan*, 30 A. B. R. 97.

*Dyer* held not entitled to lien under

Pennsylvania Act of 1907 (P. L. 228). *In re Kemmerer*, 205 Fed. 108, 30 A. B. R. 72.

*Commission merchant* selling consignment of goods shipped by customer held a mere debtor of such customer and latter held not entitled to lien on funds in hands of trustee, especially where same were not identified as being proceeds of sale. *In re Emerson, Marlow & Co.*, 199 Fed. 95, 29 A. B. R. 173.

9—*In re Sterin & Levi*, 26 A. B. R. 535. See also *ante* § 856.

10—*In re Sabin*, 12 N. B. R. 142, Fed. Cas. No. 12194; *In re Brunquest*, 14 N. B. R. 529, 7 Biss. 208, Fed. Cas. No. 2055; *In re Duke*, 9 N. B. R. 430, Fed. Cas. No. 4227.

11—*In re Southern Textile Co.*, 174 Fed. 523, 23 A. B. R. 172.

12—*York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 15 A. B. R. 633, rev'g 135 Fed. 52, 14 A. B. R. 52; *In re Hanna et al.*, 105 Fed. 587, 5 A. B. R. 127; *In re Wright*, 1 N. B. R. 381, 2

the claims of the creditors of the bankrupt;<sup>13</sup> and could dispute any that either the bankrupt or any of his creditors could have legally objected to,<sup>14</sup> and hold property of the bankrupt as against a chattel mortgage or a contract of conditional sale which was void as against general creditors for want of record.<sup>15</sup>

By the terms of that amendment the trustee "as to all property in the custody of or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

By virtue of 67c of the original act, the trustee was subrogated to a lien by legal or equitable proceedings, if created within four months, and could enforce it for the benefit of the estate. If created beyond four months, from the filing of the petition, it was valid as against the trustee, under both the original and the amended acts. The class of cases, unprovided for by the original act and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings. The amendment was passed to overcome the effect of the decision of the supreme court in *York Manufacturing Company v. Cassel*,<sup>16</sup> under which liens valid as against the bankrupt were held valid as against the trustee irrespective of the rights of creditors, and under the amendment the trustee may

A. B. R. 364, 96 Fed. 187; In re Kansas City S. & M. Mfg. Co., 9 N. B. R. 76, Fed. Cas. No. 7610; Duplan Silk Co. v. Spencer, 115 Fed. 689, 8 A. B. R. 367. See *ante* § 747.

Statutory term "creditor" as used in Kentucky recording act does not include trustee in bankruptcy. *Toof v. City Nat. Bank*, 206 Fed. 250, 30 A. B. R. 79.

13—In re Emslie, 2 N. B. N. R. 992, 102 Fed. 291, 4 A. B. R. 126; In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re Legg, 1 N. B. N. 420, 96 Fed. 326, 2 A. B. R. 805; In re Booth, 2 N. B. N. R. 377, 98 Fed. 975, 3 A. B. R. 574; In re Burkle, 116 Fed. 766, 8 A. B. R. 542.

14—*Skilton v. Codington*, 185 N. Y.

80, 15 A. B. R. 810; In re Barker, 20 A. B. R. 674; In re Leigh Bros., 1 N. B. N. 425, 2 A. B. R. 606, s. c. 1 N. B. N. 526, 96 Fed. 806; In re Kindt, 2 N. B. N. R. 269; In re McNamara, 2 N. B. N. R. 341; *Press Post Printing Co. v. London Printing and Pub. Co.*, 2 N. B. N. R. 774; contra: In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; In re Ohio Co-op. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re Metropolitan Store & Saloon Fixture Co., 15 A. B. R. 119.

15—In re Andrae & Co., 117 Fed. 561, 9 A. B. R. 135. See *post* § 902.

16—*York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 159 B. R. 633, *rev'g* 135 Fed. 52, 14 A. B. R. 52.

avoid any lien void as to creditors.<sup>17</sup> The language of the amendment aptly refers to such rights, remedies, and powers as a creditor holding a lien by legal or equitable proceedings or a judgment creditor holding an execution duly returned unsatisfied is entitled to under the law rather than to the rights, remedies, and powers of a creditor who has actually fastened a lien on the property or obtained a judgment with an execution returned unsatisfied, and its application is not restricted to cases in which a creditor has in fact a lien by legal or equitable proceedings or has levied an execution which has been returned unsatisfied.<sup>18</sup>

Where an alleged lien on certain property is held to be invalid, the trustee is entitled to the property free of any lien, even though an appeal is taken from the decree declaring the lien invalid, especially where no stay has been secured.<sup>19</sup>

### § 860. Trustee to enforce creditors' rights.

Section 67b of the act provides that, "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

This practically means that, if at the time the bankruptcy proceedings are commenced, there are any outstanding rights which the creditors of the bankrupt or any one of them might enforce, the trustee is subrogated to such rights and may enforce them for the benefit of the estate. It will be observed that such rights are thus preserved, but what was previously available to possibly but a limited number of the creditors, is by the act given for the benefit of all. The trustee so far represents the general creditors that, when they wish to set aside a fraudulent conveyance, he can attack the same though the bankrupt could not.<sup>20</sup>

17—In re Hartdagen, 189 Fed. 546, 26 A. B. R. 532; Sturdivant Bank v. Schade, 195 Fed. 188, 27 A. B. R. 673, rev'g In re Jackson Brick & Tile Co., 189 Fed. 636, 26 A. B. R. 916, and see cases cited in *ante*, § 748.

18—In re Calhoun Supply Co., 189 Fed.

537, 26 A. B. R. 528; In re Bazemore, 189 Fed. 236, 26 A. B. R. 494. See also *ante*, § 748.

19—In re National Lock & Metal Co., 155 Fed. 690, 19 A. B. R. 106.

20—Sec. 67e, Act of 1898; Patten v. Carley, 8 A. B. R. 482; In re New York

Under the former act there was at first much doubt as to the power of a trustee to bring a judgment creditor's action,<sup>21</sup> but the authorities now generally recognize the trustee as so far a judgment creditor as to have a proper standing in an action to reach equities beyond the domain of legal remedies,<sup>22</sup> which right the present act<sup>23</sup> seems to have settled. The title to the bankrupt's property and to the rights of action to recover it are vested by the adjudication in the trustee, and thereafter he must bring the action. He may abide by the result of the adjudication dissolving an attachment or the like, or he may retain the benefit of the attachment if for the good of the estate.<sup>24</sup>

If a lien be invalid as to one creditor but valid as to others, or only one may enforce his rights against it, the trustee can avoid it only to the extent of the claim of such creditor.<sup>25</sup>

### § 861. Trustee is proper party to attack liens.

The trustee is the proper person to attack chattel mortgages, bills of sale, contracts of conditional sale and bonds for the sale of real estate for want of record and other like grounds of avoidance;<sup>26</sup> to recover the property held under levy by the sheriff, the proceeds of property sold on execution and any rents collected by him in a case where the liens acquired by a creditor by judgment, judgment creditor's bill or execution are dissolved by an adjudication in bankruptcy,<sup>27</sup> or to recover property which was given as a voidable preference.<sup>28</sup>

Economical Printing Co., 110 Fed. 514, 6 A. B. R. 615; In re Leland, 9 N. B. R. 209, 7 Ben. 156, Fed. Cas. No. 8230; Bradshaw v. Klein, 1 N. B. R. 146, 2 Biss. 20, Fed. Cas. No. 1790; In re Hartman, 185 Fed. 196, 26 A. B. R. 76.

21—In re Collins, 12 N. B. R. 379, 12 Blatch. 548, Fed. Cas. No. 3007; Cook v. Whipple, 55 N. Y. 150.

22—Southard v. Benner, 72 N. Y. 424; In re Metzger, 2 N. B. R. 114, Fed. Cas. No. 9510; In re Duncan, 14 N. B. R. 18, 8 Ben. 365, Fed. Cas. No. 4131; Barker v. Barker's Ass., 12 N. B. R. 474, 2 Woods 87, Fed. Cas. No. 986.

23—Sec. 70e, Act of 1898, Sec. 47a (2) as amended in 1910; Patten v. Carley, 8 A. B. R. 482.

24—Watschke v. Thompson, 85 Minn. 105, 7 A. B. R. 504. See also, § 896.

25—In re N. Y. Economical Printing Co., 110 Fed. 514, 6 A. B. R. 615.

26—In re Adams, 1 N. B. N. 503, 97 Fed. 188, 2 A. B. R. 415; In re Loud, 1 N. B. N. 502; In re Wright, 1 N. B. N. 381, 96 Fed. 187, 2 A. B. R. 364; In re Booth, 2 N. B. N. R. 377, 98 Fed. 975, 3 A. B. R. 574.

27—In re Fellerath, 1 N. B. N. 292, 95 Fed. 121, 2 A. B. R. 40; In re Kenney, 2 N. B. N. R. 141, 97 Fed. 554, 3 A. B. R. 353; In re Kenney, 105 Fed. 897, 5 A. B. R. 355.

28—In re McLam, 97 Fed. 922, 3 A. B. R. 245; In re Burrus, 97 Fed. 926, 3 A. B. R. 296.



A trustee can take advantage of the fact that a chattel mortgage is void for want of filing, by simply taking possession of the property, but if such chattel mortgage has been once filed and is claimed to be invalid for failure to refile, he must take proper proceedings to have such invalidity established by a competent court; since neither a creditor at large nor a judgment creditor can bring any action against the bankrupt, tending to individually benefit himself.<sup>29</sup>

The trustee may oppose without pleading, the petition of a creditor to be awarded a lien.<sup>30</sup>

### § 862. Lien claimants are not represented by trustee.

The trustee does not represent lien claimants; nor can he do anything to preserve or protect a lien against the estate of the bankrupt, for if he did, it would violate the main purpose of the act, which is to distribute such estate equally among the creditors.<sup>31</sup>

### § 863. Bona fide purchasers.

By the express provisions of sections 67d and 67f, the title of a bona fide purchaser or incumbrancer for value is protected.<sup>32</sup>

To constitute a bona fide purchaser for value, he must not only show that he had no notice, but he must have paid a consideration at the time of the transfer either in money or other property, or by a surrender of existing debts or securities, which would exclude a second purchaser knowing of bankrupt's failure and that seller held under mortgage from bankrupt.<sup>33</sup> An agreement to give security for a loan followed at a subsequent date by the giving thereof pursuant to the agreement is not the giving of security on the date of the loan, and the security so given cannot be held to be for a present consideration.<sup>34</sup>

No person can be a purchaser in good faith if title or security was accepted "in contemplation of or in fraud upon" the bankruptcy act, or if for any reason it would not have been valid

29—In re Harrison, 2 N. B. N. R. 541.

30—In re Mulligan, 116 Fed. 715, 9 A. B. R. 8.

31—Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104.

32—Provision regarding bona fide

purchaser in section 67f corresponds to section 67d. In re Alabama Coal & Coke Co., 210 Fed. 940, 31 A. B. R. 387.

33—Rison v. Knapp, 4 N. B. R. 114, Fed. Cas. No. 11861.

34—In re Thomas, 199 Fed. 214, 29 A. B. R. 945.

against the creditors of the bankrupt, even though a present fair consideration be given.<sup>35</sup>

The standard of good faith on the part of the purchaser is the same as that of a creditor in accepting payments or transfers of property from the bankrupt within the four month period, i. e., he must exercise ordinary prudence and diligence to ascertain whether his transferee can make a valid conveyance.<sup>36</sup> The transferee, to merit condemnation, must have had either actual or constructive notice of the fraudulent intent of the bankrupt.<sup>37</sup>

The knowledge of the mortgagee or purchaser of the fraudulent intent of the bankrupt, as derived from knowledge of his financial condition, is a question of fact, and mere inability to pay debts does not invalidate a transfer or mortgage, if a present valid consideration be given therefor, by one who has no reason to know that a fraud will thereby be committed.<sup>38</sup>

The fact that a voluntary conveyance by the bankrupt was recorded is not conclusive on the question of the good faith of the parties thereto.<sup>39</sup>

### § 864. Liens after bankruptcy.

A petition in bankruptcy is a caveat to all the world preventing interference with the property of the bankrupt by attachment or other means in derogation of the interests of the estate.<sup>40</sup> Accordingly, attachments filed and liens acquired between the filing of the petition and the adjudication or after the adjudication are void;<sup>41</sup> and a levy then made will give the petitioning

35—*McAtee v. Shade*, 185 Fed. 442, 26 A. B. R. 151; *In re Pease*, 129 Fed. 446, 12 A. B. R. 66.

36—*In re Moody*, 134 Fed. 628, 14 A. B. R. 272.

A bona fide purchaser for value under the provisions of 67f is one who obtains the property of a bankrupt without (1) notice or (2) reasonable cause for inquiry. *In re Alabama Coal & Coke Co.*, 210 Fed. 940, 31 A. B. R. 387.

37—But see *Wright v. Sampter*, 152 Fed. 196, 18 A. B. R. 355; *Van Iderstine v. National Discount Co.*, 174 Fed. 518, 23 A. B. R. 345.

38—*In re Mahland*, 184 Fed. 743, 26 A. B. R. 81; *Shelton v. Price*, 174 Fed. 891, 23 A. B. R. 431.

39—*Beasley v. Coggins*, 48 Fla. 215, 12 A. B. R. 355.

40—*Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224, rev'g 105 Fed. 581, 5 A. B. R. 176; *Blake, Moffitt & Towne v. Valentine Co.*, 89 Fed. 691, 1 A. B. R. 372; *Matter of York Silk Mfg. Co.*, 188 Fed. 735, 26 A. B. R. 650, aff'd 192 Fed. 81, 27 A. B. R. 525; *In re Granite City Bank of Dell Rapids*, 137 Fed. 818, 14 A. B. R. 404, aff'g 131 Fed. 1004, 12 A. B. R. 727; *State Bank of Chicago v. Cox*, 143 Fed. 91, 16 A. B. R. 32.

41—*Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262; *In re Franklin Lumber Co.*, 147 Fed. 852, 17 A. B. R. 443; *In*

creditors no greater or different rights from the creditors at large.<sup>42</sup> Those acquiring rights to the bankrupt's property subsequent to such filing are not bona fide purchasers, without notice,<sup>43</sup> as to be such they must be without notice of the rights and equities sought to be enforced at the time of payment of the consideration.<sup>44</sup>

That proceedings to establish a lien were pending at the date of the adjudication is insufficient to establish the same,<sup>45</sup> and the fact that the proceeds of an attachment levied subsequent to the filing of the petition gave the creditor no greater percentage of his debt than that received by other creditors upon distribution of the estate is immaterial.<sup>46</sup> However, a lien existing prior to the filing of the petition is valid though it is not completed by filing within the statutory time until after adjudication,<sup>47</sup> and a mechanic's lien filed after the adjudication of the contractor but within the time required by the state law, is not affected by the adjudication.<sup>48</sup>

After the filing of a petition in bankruptcy either by or against the bankrupt, he is prohibited absolutely from giving a mortgage or any security on property to which he had title at the time of filing the petition and the same will be summarily set aside as void,<sup>49</sup> though there is nothing to prevent him giving the mortgage if on property acquired by him subsequent to the filing of the petition for a debt either due prior thereto or incurred subsequently.

The bankrupt's property is not subject to levy by a sheriff to satisfy a judgment against the trustee, who is entitled to an

re Engle, 105 Fed. 893, 5 A. B. R. 372; citing Kinmouth v. Braentigam, 46 Atl. 769; McLean v. Rackey, 3 McLean 235, Fed. Cas. No. 8891; Sicard v. R. R. Co., 15 Blatch. 525, Fed. Cas. No. 12831; In re Tift, 19 N. B. R. 201, Fed. Cas. No. 14034; Stuart v. Hines, 6 N. B. R. 416; Winters v. Clayton, 18 N. B. R. 533; Smith v. Buchanan, 4 N. B. R. 133, Fed. Cas. No. 13016; Cox v. State Bank of Chicago, 125 Fed. 654, 11 A. B. R. 112.

42—In re Lawrence, 18 N. B. R. 516, Fed. Cas. No. 8133.

43—In re Lake, 6 N. B. R. 542, 3 Biss. 304, Fed. Cas. No. 7992; Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486,

Fed. Cas. No. 2521. See Hull v. Burr, 61 Fla. 625, 26 A. B. R. 897.

44—Marsh v. Armstrong, 11 N. B. R. 125.

45—In re Monroe Lumber Co., 186 Fed. 252, 24 A. B. R. 371.

46—State Bank of Chicago v. Cox, 143 Fed. 91, 16 A. B. R. 32.

47—In re Lillington Lumber Co., 132 Fed. 886, 13 A. B. R. 153.

48—Hildreth Granite Co. v. City of Watervliet, 146 N. Y. Supp. 449, 31 A. B. R. 703, rev'g 30 A. B. R. 789.

49—In re Sims, 16 N. B. R. 251, Fed. Cas. No. 12888.

order restraining such a threatened levy.<sup>50</sup> Funds in the hands of the trustee or deposited by him are not subject to trustee process,<sup>51</sup> even after distribution is ordered, and checks are drawn and countersigned, but not delivered.<sup>52</sup>

### § 865. Liens upon exempt property.

See post, chapter XXIV.

### § 866. Liens void for "want of record or other reasons"—In general.

Section 67a of the act provides that, "Claims which for want of record or for other reasons would not have been valid liens against the claims of the creditors of the bankrupt shall not be liens against his estate." The words used are claims invalid for "want of record or for other reason." Provision is made elsewhere for preferences and transfers in fraud of creditors,<sup>53</sup> and besides, the words "for other reasons" refer to something similar to that which precedes it; as filing or recording a chattel mortgage or bill of sale,<sup>54</sup> filing of notice in the case of mechanic's,<sup>55</sup> or labor liens,<sup>56</sup> or asserting a lien within the time prescribed,<sup>57</sup> or filing a renewal statement,<sup>58</sup> or delivery of possession in case of a sale or chattel mortgage.<sup>59</sup> The liens meant by this provision are those in which something required to be done before they are complete has been omitted. After the proceedings in bankruptcy are commenced a creditor can do nothing to perfect a lien. If it is not then perfect the creditor is pre-

50—In re Neely, 108 Fed. 371, 5 A. B. R. 836.

51—Coward v. Caldwell, 134 Ga. 544, 24 A. B. R. 546; In re Argonaut Shoe Co., 187 Fed. 784, 26 A. B. R. 584.

52—Rockland Sav. Bank v. Alden, 103 Me. 230, 14 L. R. A. (N. S.) 1220, 19 A. B. R. 886.

53—Section 60, Act of 1898.

54—Section 67e, Act of 1898.

55—Press Post Printing Co. v. London Pr. & Pub. Co., 2 N. B. N. R. 774; In re Legg, 1 N. B. N. 420, 96 Fed. 326, 2 A. B. R. 805; In re Ohio Co-op. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re Leigh Bros., 1 N. B. N. 526, 96 Fed. 806; In re Bozeman, 2

A. B. R. 809, 1 N. B. N. 479; In re McKay, 1 N. B. N. 133, 1 A. B. R. 292.

56—In re Beck Provision Co., 2 N. B. N. R. 532; In re Emslie, 2 N. B. N. R. 992, rev'g 2 N. B. N. R. 324, 98 Fed. 716, 2 N. B. N. R. 171, 3 A. B. R. 282, 97 Fed. 924; In re Drolesbaugh, 2 N. B. N. R. 1079.

57—In re Kerby Denis Co., 1 N. B. N. 337, 2 A. B. R. 218, 94 Fed. 818, aff'd 1 N. B. N. 399, 2 A. B. R. 402, 95 Fed. 116.

58—In re Thomas, 199 Fed. 214, 29 A. B. R. 945.

59—Low v. Taylor, 73 N. J. Eq. 406, 19 A. B. R. 879; In re Bellevue Pipe & Foundry Co., 22 A. B. R. 97.

vented from obtaining it.<sup>60</sup> In other words, it is only valid existing liens which are preserved by the act.

The language used in the present act means that claims which for want of record, or for other reasons, are invalid under the laws of the state as construed by the state courts, shall not be liens against the bankrupt's estate.<sup>61</sup> Congress evidently intended to recognize all liens equitable and legal, created under the state laws and to leave them as it found them and not to level them to a common plane;<sup>62</sup> although the lien must be complete when the bankruptcy proceedings are commenced;<sup>63</sup> and, if the statutory requisites have not been complied with, it is invalid.<sup>64</sup>

While a mortgage not recorded until after the adjudication in bankruptcy will be treated as an unrecorded mortgage,<sup>65</sup> the intervention of bankruptcy proceedings within the period prescribed by the state laws for the recording of liens does not dispense with the necessity of such recording to validate the lien as against the trustee.<sup>66</sup>

### § 867. Effect of record.

The provision that claims which for want of record or other reason are invalid against creditors are not valid against bankrupt's estate, implies that claims properly recorded will be. It is this implication with which the provision<sup>67</sup> from the former act corresponds. The provision made in the present act is new.

### § 868. The four-month period.

### § 869. — Fraudulent conveyances and incumbrances.

Section 67e of the act providing that all conveyances, transfers, assignments or incumbrances made or given by the bank-

60—*Goldman v. Smith*, 1 N. B. N. 291, 2 A. B. R. 104.

61—*Rosenbluth v. DeForest & Hotchkiss Co.*, 85 Conn. 40, 27 A. B. R. 359; *Goldman v. Smith*, 1 N. B. N. 291, 2 A. B. R. 104, citing *Morgan v. Campbell*, 22 Wall. 381, 22 L. ed. 796.

62—*In re Harrison*, 2 N. B. N. R. 541.

63—*In re Falls City Shirt Mfg. Co.*, 1 N. B. N. 565, 98 Fed. 592, 3 A. B. R. 437; *Fletcher v. Money*, 2 Story 555, Fed. Cas. No. 4864; *Ex p. General Assignee, Brandenburg*—41

Fed. Cas. No. 5305; *In re Lukens*, 138 Fed. 188, 14 A. B. R. 683.

64—*Goldman v. Smith*, 1 N. B. N. 291, 2 A. B. R. 104.

65—*Hanson v. Blake & Co.*, 155 Fed. 342, 19 A. B. R. 325.

66—*In re Dancy Hardware & Furniture Co.*, 198 Fed. 336, 28 A. B. R. 444.

67—Sec. 20, Act of 1867: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment

rupt within four months prior to the filing of the petition in bankruptcy shall be void if given with intent to hinder, delay or defraud creditors, covers frauds upon the act, whether actual or constructive, committed within four months prior to the filing of the petition. It may be construed as the enactment of a federal statute of fraudulent conveyances with respect to proceedings in bankruptcy properly so called, that is, proceedings in the bankruptcy court.<sup>68</sup> But the trustee is not restricted to the four months' period in the case of property transferred in fraud of creditors whose claims existed at the time of the transfer, but he is subrogated to the rights of such creditors<sup>69</sup> and may institute proceedings to have the same set aside at any time within the period fixed by the statute of limitations of the state in which the property is situated.<sup>70</sup> The distinction is between those transfers made wrongful and void by this subdivision if within four months, but which are not forbidden by the state laws or at common law, and those generally fraudulent as to creditors, irrespective of a bankruptcy law. Thus he cannot impeach the title of one who purchased property of the bankrupt, on the ground that it enabled the latter to pay some of his creditors in preference to others, the entire transaction occurring prior to the four months' period;<sup>71</sup> or a transfer made on the payment of a bona fide debt, though intended as a preference, provided the transfer was recorded more than four months, or if not, that there had been continuous, notorious or exclusive possession for that period.<sup>72</sup>

A mortgage executed and delivered more than four months prior to bankruptcy but not recorded until within four months will be upheld unless void under the local laws.<sup>73</sup> An assign-

of a debt owing to him from the bankrupt he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property."

68—In re Adams, 1 N. B. N. 167, 1 A. B. R. 94.

69—In re Adams, *supra*; Skillen v. Endelman, 39 Misc. (N. Y.) 261, 11 A. B. R. 766; Underleak v. Scott, 117 Minn. 136, 28 A. B. R. 926.

70—In re Grahs, 1 N. B. N. 164, 1

A. B. R. 465; In re Taylor, 1 N. B. N. 480, 95 Fed. 956.

71—In re Kindt, 101 Fed. 107, 4 A. B. R. 148, rev'g 2 N. B. R. 369.

72—In re Woodward, 1 N. B. N. 352, 2 A. B. R. 233.

73—Bean v. Orr, 182 Fed. 599, 25 A. B. R. 400; Underleak v. Scott, 117 Minn. 136, 28 A. B. R. 926. But see Morgan v. First Nat. Bank of Mannington, 145 Fed. 466, 16 A. B. R. 639.

ment of property within the four-month period to pay off an incumbrance on the homestead is valid.<sup>74</sup>

Where the summons in a creditor's action to set aside firm transfers is served upon one partner more than four months prior to bankruptcy the lien acquired thereby will be upheld as against the trustee of the firm, though the other partner is served within the four-month period.<sup>75</sup>

Such provisions as that of the Civil Code of Louisiana "that a mortgage given and inscribed within three months previous to the failure of the debtor, shall be null and void, and presumed to be in fraud of creditors, unless the person to whom the mortgage is given shall prove that he paid, in obtaining it, a real and effective value at the moment of the contract," are in effect incorporated in the bankruptcy law, and such mortgages are void under it, as well as under the state statute.<sup>76</sup>

In accordance with equitable principles, a mortgage, bill of sale, or assignment executed just prior to the bankruptcy in pursuance of a parol agreement for a present valuable consideration more than four months prior to the filing of the petition has been held valid as against the trustee, as relating back to such agreement,<sup>77</sup> but this position does not appear tenable in view of the drastic provisions of section 67 of the law, and if it were valid such transaction would be open to the closest scrutiny and would be sustained only in case of proof to a high degree of certainty.

In computing the four-month period, the day of the filing of the petition is excluded and the day of transfer included.<sup>78</sup> A petition is filed within the meaning of the bankruptcy law when delivered to the clerk personally and by him marked "Filed," though it be outside of his office and after office hours,<sup>79</sup> but in order to mark the date with reference to which the validity of

74—*Southern Irrigation Co. v. Wharton Nat. Bank*, 144 S. W. 701, 28 A. B. R. 941.

75—*Ninth Nat. Bank v. Moses*, 39 Misc. (N. Y.) 664, 11 A. B. R. 772.

76—*In re Jacobs*, 1 N. B. N. 183, 1 A. B. R. 518.

77—*Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. 940, 22 A. B. R. 803; *Sabin v. Camp*, 2 N. B. N. R. 375, 98 Fed. 974, 3 A. B. R. 578; *Post v. Cor-*

*bin*, 5 N. B. R. 11; *In re Wood*, 5 N. B. R. 421, Fed. Cas. No. 17937; *Burdick v. Jackson*, 15 N. B. R. 318; but see *Graham v. Stark*, 3 N. B. R. 92, 3 Ben. 520, Fed. Cas. No. 5676; *Moore v. Green*, 145 Fed. 472, 16 A. B. R. 648.

78—*In re Hill*, 140 Fed. 984, 15 A. B. R. 499.

79—*In re Von Boreke*, 1 N. B. N. 505, 94 Fed. 352, 2 A. B. R. 322,

liens and preferential transfers are to be determined, it must be sufficient to confer jurisdiction.<sup>80</sup> Where the petition is defective on its face because of failure to show the requisite number of petitioning creditors, the time does not commence to run until the petition is made sufficient by the appearance and joinder of a sufficient number of creditors.<sup>81</sup>

### § 870. — Liens by legal proceedings.

Under section 67f of the act all levies, judgments, attachments, or other liens obtained through legal proceedings against the bankrupt, at any time within four months prior to the filing of the petition are null and void.

The four months run from the date of that step in the proceedings which creates the lien. In the case of a judgment creditor's bill, the filing of the same and service of process creates a lien in equity on the judgment debtor's equitable assets,<sup>82</sup> and while it may be defeated, so long as it exists, it is a charge or specific lien on the assets. Hence the four months' period begins to run from the filing of the bill and not from the date of the judgment or decree in enforcement of what is an otherwise valid pre-existing lien.<sup>83</sup> The computation is made by counting back the four months from the date of the filing of the petition, which latter date is excluded.<sup>84</sup>

Every one obtaining a lien through legal proceedings does so subject to the contingency that he may lose the advantage he would otherwise have by the institution of bankruptcy proceedings within four months thereafter and adjudication therein.<sup>85</sup> Liens obtained through legal proceedings more than four months before the filing of the petition in bankruptcy are not affected,<sup>86</sup> and a lien acquired within the four months is not invalid if the debtor was solvent at the time.<sup>87</sup>

80—In re Rogers, 10 N. B. R. 444.

81—Manning v. Evans, 156 Fed. 106, 19 A. B. R. 217.

82—Miller v. Sherry, 2 Wall. 237, 17 L. ed. 827; Freedmen's Savings & Trust Co. v. Earle, 110 U. S. 710, 28 L. ed. 301.

83—Metcalf v. Barker, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36. But see Marsh v. Wilson Bros., 124 Minn. 254, 31 A. B. R. 874.

84—In re Warner, 144 Fed. 987, 16 A. B. R. 519; Jones v. Stevens, 94 Me. 582, 5 A. B. R. 571.

85—In re Kenney, 2 N. B. R. 140, 97 Fed. 554, 3 A. B. R. 353; Corner v. Miller, 1 N. B. R. 98.

86—In re Lesser, 2 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815, aff'd 5 A. B. R. 320; In re Dunavant, 1 N. B. N. 542, 96 Fed. 542, 3 A. B. R. 41; In re Ferguson, 95 Fed. 429, 2 A. B. R. 586; Hatch v. Seely, 13 N. B. R. 380; Batchelder v. Putnam, 13 N. B. R. 404; Smith v. Meisenheimer, 1 N. B. N. 19, 47 S. W. 1087.

87—Newberry Shoe Co. v. Collier, 111 Va. 288, 25 A. B. R. 130.



**§ 871. Release and abandonment of liens.**

A secured creditor will not be held to have released his security in the absence of clear and convincing evidence.<sup>88</sup> While a lien may be waived by filing a claim in the bankruptcy court,<sup>89</sup> yet the lienor's filing a claim in the bankruptcy court for the balance of his claim after applying the sum upon which a lien is claimed as part satisfaction will not have that effect.<sup>90</sup> A lien may be considered abandoned where the creditor issues an execution and allows the same to be retained by the officer for a long period of time under an arrangement with the debtor that he is to make periodical payments upon the claim.<sup>91</sup> The lien of a mortgage is lost by the substitution therefor of a mortgage on property of another corporation.<sup>92</sup>

**§ 872. Redemption by trustee.**

Whenever it is deemed for the benefit of the estate to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve property from any conditional contract, and to tender performance of the conditions thereof, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor, whereupon the court must appoint a time and place for hearing and notice be given to persons interested.<sup>93</sup>

Where under the state laws, the legal title to mortgaged property remains in the mortgagor, such title vests in his trustee in bankruptcy, together with his statutory right of redemption from a foreclosure sale under a decree rendered after the adjudication.<sup>94</sup> Accordingly, upon payment by the trustee of the amount due upon a mortgage executed by the bankrupt, the court may compel the mortgagee to execute an assignment thereof to the trustee or such other person as it may direct.<sup>95</sup>

A trustee, who redeems pledges is subrogated to the rights of

88—*In re Cyclopean Co.*, 167 Fed. 971, 21 A. B. R. 679.

89—*Brown v. City National Bank*, 72 Misc. (N. Y.) 201, 26 A. B. R. 638. See also chapter XV.

90—*Kneeland v. Pennell*, 54 Misc. (N. Y.) 43, 18 A. B. R. 538

91—*In re Thackara Mfg. Co.*, 140 Fed. 126, 15 A. B. R. 258.

92—*Long v. Gump*, 144 Fed. 824, 16 A. B. R. 501.

93—G. O. XXVIII.

94—*In re Novak*, 111 Fed. 161, 7 A. B. R. 27; *In re Roger Brown & Co.*, 196 Fed. 758, 28 A. B. R. 336.

95—*In re Bacon*, 132 Fed. 157, 12 A. B. R. 730.

the pledgee until, from the proceeds of the pledges redeemed, the fund is made good.<sup>96</sup>

### § 873. Subrogation of creditors.

Conventional subrogation may result from a direct agreement between the bankrupt and a third person who pays the debt, that he shall be subrogated to all the right and securities existing in favor of the creditor whose claim has been paid. But nothing short of an express agreement to that effect will suffice. The mere fact that one pays off a debt at the instance of the debtor or lends money to pay off such debt, or a mere understanding on the part of the person paying the debt that he will be subrogated does not entitle him to subrogation to the liens of the creditor paid off.<sup>97</sup>

The doctrine of subrogation by agreement with the debtor alone to the liens and equities of a creditor who has been paid by a volunteer originated in the civil law, and is enforced only when the agreement creates equitable rights against the debtor which will not impair or overthrow equitable rights of the creditor or of innocent third persons. The rights of the creditor to the remainder of his debt must not be prejudiced.<sup>98</sup>

A surety who pays the debt of the bankrupt has been held entitled to subrogation to the rights of the creditor who has obtained a lien by attachment.<sup>99</sup>

### § 874. Formal discharge of lien.

Although by the express provision of the statute an attachment is made null and void and the property affected thereby is deemed wholly discharged and released from the same by the adjudication in bankruptcy within four months, the proper practice is for the trustee to apply to the state court for an order formally discharging the attachment and releasing the property of the bankrupt from this levy. An order thus obtained would be authority for the sheriff to release the levy which might otherwise be valid but for the adjudication. It is the duty of

96—McLean v. Cadwalader, 15 N. B. R. 383.

97—Browder & Co. v. Hill, 136 Fed. 821, 14 A. B. R. 619; but see *In re McGuire*, 137 Fed. 967, 13 A. B. R. 704.

98—Browder & Co. v. Hill, 136 Fed. 821, 14 A. B. R. 619.

99—Moody v. Huntley, 149 Fed. 797, 17 A. B. R. 904.

the court, upon these facts being called to its attention, to vacate the attachment and remove the lien.<sup>1</sup> A similar application should be made by the trustee in the case of any other lien which it may be necessary to have released.

### § 875. Enforcement of lienor's or mortgagee's rights.

#### § 876. — In general.

A creditor claiming a lien or equity in bankrupt's property may at once appear in the court of bankruptcy and be heard without first having his lien established in another tribunal.<sup>2</sup>

As already pointed out, valid existing liens may be enforced after the filing of the petition in bankruptcy. This does not give one creditor an advantage over another nor diminish the estate, except as always occurs in the recognition of different degrees among creditors. Where a creditor has secured a valid existing lien before the four months' period, the bankruptcy court may authorize him to proceed to have the same satisfied if convinced that full value will be obtained for the property on which his lien exists, or may direct the redemption of the property as seems most for the interest of the estate.<sup>3</sup> It has been held that the provisions of the act with reference to the preservation of valid liens relates only to the obligation of the contract and not to the remedy provided therein.<sup>4</sup>

Where there is no reason to question the validity of a mortgage, the court of bankruptcy will entertain the summary petition of the mortgagee for the sale of the property,<sup>5</sup> and upon request may authorize its foreclosure in the usual way making the trustee a party,<sup>6</sup> or take upon itself the duty of ascertaining and liquidating the lien by its sale and applying

1—Hardt v. Schuylkill Plush & Silk Co., 74 N. Y. S. 549, 8 A. B. R. 479.

2—In re Byrne, 2 N. B. N. R. 246, 97 Fed. 762, 3 A. B. R. 268.

3—In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6837; Kneeland v. Pennell, 54 Misc. (N. Y.) 43, 18 A. B. R. 138.

4—A mortgagee is not entitled to foreclose a mortgage after the bankruptcy of the mortgagor, but must accept the remedy provided by the Bankruptcy Act.

In re Hasie, 206 Fed. 789, 30 A. B. R. 83.

5—In re Sacchi, 6 N. B. R. 497, 43 How. Pr. 252, Fed. Cas. No. 12200.

6—In re Davis, 2 N. B. R. 125, Fed. Cas. No. 3618; In re Sabin, 9 N. B. R. 383, Fed. Cas. No. 12193; Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, Fed. Cas. No. 13071; Lockett v. Hodge, 9 N. B. R. 167, Fed. Cas. No. 8444; contra, In re Hasie, 206 Fed. 789, 30 A. B. R. 83.

the proceeds in payment, after first deducting the costs of court, and the care and preservation of the property, and of the sale and taxes.<sup>7</sup> It may sell the property free of encumbrances, remitting the lien-holders to the proceeds on the application of subsequent encumbrancers or other parties having a right in the equity of redemption;<sup>8</sup> but in such case the right of a mortgagee not a party to the proceedings is not affected.<sup>9</sup> The creditor may sell the property according to the terms of his contract where there is no claim that such power will be exercised in a fraudulent or oppressive manner.<sup>10</sup> It has been held that a petition for an order that the trustee make sale of simply the right of redemption will not be considered.<sup>11</sup>

The filing of a petition in bankruptcy by the defendant in a state court in a proceeding to foreclose a lien on realty, created more than four months before the filing of the petition, does not affect the right of the plaintiff to proceed with the foreclosure, unless he proves his demand in bankruptcy.<sup>12</sup> If the mortgagee has relied upon his security and not proved his claim and the property has not been disposed of as above stated, he may enforce his lien by appropriate proceedings in the state court after the discharge of the bankrupt.<sup>13</sup>

A sale by a creditor of property of a debtor, in his possession and on which he has a valid lien will not be disturbed because of the fact that the debtor was insolvent and that the creditor knew that bankruptcy was imminent, provided there was no fraud and the property was sold at a fair price.<sup>14</sup>

The court may enjoin the sale of property in the possession of an adverse claimant,<sup>15</sup> as well as a sale of an entire stock of merchandise, only part of which is covered by a mortgage, in

7—*In re Sink*, 2 N. B. N. R. 645; *In re Ellerhorst*, 7 N. B. R. 49, 2 Sawy. 218, Fed. Cas. No. 4380; *In re Frick*, 1 N. B. N. 214, 1 A. B. R. 719.

8—*Sutherland v. Lake Sup. Ship Canal, R. R. and Iron Co.*, 9 N. B. R. 298, Fed. Cas. No. 13643.

9—*Ray v. Brigham*, 12 N. B. R. 145.

10—*In re Brown*, 104 Fed. 762. But see *In re Jersey Island Packing Co.*, 138 Fed. 625, 2 L. R. A. (N. S.) 560, 14 A. B. R. 689.

11—*Ferguson v. Peckham*, 6 N. B. R. 569, Fed. Cas. No. 4741; *In re Oxley & White*, 182 Fed. 1019, 25 A. B. R. 656.

12—*Reed v. Equitable Trust Co.*, 115 Ga. 780, 8 A. B. R. 242.

13—*Wicks v. Perkins*, 13 N. B. R. 208, 1 Woods, 383, Fed. Cas. No. 17615.

14—*In re Roseberry*, 16 N. B. R. 340, 8 Biss. 112, Fed. Cas. No. 12052.

15—*In re Norris*, 177 Fed. 598, 24 A. B. R. 444.

pursuance of a decree of a state court directing such sale to satisfy the mortgage.<sup>16</sup>

A suit being brought in a state court within four months of the filing of the petition and all proceedings therein being null and void, the bankruptcy court has power to restrain all parties, including the officers of the state court, from interfering with the bankrupt's property, and whenever because of such interference the law cannot be properly administered, it should not hesitate to exercise its authority. It may restrain the prosecution of a replevin or attachment suit, or stay proceedings supplementary to execution, or permit such proceedings to continue, in which case upon the appointment therein of a receiver, the creditor acquires no lien upon or specific interest in the bankrupt's property, since the entire estate being under the control of the bankruptcy court when such receiver was appointed, he takes no title that could relate back to the commencement of the supplementary proceedings.<sup>17</sup>

### § 877. — Costs and fees.

As the costs, fees and disbursements in a lien proceeding which is rendered void by the bankruptcy proceedings are an incident of the lien and fall with it,<sup>18</sup> the trustee is not called upon to pay them; nor can the officer in possession of such property retain it until his fees are paid, but he should have them taxed in the proper court as the basis for his claim against the estate in bankruptcy.<sup>19</sup> Where a judgment creditor, who has

16—*In re Oxley & White*, 182 Fed. 1019, 25 A. B. R. 656.

17—*Booth v. Nickerson*, 1 N. B. N. 476, 96 Fed. 943, 2 A. B. R. 770; *In re Kletchka*, 1 N. B. N. 160, 92 Fed. 901, 1 A. B. R. 479; citing *Johnson v. Rogers*, 15 N. B. R. 1, 10, Fed. Cas. No. 7408; *In re Pitts*, 9 Fed. 542; *Becker v. Torrance*, 31 N. Y. 631; *Bk. v. Shuler*, 153 N. Y. 172; *Olney v. Tanner*, 10 Fed. 101, 113 *aff'd* 18 Fed. 636; *Kitchen v. Lowery*, 127 N. Y. 53; *In re Agins*, 1 N. B. N. 133, 180, 184; *Bear v. Chase*, 99 Fed. 920, 3 A. B. R. 746; *In re O'Connor*, 2 N. B. N. R. 90, 95 Fed. 943.

18—*In re Jennings*, 8 A. B. R. 358.

But see *In re W. J. Schmidt & Co.*, 165 Fed. 1006, 21 A. B. R. 593.

19—*In re Francis-Valentine Co.*, 1 N. B. N. 529, 532, 94 Fed. 793, 2 A. B. R. 522; *In re Young*, 1 N. B. N. 428, 96 Fed. 606, 2 A. B. R. 673; *In re Stevens*, 5 N. B. R. 298, 2 Biss. 373, Fed. Cas. No. 13392. The rule under the former act that costs were payable out of the estate if the lien proceedings were used in aid of the bankruptcy proceedings and for the benefit of creditors or if incurred at debtor's request would probably be adopted by the court now. (*In re Irons*, 18 N. B. R. 95, Fed. Cas. No. 7067; *In re Preston*, 6 N. B. R. 545, Fed. Cas. No. 11394.)

set aside a fraudulent conveyance, loses his prior right to the fund by the adjudication of the debtor a bankrupt within four months of the decree, the state court can make a reasonable allowance for costs and expenses before directing its receiver to turn over the property to the trustee.<sup>20</sup> This, in effect, pays out of the estate, where an attachment is dissolved, so much of the costs as was incurred prior to the filing of the petition.<sup>21</sup>

### § 878. Liens through legal proceedings.

#### § 879. — Statutory provisions.

Section 67c of the act provides that, "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."<sup>22</sup>

Section 67f provides, that "all levies, judgments, attachments,

20—*In re Lesser*, 2 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815.

21—*In re Allen*, 96 Fed. 512, 3 A. B. R. 38.

22—23—Analogous provision of act of 1867. "Sec. 14. That as soon as said assignee is appointed and qualified, the judge . . . shall . . . assign . . . all the estate . . . of the bankrupt . . . and such assignment

shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate . . . shall vest in the said assignee, although the same is then held attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.”<sup>23</sup>

Section 67f has not been repealed by the amendment of 1910 to section 60b.<sup>24</sup>

### § 880. — Comparison of the acts of 1867 and 1898.

The provision in the act of 1867 dissolved any attachment on mesne process provided it was made within four months of the bankruptcy proceedings. The provisions of the present act dissolve any “lien” (a broader term) obtained through legal proceedings against a person who is insolvent,<sup>25</sup> at any time within four months prior to the filing of a petition in bankruptcy.

### § 881. — Constitutionality of provisions.

The fact that in voluntary proceedings liens acquired prior to the passage of the act are affected by it does not render it unconstitutional since it does not impair the obligation of existing contracts, and hence is not open to constitutional objection on that ground, but simply affects the remedy to enforce such contracts. The difference between the obligation of a contract and the remedy given by the legislature to enforce that obliga-

<sup>24</sup>—In re Petersen, 200 Fed. 739, 29 A. B. R. 26.

<sup>25</sup>—Section 1 (15), Act of 1898.

tion, exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.<sup>26</sup> Irrespective of this, the inhibition to the impairment of contracts applies merely to the states and not to the federal government, and although in case a contract was impaired the provision would not be unconstitutional.<sup>27</sup>

**§ 882. — Conflict between subdivisions “c” and “f” of section 67.**

Subdivision “c” of section 67 provides that liens obtained through judicial proceedings begun within four months of bankruptcy shall be dissolved by the adjudication provided either of three conditions exists, or for the subrogation in certain circumstances of the trustee to the rights of the lien-holder. Subdivision “f” provides for the unconditional dissolution by the adjudication of all liens obtained through legal proceedings within such four months with a similar reservation for the benefit of the estate. The two subdivisions appear antagonistic and irreconcilable and under the well-known rule of construction the latter subdivision must prevail.<sup>28</sup>

While statutes should, if possible, be construed so as to give every part effect, it is sometimes impossible to harmonize them, as appears to be the case here. It is quite clear that congress either inadvertently left subdivision “c” in the bill after adding subdivision “f,” or intended to strengthen the act by the broader and more drastic provisions of the latter clause. Subdivision

26—In re Rhoads, 2 N. B. N. R. 301, 98 Fed. 399, 3 A. B. R. 380; citing *Sturges v. Crowninshield*, 4 Wheaton 122, 4 L. ed. 529. See *Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36.

27—In re Jordan, 8 N. B. R. 180, Fed. Cas. No. 7514; In re Smith, 14 N. B. R. 295, Fed. Cas. No. 12996; In re Everett, 9 N. B. R. 90, Fed. Cas. No. 4579.

28—Cook v. Robinson, 194 Fed. 785, 28 A. B. R. 182. See In re Richards, 2 N. B. N. R. 38, 96 Fed. 935; 3 A. B. R. 145; s. c. below, 95 Fed. 258, 2 A. B. R. 518, in which the origin of the conflict was explained by the fact that two bank-

ruptcy bills were presented to Congress; one to the Senate and one to the House of Representatives, broadly divergent in spirit, the Senate bill supposed to be in the interest of the creditor while the House bill favored the debtor. Upon a disagreement between the two houses the matter was referred to a conference committee near the end of the session, resulting in the incorporation into the House bill of subdivision “f,” which was in the Senate bill, for the avowed purpose of strengthening it. See also In re Rhoads, 2 N. B. N. R. 301, 98 Fed. 399, 3 A. B. R. 380; In re Kemp, 101 Fed. 689, 2 N. B. N. R. 565, 4 A. B. R. 242.



"c" provides that liens of a certain character shall be void under certain conditions, while subdivision "f" provides that all the liens embraced by subdivision "c" shall be void without reference to any conditions save the insolvency of the debtor and their being obtained within four months. Subdivision "f" is the latest expression of the legislative will and is in harmony with the general purpose of the act to avoid preferences obtained after insolvency and an express inhibition against, and a declaration of the unlawful character of, liens which subdivision "c," if it sustains, does so by implication only. Subdivision "f" is therefore the law governing liens obtained within four months prior to the filing of a petition in bankruptcy through legal proceedings against an insolvent debtor.<sup>29</sup>

Notwithstanding the fact that subdivision "c" is undoubtedly superseded by subdivision "f" where the two are in conflict, the former has nevertheless been resorted to by some courts in determining the validity of a lien.<sup>30</sup>

29—In *re Rhoads*, 2 N. B. N. R. 301, 98 Fed. 399, 3 A. B. R. 380; s. c. 2 N. B. N. R. 176; citing *The Attorney General v. Chelsea Water Wks., Fitzgibbon*, 195, followed in *Townsend v. Brown*, 4 Zabriskie, 88, and *Puffendorf's Rules*, p. 132, *Potter's Dwaris on Statutes*; see also In *re Richards*, 2 N. B. N. R. 38, 96 Fed. 935, 3 A. B. R. 145; s. c. 95 Fed. 258, 2 A. B. R. 518; In *re Peck Lumber Co.*, 1 N. B. N. 262, 1 A. B. R. 701; In *re Moyer*, 1 N. B. N. 260, 93 Fed. 188, 1 A. B. R. 577; In *re Francis-Valentine Co.*, 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522.

30—See *First Nat. Bank of Pittsburgh, Pa. v. Guarantee Title & Trust Co.*, 178 Fed. 187, 24 A. B. R. 330; In *re Pollman*, 156 Fed. 221, 19 A. B. R. 474.

In order to reconcile the conflict between subdivisions "c" and "f," various interpretations have been given the former. In one case it was held to apply to liens acquired within four months in proceedings begun prior thereto and subdivision "c" to liens acquired within the period, which were avoided under cer-

tain conditions (In *re Hopkins*, 1 N. B. N. 71, 1 A. B. R. 209); in another, that both subdivisions would apply in most cases and if it came within the terms of either or both, either or both applied (In *re Friedman*, 1 N. B. N. 208, 1 A. B. R. 510; *Peck Lumber Co. v. Mitchell*, 1 N. B. N. 262, 1 A. B. R. 701); in another, that subdivision "c" applied to liens obtained by the acquiescence or connivance of the debtor, or in view of his known insolvency and contemplated bankruptcy (In *re O'Connor*, 2 N. B. N. R. 90, 95 Fed. 943). Notwithstanding the conflict, other courts have held this subdivision to be in full force being governed in such conclusion by the desire if possible to give every portion of the law effect. (See In *re Arnold*, 1 N. B. N. 334, 94 Fed. 1001, 2 A. B. R. 180; In *re Burrus*, 97 Fed. 926, 3 A. B. R. 296; In *re Collins*, 1 N. B. N. 290, 2 A. B. R. 1; In *re Hammond*, 98 Fed. 845, 3 A. B. R. 466; In *re Rhoades*, 2 N. B. N. R. 176; In *re Kemp*, 2 N. B. N. R. 565, 101 Fed. 689, 4 A. B. R. 242.

### § 883. — Provisions apply to voluntary and involuntary cases.

The language, "filing of a petition in bankruptcy against him," in section 67f taken literally means an involuntary proceeding; but "a person against whom a petition has been filed" is defined<sup>31</sup> to include "a person who has filed a voluntary petition," and therefore justifies the position that this subdivision applies to voluntary as well as involuntary proceedings. It is only in this way that a harmonious design can be evolved from the law. To restrict its application to involuntary proceedings would defeat the manifest purpose to secure equality in the treatment of creditors and to avoid all transactions within a limited time, which are in fraud of creditors. By a race of diligence between debtor and creditor, the former might anticipate the action of the latter and, by voluntary bankruptcy legalize fraudulent transactions which the act would avoid upon involuntary proceedings. This could never have been intended and should be so interpreted only if the language were so clear and precise, as would admit of no other construction.<sup>32</sup>

### § 884. — Liens affected in general.

The expression "liens obtained through legal proceedings," in section 67f, is restricted to suits or proceedings at law or in equity. A legal proceeding is any proceeding in a court of justice by which a party pursues a remedy which the law affords him, and embraces any of the formal steps or measures employed in the prosecution or defense of a suit.<sup>33</sup>

Section 67f makes no exceptions in favor of any lien creditor

31—Section 1 (1), Act of 1898.

32—In re Belknap, 129 Fed. 646, 12 A. B. R. 326; McKenney v. Cheney, 118 Ga. 387, 11 A. B. R. 54; In re Lesser, 2 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815; In re Rhoads, 2 N. B. N. R. 301, 98 Fed. 399, 3 A. B. R. 380; s. c. 1 N. B. N. 176; In re Richards, 2 N. B. N. R. 38, 96 Fed. 935, 3 A. B. R. 145; s. c. 95 Fed. 258, 2 A. B. R. 518; In re Specht, 2 N. B. N. R. 238; In re Higgins, 2 N. B. N. R. 115, 97 Fed. 775, 3 A. B. R. 364; In re Vaughan, 2 N. B. N. R. 101, 97 Fed. 560, 3 A. B. R. 362; In re Fellerath, 1 N. B. N. 292, 95 Fed. 121, 2 A. B. R. 40; In re Friedman, 1 N. B. N.

208, 1 A. B. R. 510; Peck v. Mitchell, 1 N. B. N. 262, 1 A. B. R. 701; In re Hopkins, 1 N. B. N. 71, 1 A. B. R. 209; In re Dobson, 98 Fed. 86, 3 A. B. R. 420; contra: In re O'Connor, 2 N. B. N. R. 90, 95 Fed. 943; In re DeLue, 1 N. B. N. 555, 1 A. B. R. 387, 91 Fed. 510; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Easley, 1 N. B. N. 230, 93 Fed. 419, 1 A. B. R. 715; In re Brown, 91 Fed. 358, 1 A. B. R. 107; In re Benedict, 75 N. Y. S. 165, 8 A. B. R. 463; Brown v. Case, 180 Mass. 45, 6 A. B. R. 744.

33—See In re Drolesbaugh, 2 N. B. N. R. 1079.

whose lien has been obtained through legal proceedings against the bankrupt within four months of the filing of the petition, other than such person as may have obtained title by virtue of such proceedings and who has been a bona fide purchaser for value and without notice or reasonable cause for inquiry.<sup>34</sup> It does not apply solely to liens upon property which, if such liens were annulled, would pass to the trustee, but applies as well to liens upon property which but, for the filing of an attachment, would have passed to a third person.<sup>35</sup> It is not necessary that the lien was obtained for the benefit of the bankrupt's creditors in general, it being sufficient that it was obtained for the benefit of one or more creditors less than all of them.<sup>36</sup>

See Mechanic's Liens, Landlord's Lien, etc.

### § 885. — Insolvency.

To render the lien void, the bankrupt must have been insolvent at the time it was acquired.<sup>37</sup> However, a lien acquired within the four-month period at a time when the bankrupt was solvent may be lost by a sale of the property by the bankruptcy court without objection from the attaching creditor.<sup>38</sup>

Creditors who are charged with receiving preferences alleged as acts of bankruptcy are parties to the bankruptcy proceedings and, as such, are precluded upon the issue of insolvency of the debtor at the time their lien was acquired.<sup>39</sup>

### § 886. — Active participation of debtor.

Neither subdivision "c" or "f" requires any active participation in the process of transfer through legal proceedings to render the lien void. It is enough that the creditor is active and the debtor permits the activity to be unopposed.<sup>40</sup>

34—*In re Green*, 179 Fed. 870, 24 A. B. R. 665.

35—*First Nat. Bank of Baltimore v. Staake*, 202 U. S. 141, 50 L. ed. 967, 15 A. B. R. 639, aff'g 133 Fed. 717, 13 A. B. R. 281; *In re Forbes*, 186 Fed. 79, 26 A. B. R. 355.

36—See *First Nat. Bank of Pittsburgh v. Guarantee Title & Trust Co.*, 178 Fed. 187, 24 A. B. R. 330.

37—*Wise Coal Co. v. Columbia Zinc*

& Lead Co., 157 Mo. App. 315, 27 A. B. R. 445.

38—*Wise Coal Co. v. Columbia Zinc & Lead Co.*, 157 Mo. App. 315, 27 A. B. R. 445.

39—*Cook v. Robinson*, 194 Fed. 785, 28 A. B. R. 182.

40—*In re Koslowski*, 153 Fed. 823, 18 A. B. R. 723; *Henderson v. Mayer*, 225 U. S. 631, 56 L. ed. 1233, 28 A. B. R. 387; *In re Pollman*, 156 Fed. 221, 19 A. B. R. 474.

### § 887. — Creation of preference.

Section 67f is not confined to liens that create a preference,<sup>41</sup> and reasonable cause to believe a preference was intended is not essential to avoid a lien thereunder.<sup>42</sup>

### § 888. — Lien acquired by state.

The fact that the state is the judgment creditor does not make its lien enforceable if obtained within four months.<sup>43</sup>

### § 889. — Lien acquired in foreign country.

The fact that the lien was obtained in a foreign country has been held to make no difference in the meaning of the phrase, "in fraud of the provisions of this act," in section 67c.<sup>44</sup>

### § 890. — Attachments.

Under both the present and the former acts attachments sued out and levied upon the property of an insolvent, within four months of the filing of a petition in bankruptcy, whether voluntary or involuntary,<sup>45</sup> are dissolved by the adjudication thereon,<sup>46</sup> though the suit may have been pending several years;<sup>47</sup> and the property attached should pass to the trustee for the benefit of the estate.<sup>48</sup> The trustee is entitled to prop-

41—*In re Baird*, 126 Fed. 845, 11 A. B. R. 435.

42—*In re Peterson*, 200 Fed. 739, 29 A. B. R. 26.

43—*In re Green*, 179 Fed. 870, 24 A. B. R. 665.

44—*In re Pollman*, 156 Fed. 221, 19 A. B. R. 474.

45—*In re McCartney*, 109 Fed. 621, 6 A. B. R. 367; *In re Richards*, 96 Fed. 935, 3 A. B. R. 145.

46—*In re Baird*, 126 Fed. 845, 11 A. B. R. 435; *Cook v. Robinson*, 194 Fed. 785, 28 A. B. R. 182; *In re Downing*, 148 Fed. 120, 15 A. B. R. 423; *In re Cohn*, 18 A. B. R. 786; *Bear v. Chase*, 99 Fed. 920, 3 A. B. R. 746; *In re Francis-Valentine Co.*, 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522, *aff'g* 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188; *In re Kemp*, 2 N. B. N. R. 565, 101 Fed. 689, 4 A. B. R. 242; *In re Arnold*, 1 N. B. N. 334, 94 Fed. 1001, 2 A. B. R. 180; *In re Burns*, 97 Fed. 926, 3 A. B. R. 296; *In re Hammond*, 98 Fed. 845, 3 A. B. R. 466; *Duf-*

*field v. Horton*, 16 N. B. R. 59, 19 N. B. 3. 13; *Bennington v. Lowenstein*, 1 N. B. R. 157, Fed. Cas. No. 10938; *Appleton v. Stevers*, 10 N. B. R. 515; *In re Ellis*, 1 N. B. R. 154, Fed. Cas. No. 4400; *Kaiser v. Richardson*, 14 N. B. R. 391; *Miller v. Bowles*, 10 N. B. R. 515, 58 N. Y. 263; *Bk. v. Overstreet*, 13 N. B. R. 154; *King v. Loudon*, 14 N. B. R. 383; *In re Kanpisch Creamery Co.*, 107 Fed. 93, 5 A. B. R. 790; *see Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36, 44; *Hart v. Schuylkill Plush & Silk Co.*, 69 App. Div. (N. Y.) 90, 8 A. B. R. 479; *In re Beals*, 116 Fed. 530, 8 A. B. R. 639; *Watschke v. Thompson*, 85 Minn. 105, 7 A. B. R. 504.

47—*In re Higgins*, 2 N. B. N. R. 115, 97 Fed. 775, 3 A. B. R. 364.

48—*Peck v. Mitchell*, 1 N. B. N. 262, 1 A. B. R. 701, citing and criticising, *In re Delue*, 1 N. B. N. 555, 91 Fed. 510, 1 A. B. R. 387.

The adjudication operates as a seizure of attached property, and it is in custo-

erty in the bankrupt's possession free of lien notwithstanding the sheriff, more than four months before bankruptcy, having attachments against him, took receipts for such property but left it in the bankrupt's possession.<sup>49</sup>

The adjudication of a partner does not defeat an attachment lien of a firm creditor who has caused an attachment to be levied on the firm assets within four months prior to the adjudication of the partner.<sup>50</sup>

When a writ of attachment has been fully executed and the proceeds paid over to the creditor, the provisions of section 67f do not apply. That section applies only when the rights of creditors exist by way of liens, and does not reach cases where property or its proceeds are no longer held under the writs.<sup>51</sup> However, an attachment within four months of bankruptcy may be vacated upon motion of the trustee, though prior to bankruptcy it has been discharged by giving an undertaking, the surety having taken security from the bankrupt sufficient to indemnify it.<sup>52</sup>

A lien is not invalidated under section 67f, that is obtained by the levy of an attachment more than four months prior to the bankruptcy proceedings, though dependent for enforcement on a judgment obtained within four months,<sup>53</sup> or after the discharge in bankruptcy.<sup>54</sup>

A bond which stands in the place of the attachment levied within the four months, as well as the attachment lien, is relieved

dia legis from that time; and upon appointment and qualification of the trustee the title and right to the property pass to the trustee, who becomes the legal custodian for the court of bankruptcy, and that court will award the property to whomever it rightfully belongs. In re Walsh Bros., 159 Fed. 560, 20 A. B. R. 472.

The discharge of an attachment under section 67f has the effect merely to place title to the property in the trustee for the benefit of all creditors, subject only to the rights of bona fide holders. Corey v. Blackwell Lumber Co., 24 Idaho 642, 31 A. B. R. 135.

49—In re Ashley, 19 N. B. R. 237, Fed. Cas. No. 581.

Brandenburg—42

50—American Steel & Wire Co. v. Coover, 27 Okla. 131, 25 A. B. R. 58.

51—Johnson v. Anderson, 70 Neb. 233, 11 A. B. R. 294.

52—Tennant Sons & Co. v. N. J. Oil & M. Co., 31 A. B. R. 901.

53—In re Crafts-Riordan Shoe Co., 185 Fed. 931, 26 A. B. R. 449; In re Snell, 125 Fed. 154, 11 A. B. R. 35; In re Beaver Coal Co., 110 Fed. 630, 6 A. B. R. 404; In re Beaver Coal Co., 113 Fed. 889, 7 A. B. R. 542; In re Blair, 108 Fed. 529, 6 A. B. R. 206; contra, In re Lesser, 108 Fed. 201, 5 A. B. R. 326, and In re Johnson, 108 Fed. 373, 6 A. B. R. 202.

54—Schunack v. Art Metal Novelty Co., 84 Conn. 331, 26 A. B. R. 731.

and released, and the liability of the surety thereon is extinguished.<sup>55</sup>

Stay of discharge to enable plaintiff in attachment to enforce his rights against the sureties on the attachment bond, see post, chapter XXXIV.

### § 891. — Creditors' suits.

A creditor who files a bill to reach equitable assets or set aside a fraudulent conveyance or the like thereby acquires an equitable lien,<sup>56</sup> which although contingent in the sense that it may possibly be defeated by the event of the suit, yet so long as it exists it is a specific lien or charge on the assets, and if filed more than four months before the filing of the petition in bankruptcy, would not be defeated by the adjudication, although the judgment or decree in enforcement of such lien is rendered within the four months.<sup>57</sup> If in such suit a state court acquired jurisdiction of the subject matter and the property was in its actual possession, or that of its receiver more than four months before the adjudication in bankruptcy, the bankrupt act does not interfere with the state court's jurisdiction, possession or control of the property, without regard to whether the receiver had taken actual possession, or not, but the latter will be permitted to dispose of the same under its own decrees.<sup>58</sup>

When property fraudulently conveyed before the passage of the bankruptcy act is in the hands of a receiver and beyond the reach of the bankruptcy court, but the fraudulent grantee subsequently voluntarily restores title to the grantor and the latter is afterwards adjudged bankrupt, the possession and administration of the property belong to the court of bankruptcy.<sup>59</sup>

55—*Crook-Horner Co. v. Gilpin*, 112 Md. 1, 23 A. B. R. 350; contra, *King v. Block Amusement Co.*, 126 App. Div. (N. Y.) 48, 20 A. B. R. 784.

56—*Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827; *Freedman's Trust Co. v. Earle*, 110 U. S. 710, 28 L. ed. 301.

57—*Metcalf v. Barker*, *supra*; contra, *In re Lesser*, 3 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815; *In re Fellerath*, 1 N. B. N. 292, 95 Fed. 121, 2 A. B. R. 40.

58—*Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 320; *Pickens v. Dent*, 106 Fed. 653, 5 A. B. R. 644; *Frazier v. Southern L. & T. Co.*, 99 Fed. 707, 3 A. B. R. 710; *Eyster v. Gaff*, 91 U. S. (1 Otto) 521, 23 L. ed. 403; see also *Johnson v. Rogers*, 15 N. B. R. 1, Fed. Cas. No. 7408; *In re Kavanaugh*, 2 N. B. N. R. 528, 99 Fed. 928, 3 A. B. R. 832.

59—*In re Brown*, 1 N. B. N. 240, 91 Fed. 358, 1 A. B. R. 107.

Where state laws confer on contract creditors the right to enforce their claims as against fraudulent transfers, no resort to legal remedies is necessary to establish such creditors' interests.<sup>60</sup>

A lien acquired by commencement of creditor's suit is waived by proof of the judgment and its allowance in the bankruptcy court without the disclosure of the pendency of the suit.<sup>61</sup>

It has been held that, the right of a creditor, under the state law, to have a preferential transfer set aside, is in the nature of an inchoate lien, and where the transfer complained of is made more than four months prior to bankruptcy, the lien may be perfected by the bringing of a suit within the four-month period without violating the provisions of the bankruptcy act.<sup>62</sup>

### § 892. — Garnishments.

The phrase "legal proceedings" in section 67f applies to proceedings in garnishment,<sup>63</sup> and the court may receive from one indebted to the bankrupt the amount of such debt, although garnished within four months of the adjudication in bankruptcy, the judgment therefor being entered in a state court, and may make such order as may be necessary to protect the garnishee.<sup>64</sup>

A lien acquired more than four months prior to bankruptcy by serving a writ of garnishment upon an assignee for the benefit of creditors, will be upheld, the creditors not having assented to the transfer or accepted the garnishee as a trustee.<sup>65</sup>

Stay of discharge to enable plaintiff in garnishment proceedings to enforce his rights against the garnishee and his bond, see post, chapter XXXIV.

### § 893. — Judgment and execution liens.

A judgment does not necessarily constitute a lien upon property unless made so by statute. Usually as it respects personal

60—In re Andrae, 117 Fed. 561, 9 A. B. R. 135.

61—Dunn Salmon Co. v. Pillmore, 55 Misc. (N. Y.) 546, 19 A. B. R. 172.

62—Moore v. Green, 145 Fed. 472, 16 A. B. R. 648. But see Dunn Salmon Co. v. Pillmore, 55 Misc. (N. Y.) 546, 19 A. B. R. 172.

63—In re Ransford, 194 Fed. 658, 28 A. B. R. 78.

64—In re McCartney, 109 Fed. 621, 6 A. B. R. 367.

65—In re Culpepper, 31 A. B. R. 762.

property, it only becomes a lien by virtue of an execution and levy. From the time of the levy the lien is deemed to attach but not before.<sup>66</sup>

Congress made facts, not intentions, the test of the validity of execution liens attaching within four months of the adjudication in bankruptcy. These facts are the date of the lien and the then insolvency of the debtor.<sup>67</sup> Execution liens attaching to an insolvent's property within four months of his bankruptcy are overthrown and made ineffectual for any purpose, unless preserved for the benefit of the estate, and the sheriff's lien incident thereto, also falls.<sup>68</sup>

It is immaterial when the suit was begun or the judgment entered, or that the debt on which the judgment rests was valid, due when the action was commenced, or not released by a discharge,<sup>69</sup> and that the judgment was entered and levy made without collusion, or that the judgment was entered upon a judgment note given more than four months prior to the bankruptcy proceedings, or even prior to the passage of the act. The court will not consider the facts leading up to the creation of the lien complained of, but only the lien itself even though such facts took place more than four months before the bankruptcy and therefore would not themselves subject the debtor to proceedings in bankruptcy.<sup>70</sup>

The nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings,<sup>71</sup>

66—In re Bailey, 144 Fed. 214, 16 A. B. R. 289.

67—Act of 1898, § 67f. *Keystone Brewing Co. v. Schermer*, 241 Pa. 361, 31 A. B. R. 279.

68—*Clarke v. Larremore*, 188 U. S. 486, 45 L. ed. 555, 9 A. B. R. 476; In re Jennings, 8 A. B. R. 358; In re Burton Bros. Mfg. Co., 134 Fed. 157, 14 A. B. R. 218.

69—In re Green, 179 Fed. 870, 24 A. B. R. 665; In re S. Ah Mi, 18 A. B. R. 138; In re Benedict, 37 Misc. (N. Y.) 230, 8 A. B. R. 463.

70—In re Bailey, 144 Fed. 214, 16 A. B. R. 289; In re Rhoads, 2 N. B. N. R. 301, 98 Fed. 399, 3 A. B. R. 380; s. c. 2 N. B. N. R. 176; In re Richards, 2 N. B. N. R. 38, 96 Fed. 935, 3 A. B. R. 145;

s. c. 95 Fed. 258, 2 A. B. R. 518; In re Richards, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506; In re Spacht, 2 N. B. N. R. 238; In re Vaughan, 2 N. B. N. R. 101, 97 Fed. 560, 3 A. B. R. 362; In re Nelson, 1 N. B. N. 567, 98 Fed. 76, 1 A. B. R. 63; In re Whalen, 1 N. B. N. 228; In re Huffman, 1 N. B. N. 215, 1 A. B. R. 587; In re Myers, 1 N. B. N. 207, 1 A. B. R. 1; In re Wilson, 101 Fed. 571, 4 A. B. R. 260; In re Engle, 105 Fed. 893, 5 A. B. R. 372; In re Darwin, 117 Fed. 407, 8 A. B. R. 703; In re Ferguson, 95 Fed. 429, 2 A. B. R. 586; *Levor v. Seiter*, 34 Misc. (N. Y.) 382, 5 A. B. R. 576.

71—*Mohr & Sons v. Mattox*, 120 Ga. 962, 12 A. B. R. 330; *Clarke v. Larre-*



but, if the judgment has been satisfied and the matter entirely closed before the commencement of the bankruptcy proceedings, then the provisions of 67f do not apply.<sup>72</sup>

Subdivision "f" applies to the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute. The judgment liens intended are such judgments as of themselves create liens.<sup>73</sup> Where the lien has come into existence more than four months prior to the filing of the petition in bankruptcy, by the creative power of a statute, as an incident to a judgment, levy or otherwise, and the legal proceeding begun within the four months, or even after the adjudication, is intended to preserve or enforce such lien, the subdivision has no application.<sup>74</sup>

It is not the judgment, that is, the determination of the controversy, but the judgment lien and proceedings tending to enforce the judgment which are annulled, and, if such a judgment is offered for proof, it can be attacked only on the ground of fraud, collusion or want of jurisdiction.<sup>75</sup> It must appear that there was property of the bankrupt estate subject to an attachment or judgment lien which could be released from the same, or which could pass to the trustee for the benefit of the estate.<sup>76</sup>

more, 188 U. S. 486, 45 L. ed. 555, 9 A. B. R. 476.

72—*Levor v. Seiter*, 69 App. Div. (N. Y.) 33, 8 A. B. R. 459; *Rodolf v. First Nat. Bank*, 28 A. B. R. 897; *In re Weit- zel*, 191 Fed. 463, 27 A. B. R. 370.

73—*Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36; *In re Blair*, 108 Fed. 529, 6 A. B. R. 206; *In re Beaver Coal Co.*, 110 Fed. 630, 6 A. B. R. 404; *In re Pease*, 4 A. B. R. 547; *Doyle v. Heath*, 22 R. I. 213, 4 A. B. R. 705; *Taylor v. Taylor*, 59 N. J. Eq. 86, 4 A. B. R. 211; *In re Kavanaugh*, 2 N. B. N. R. 528, 99 Fed. 928, 3 A. B. R. 832.

74—*In re Rohrer*, 177 Fed. 381, 24 A. B. R. 52; *Fairlamb v. Smedley Construc- tion Co.*, 36 Pa. Super. Ct. 17, 22 A. B. R. 824; *Woods v. Klein*, 223 Pa. St. 256, 22 A. B. R. 722; *In re Resnek*, 167 Fed. 574, 21 A. B. R. 740; *In re Koslowski*, 153 Fed. 823, 18 A. B. R. 723; *In re Mc- Kane*, 152 Fed. 733, 18 A. B. R. 594; *In re Bailey*, 144 Fed. 214, 16 A. B. R. 289; *Hiller v. LeRoy*, 179 N. Y. 369, 12 A. B. R. 733.

75—*In re Pease*, 2 N. B. N. R. 657, 4 A. B. R. 547; *contra*, *St. Cyr v. Diag- nault*, 103 Fed. 854, 4 A. B. R. 638.

76—*Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897.

A judgment obtained against an insolvent debtor without fraud or collusion would be as conclusive evidence of the claim and its amount as if given against a solvent debtor.<sup>77</sup>

In certain states an execution placed in the sheriff's hands, but never levied, creates an inchoate lien although the judgment was not recorded, but it will not avail against the estate in bankruptcy<sup>78</sup> any more than in the case of one who takes an inchoate security, such as a judgment note, on which judgment has not been entered;<sup>79</sup> or a judgment docketed on a holiday, which by statute is dies non juridicus;<sup>80</sup> or where goods taken upon execution have been relinquished before the petition in bankruptcy is filed.<sup>81</sup> In case of money collected on execution and turned over to the execution creditor, recovery can only be had if the creditor had reasonable cause to believe a preference would be affected.<sup>82</sup>

The act in dealing with the property owned by the bankrupt at the time the petition is filed annuls judgment liens affecting it, but if the bankrupt fails to obtain a discharge, there seems no good reason why the judgment, which may have been entered long before bankruptcy proceedings, should not be valid as to after acquired property. To require the creditor to resort to his original cause of action would merely put him to additional cost and trouble without any compensating benefit to any one.<sup>83</sup>

77—*Catlin v. Hoffman*, 9 N. B. R. 342, 2 Sawy. 486, Fed. Cas. No. 2521.

78—*In re Hopkins*, 1 N. B. R. 71, 1 A. B. R. 209.

79—*Clark v. Iselin*, 9 N. B. R. 19, 10 Blatch. 204, Fed. Cas. No. 2825.

80—*In re Worthington*, 14 N. B. R. 488, Fed. Cas. No. 18052; s. c. 16 N. B. R. 52, 7 Biss. 455, Fed. Cas. No. 18051.

81—*Sage v. Wyncoop*, 16 N. B. R. 363, Fed. Cas. No. 12215.

82—Act of 1898, § 60b as amended 1910. *In re Blair*, 102 Fed. 987, 2 N. B. R. 890, 4 A. B. R. 220.

83—In general it was held under the Act of 1867 that the law did not affect the lien of a judgment or execution (*Haworth v. Travis*, 11 N. B. R. 145; *In re Gold Mountain Min. Co.*, 15 N. B. R. 545; 3 Sawy. 601, Fed. Cas. No. 5515; *In re Wimm*, 1 N. B. R. 131, Fed. Cas. No. 17876); and consequently the decisions

under that act on this point do not now apply. But some of the decisions being on general principles do; as that where a creditor advanced money to pay a valid execution and took judgment for his own claim and such advance it was good as to the advance (*Lathrop v. Drake*, 13 N. B. R. 472, 91 U. S. (1 Otto) 516, 23 L. ed. 414); that a judgment recovered after an assignment for the benefit of creditors created no lien though such assignment was afterwards set aside by assignee in bankruptcy (*Belden v. Smith*, 16 N. B. R. 302, Fed. Cas. No. 1242); that in an action by lien-holders a judgment, limited to the property subject to the lien, could be rendered notwithstanding the bankruptcy proceedings (*Reed v. Bullington*, 11 N. B. R. 408); that a judgment creditor whose judgment was a valid lien on such property could enforce his claim against it though the bankrupt

### § 894. — Replevin.

A seizure under a writ of replevin is a levy within the meaning of section 67f.<sup>84</sup>

### § 895. — Sale under attachment or execution.

The ultimate property in attached goods being in the debtor,<sup>85</sup> the trustee in bankruptcy is entitled to the proceeds of a sale under a judgment entered or an attachment or execution levied on the debtor's property within four months of his adjudication in bankruptcy,<sup>86</sup> less reasonable costs of sale, whether the proceeds be in the hands of the sheriff or of a state court; and the sheriff may be enjoined from paying the proceeds to the judgment creditor, and may be required upon a summary petition to pay it over to the trustee,<sup>87</sup> but if the trustee brings suit for the same he must allege that the execution debtor was insolvent when the execution was made.<sup>88</sup> After the period of redemption from an execution sale has expired before the appointment of a trustee, he takes nothing but the bankrupt's naked title, which is valueless, since the purchaser

had sold it before the commencement of the proceedings in bankruptcy (Phillips v. Bowdoin, 14 N. B. R. 43); or although he had levied on personalty but subsequently abandoned such levy permitting the personalty to return to defendant (Winship v. Phillips, 14 N. B. R. 50).

84—In re Hymes Buggy & Implement Co., 130 Fed. 977, 12 A. B. R. 477; In re Weinger, Bergman & Co., 126 Fed. 875, 11 A. B. R. 424.

85—In re Hull, 18 N. B. R. 1, 14 Blatch. 257, Fed. Cas. No. 6857.

86—Clarke v. Larremore, 188 U. S. 486, 45 L. ed. 555, 9 A. B. R. 476; In re Kenney, 105 Fed. 897, 5 A. B. R. 355; In re Moyer, 97 Fed. 324; Wallace v. Conrad, 3 N. B. R. 10; In re Duguid, 100 Fed. 274, 2 N. B. N. R. 607, 3 A. B. R. 794; Bear v. Chase, 99 Fed. 920, 3 A. B. R. 746; In re Franks, 95 Fed. 635, 2 A. B. R. 634; In re Kenney, 2 N. B. N. R. 140, 97 Fed. 554, 3 A. B. R. 353; In re Francis-Valentine Co., 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522; s. c. 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188;

Reese v. Vinton, 1 N. B. N. 544; In re Moyer, 1 N. B. N. 260, 93 Fed. 188, 1 A. B. R. 577; In re Fellerath, 1 N. B. N. 292, 95 Fed. 121, 2 A. B. R. 40; In re Richards, 95 Fed. 258, 2 A. B. R. 518; see also In re Globe Cycle Works, 1 N. B. N. 570; In re Mullen, 101 Fed. 413, 4 A. B. R. 224; Long v. Conner, 17 N. B. R. 540, Fed. Cas. No. 8479; In re Black, 1 N. B. R. 81, 2 Ben. 196, Fed. Cas. No. 1457.

87—In re Kenney, 2 N. B. N. R. 140, 97 Fed. 554, 3 A. B. R. 353; s. c. 1 N. B. N. 401, 95 Fed. 427, 2 A. B. R. 494; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 Fed. 793; s. c. below 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188; Reese v. Vinton, 1 N. B. N. 544; In re Moyer, 1 N. B. N. 260, 93 Fed. 188, 1 A. B. R. 577; s. c. 97 Fed. 324; In re Fellerath, 1 N. B. N. 292, 95 Fed. 121, 2 A. B. R. 40; In re Franks, 95 Fed. 635, 2 A. B. R. 634. See Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623.

88—Simpson v. Van Etten, 108 Fed. 199, 6 A. B. R. 204.

can, at any time, demand a deed from the sheriff.<sup>89</sup> Where a sale has been made upon an execution on a judgment obtained within the four-month period, and the proceeds have been paid to the judgment creditor, it is held that the purchaser at the sale is entitled to the property as against the receiver or trustee in bankruptcy.<sup>90</sup>

### § 896. — Preservation of lien for estate.

If no sale has been made under an attachment on execution, the trustee is entitled to the property, or, if deemed for the best interests of the estate, he will be subrogated to the rights of the attaching or judgment creditors as respects the lien, and the lien will be preserved for the benefit of the estate,<sup>91</sup> and so much of the value of the property attached or levied upon as is represented by the attachment or execution passes to the trustee for the benefit of all creditors.<sup>92</sup> The statute was designed to preserve some interest acquired by virtue of an attachment, which would not pass to the trustee by virtue of the bankruptcy proceeding. If the property passes at any rate to the trustee, there is no necessity for invoking the order of the court. The attachment being dissolved, the trustee is not further embarrassed in his settlement of the estate. It is therefore for preserving some interest that the attaching creditor has acquired for the benefit of the estate, that would not otherwise pass to the trustee, that the court's order may be brought into requisition.<sup>93</sup> This is the view taken by the supreme court which, speaking through Brown, J., has construed the act as follows:

“Section 67f makes two distinct provisions for the disposition

89—In re Goldman, 2 N. B. N. R. 818, 102 Fed. 122, 4 A. B. R. 100.

90—In re Weitzel, 191 Fed. 463, 27 A. B. R. 370.

91—Act of 1898, §§ 67c, 67f. *Martin v. Globe Bank & Trust Co.*, 193 Fed. 841, 27 A. B. R. 545; *In re Waite-Robbins Co.*, 192 Fed. 47, 27 A. B. R. 541; *First Nat. Bank of Pittsburgh v. Guarantee Title & Trust Co.*, 178 Fed. 187, 24 A. B. R. 330; *Miller v. New Orleans Acid & Fertilizer Co.*, 211 U. S. 496, 53 L. ed. 300, 21 A. B. R. 416, aff'g 117 La. 821; *In re Merrow*, 131 Fed. 993, 12 A. B. R. 615; *In re Baird*, 126 Fed. 845, 11 A.

B. R. 435; *Watschke v. Thompson*, 85 Minn. 105, 7 A. B. R. 504; *In re Hammond*, 98 Fed. 845; *In re Francis-Valentine Co.*, 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522; s. c. 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188; *Reed v. Bullington*, 11 N. B. R. 408; *Morris v. Davidson*, 11 N. B. R. 454; *In re Preston*, 6 N. B. R. 545, Fed. Cas. No. 11394; *In re Houseberger*, 2 N. B. R. 33, 2 Ben. 504, Fed. Cas. No. 6734.

92—*Conti v. Sunseri*, 18 A. B. R. 891.

93—*Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. 940, 22 A. B. R. 803.

of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or, second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors; that is, for the benefit of the estate—in other words the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors. The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's estate as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of attaching creditors, by the institution of proceedings in bankruptcy.”<sup>94</sup>

The trustee is not by section 67f subrogated by mere operation of law to the rights of a levying creditor. He must obtain an order of court preserving the rights of the levying creditor for the benefit of the bankrupt's estate,<sup>95</sup> and where an execution

94—First Nat. Bank of Baltimore v. Staake, 202 U. S. 141, 50 L. ed. 967, 15 A. B. R. 639, aff'g 133 Fed. 717, 13 A. B. R. 281.

95—Thompson v. Fairbanks, 196 U. S.

516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n; First Nat. Bank of Pittsburgh v. Guarantee Title & Trust Co., 178 Fed. 187, 24 A. B. R. 330.

or attachment lien is sought to be preserved for the benefit of the estate, steps must be taken to that end before the lien is discharged.<sup>96</sup> The subrogation of the trustee as plaintiff in the attachment suit after the lien has been discharged does not revive the lien.<sup>97</sup>

Where an execution creditor seeks to subject equitable assets to his judgment and there are no assets to pay the costs of litigation, or the same is of doubtful outcome, or only one creditor is interested, it has been held proper, on notice to all the creditors that a single creditor or class of creditors desires to conduct such litigation through the trustee, to order a suit brought for the benefit of creditors so sharing in the expense.<sup>98</sup>

### § 897. — Reimbursement of creditors for costs.

A trustee cannot be compelled to pay the costs incurred by creditors in procuring a preferential attachment as a condition precedent to obtaining possession of the property attached.<sup>99</sup>

### § 898. Assignments for creditors and receiverships.

A voluntary general assignment for the benefit of creditors, with or without preferences, made within the prescribed four months, is constructively fraudulent and void, though innocent as a matter of fact. Its purpose is to "hinder, delay and defraud" creditors, within the meaning of section 67e, because its necessary effect is to defeat the operation of the bankruptcy act, by depriving creditors of the choice of a trustee, of the summary jurisdiction of the bankruptcy court and of the ample control which the law intended to give them over the estate of their insolvent debtor.<sup>1</sup> Such assignment is voidable, not void,

96—*Davis v. Compton*, 158 Fed. 735, 20 A. B. R. 53; *In re Walsh Bros.*, 195 Fed. 576, 28 A. B. R. 243.

97—*In re Walsh Bros.*, 195 Fed. 576, 28 A. B. R. 243.

98—*In re McNamara*, 2 N. B. N. R. 341.

99—*In re Shoemaker*, 205 Fed. 113, 30 A. B. R. 349.

1—*Eichholz v. Polack*, 140 App. Div. (N. Y.) 551, 25 A. B. R. 243; *Cohen v. American Surety Co.*, 192 N. Y. 227, 20 A. B. R. 65, aff'g 123 App. Div. (N. Y.) 519, 19 A. B. R. 901; *Sargent v. Blake*,

160 Fed. 57, 17 L. R. A. (N. S.) 1040, 20 A. B. R. 115; *West Co. v. Lea Bros.*, 174 U. S. 590, 43 L. ed. 1098, 1 N. B. N. 409, 2 A. B. R. 463; s. c. 1 N. B. N. 79, 91 Fed. 237, 1 A. B. R. 261; *In re Sievers*, 91 Fed. 366, 1 N. B. N. 68, 1 A. B. R. 117; s. c., as *Davis v. Bohle*, 92 Fed. 325, 1 N. B. N. 216, 1 A. B. R. 412; *Leidigh Co. v. Stengel*, 95 Fed. 637, 1 N. B. N. 387, 2 A. B. R. 383; *In re Curtis*, 1 N. B. N. 163, 91 Fed. 737, 1 A. B. R. 440; *Ins. Co. v. Ins. Co.*, 14 N. B. R. 311, Fed. Cas. No. 5486; *In re Gutwillig*, 1 N. B. N. 40, 90 Fed. 475, 1 A.

and will remain valid unless invalidated by subsequent bankruptcy proceedings, differing in this from proceedings under the state insolvency laws which are void.<sup>2</sup> The assignee or receiver takes no title against the creditors,<sup>3</sup> but is a mere naked bailee for them without a shred of title or lawful authority to the possession of the bankrupt's estate,<sup>4</sup> the acts of the creditors under an assignment being void;<sup>5</sup> and, he may, by summary order be compelled to surrender the assets to the trustee in bankruptcy.<sup>6</sup>

The trustee may maintain an action upon the bond of the assignee to recover the amount which the latter fails to turn over.<sup>7</sup>

A title or lien acquired by a general assignee that is to the advantage of the estate when it has passed into bankruptcy, is not necessarily destroyed by the suppression of the assignment proceedings, but upon order of the court of bankruptcy it may be retained by the trustee for the benefit of creditors.<sup>8</sup>

If the assignment was made prior to the four-month period the property would not pass to the trustee.<sup>9</sup> He takes title to

B. R. 78, *aff'd* 1 N. B. N. 554, 92 Fed. 337, 1 A. B. R. 388; *In re Smith*, 1 N. B. N. 356, 92 Fed. 135, 2 A. B. R. 9; *Barnes v. Rattew*, Fed. Cas. No. 1019; *Globe Ins. Co. v. Ins. Co.*, 14 N. B. R. 311, Fed. Cas. No. 5486; *In re Biesen-thal*, 15 N. B. R. 228, 3 Fed. Cas. No. 76; *In re Galvin*, 2 N. B. N. R. 146; *In re Burt*, 1 Dillon 440, Fed. Cas. No. 2210; *Hobson v. Markson*, Fed. Cas. No. 6555; *In re Smith*, Fed. Cas. No. 12974; *In re Goldschmidt*, 3 N. B. R. 164; *Boese v. King*, 108 U. S. 385, 27 L. ed. 763. But see *Gill v. Bell's Knitting Mills*, 128 App. Div. (N. Y.) 691, 21 A. B. R. 282; *In re Hirose*, *Doing Business Under the Name of Hirose Shoten*, 12 A. B. R. 154.

2—*Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1; *Patty-Joiner & Eubank Co. v. Cummins*, 93 Tex. 598, 4 A. B. R. 269; *Mayer v. Hellman*, 91 U. S. 496, 23 L. ed. 377; *In re Andrae & Co.*, 117 Fed. 561, 9 A. B. R. 135.

3—*In re Knight*, 125 Fed. 35, 11 A. B. R. 1; *In re Bruss-Ritter Co.*, 1 N. B. N. 39, 90 Fed. 651, 1 A. B. R. 58; *Lea*

*v. Geo. M. West Co.*, *supra*; *In re Hathorn*, Fed. Cas. No. 6214; *In re Bininger*, Id. 1420; *In re Wallace*, Id. 17094; *In re Washington Marine Ins. Co.*, Id. 17246; *In re Merchant's Ins. Co.*, Id. 9441; *Thornhill v. Bk.*, Id. 13992; *Mfg. Co. v. Hamilton (Mass.)*, 51 N. E. 529; *Detroit Trust Co. v. Pontiac Savings Bank*, 196 Fed. 29, 27 A. B. R. 821.

4—*In re Smith*, 1 N. B. N. 536, 92 Fed. 135, 2 A. B. R. 9.

5—*In re Gutwillig*, 91 Fed. 475, 1 N. B. N. 40, 1 A. B. R. 78.

6—*In re Hecox*, 164 Fed. 823, 21 A. B. R. 314; *In re Cameron Currie & Co.*, 20 A. B. R. 790.

7—*Cohen v. American Surety Co.*, 192 N. Y. 227, 20 A. B. R. 65, *aff'g* 123 App. Div. (N. Y.) 519, 19 A. B. R. 901.

8—*In re Fish Bros. Wagon Co.*, 164 Fed. 553, 26 L. R. A. (N. S.) 433, 21 A. B. R. 149.

9—*In re Arledge*, 1 N. B. R. 195, Fed. Cas. No. 533; *In re Shinn*, 185 Fed. 990, 25 A. B. R. 833; and see *In re Farrell*, 176 Fed. 505, 23 A. B. R. 826.

property in the hands of a common law assignee although a replevin suit or other proceedings with reference thereto are pending.<sup>10</sup> It has been held that the title of a trustee who was also the assignee under a voluntary assignment relates back to such assignment, and his acts after receiving the property, if not inconsistent with his duty as trustee, will be ratified.<sup>11</sup>

The application of a corporation for voluntary dissolution and the appointment of a temporary receiver is not the equivalent of a general assignment and upon that ground will not be avoided by bankruptcy proceedings;<sup>12</sup> but a general assignment made by a corporation is equally with one made by an individual avoided by bankruptcy proceedings.<sup>13</sup>

The title of a receiver in proceedings in a state court relates back to the commencement of the proceedings, and where such proceedings are commenced more than four months prior to the institution of the bankruptcy proceedings, the title of the receiver is superior to that of the trustee in bankruptcy,<sup>14</sup> but the re-establishment of a lien by the appointment of a receiver within four months prior to bankruptcy does not give the receiver title as against the trustee in bankruptcy.<sup>15</sup> Where a receiver appointed under state laws is not invested with title until a certified copy of the order appointing him is filed with the clerk of the county, a receiver who has not complied with the law, has no title as against the subsequently appointed trustee in bankruptcy.<sup>16</sup>

On application to the state court by the trustee in bankruptcy of an insolvent corporation, the funds in the hands of the receiver of the corporation, appointed shortly before the filing of the petition, should be turned over to him.<sup>17</sup> This is likewise true

10—*In re Solomon*, 2 N. B. N. R. 460; *In re Kenney*, 2 N. B. N. R. 140, 97 Fed. 554, 3 A. B. R. 353; *comp. MacDonald v. Moore*, 15 N. B. R. 26, 8 Ben. 579, Fed. Cas. No. 8763.

11—*In re Walker*, 18 N. B. R. 56, Fed. Cas. No. 17063.

12—*In re Harper*, 2 N. B. N. R. 605, 100 Fed. 266, 3 A. B. R. 804; *In re Empire Metallic Bedstead Co.*, 2 N. B. N. R. 304, 98 Fed. 981, *aff'g* 1 N. B. N. 386, 2 A. B. R. 329, 95 Fed. 957, *rev'g* s. c. 1 N. B. N. 301, 1 A. B. R. 136.

13—*Lea v. West Co.*, 174 U. S. 590, 43

L. ed. 1098, 1 N. B. N. 409, 2 A. B. R. 463, *aff'g* 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237.

14—*Wrede v. Clark*, 132 App. Div. (N. Y.) 293, 21 A. B. R. 821; *In re English*, 127 Fed. 940, 11 A. B. R. 674, *rev'g* 122 Fed. 113, 10 A. B. R. 133.

15—*In re Matthews & Sons*, 163 Fed. 127, 20 A. B. R. 570.

16—*In re Tyler*, 104 Fed. 778, 5 A. B. R. 152.

17—*Mauran v. Carpet Lining Co.*, 23 R. I. 324, 6 A. B. R. 734.



in the case of a partnership,<sup>18</sup> as well as in the case of an individual. The state court is without authority to make an order for the delivery of property in the possession of its receiver to the trustee in bankruptcy contingent upon the payment of fees of the receiver and his attorneys, or cause the property in the hands of such receiver to be sold for the purpose of raising such funds.<sup>19</sup>

### § 899. Assignments of money or wages.

An unrecorded assignment of money to become due has been held valid as against the trustee where under the state law, such assignment was valid as to general creditors, and creditors who, though entitled to a lien, failed to file their liens.<sup>20</sup>

An assignment of wages to be earned in the future under an existing contract of employment to secure a present debt or future advances is valid as an agreement, and takes effect as an assignment as the wages are earned, but an assignment of wages to be earned, without limit as to amount or time, is void.<sup>21</sup>

The courts are not agreed as to the effect of an adjudication in bankruptcy upon an assignment of future wages. Some courts hold that wages earned after adjudication become the property of the bankrupt clear of any claim of a creditor holding an assignment thereof executed prior to the filing of the petition,<sup>22</sup> while others rule that a valid assignment of future wages may be enforced as against wages earned after the filing of the petition in bankruptcy even though a discharge has been granted.<sup>23</sup> The former seems to be the better rule, inasmuch as the policy of the courts has always been to liberally construe the act in favor of honest debtors.

The validity of an assignment of wages earned by the bankrupt prior to bankruptcy must be determined in a plenary suit.<sup>24</sup>

18—*Wilson v. Parr*, 115 Ga. 629, 8 A. B. R. 230.

19—*Hanson v. Stephens*, 116 Ga. 722, 11 A. B. R. 172.

20—*In re Interstate Paving Co.*, 197 Fed. 371, 28 A. B. R. 573.

21—*Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 14 A. B. R. 409.

22—*In re West*, 128 Fed. 205, 11 A. B. R. 782; *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 14 A. B. R. 409; *In re*

*Home Discount Co.*, 147 Fed. 538, 17 A. B. R. 168.

23—*Citizens' Loan Ass'n v. Boston & M. Ry.*, 196 Mass. 528, 14 L. R. A. (N. S.) 1025, 124 Am. St. 584, 19 A. B. R. 650; *Mallin v. Wenham*, 209 Ill. 252, 13 A. B. R. 210. See also *post*. Chapter XXXV.

24—*In re Driggs*, 171 Fed. 897, 22 A. B. R. 621.

### § 900. Attorney's lien.

The lien of an attorney is a possessory one.<sup>25</sup> An attorney's lien on the papers of his client will be recognized, though, where the papers relate to property in the possession of the trustee or sold by him, the attorney may be required to surrender them for the purpose of recordation on condition that they shall be returned to him after being recorded.<sup>26</sup> In the absence of statute or agreement of the parties an attorney has no lien on a judgment recovered by him.<sup>27</sup>

### § 901. Banker's lien.

The validity of a banker's lien depends upon the state law. If valid under such law it will be recognized by the bankruptcy court.<sup>28</sup> A bank making a loan to the bankrupt and placing it in the general deposit account of the bankrupt has no lien thereon.<sup>29</sup>

### § 902. Chattel mortgages and trust deeds.

### § 903. — Rights of trustee.

The provision in section 70a (5) vesting in the trustee title to property of the bankrupt which prior to the filing of the petition he could by any means have transferred, covers personal property which, although mortgaged, the bankrupt was authorized to sell by the terms of the mortgage.<sup>30</sup> A chattel mortgage void as against creditors under a state law<sup>31</sup> under which the mortgagee had taken possession, having reasonable cause to believe the debtor insolvent, is void as to the trustee.<sup>32</sup>

A chattel mortgage within four months of bankruptcy, made to hinder, delay and defraud creditors, or which is invalid under the state law for want of record, or because the mortgagor retains

25—Attorney not entitled to lien where assets not in his possession. In re Marble Products Co., 199 Fed. 668, 29 A. B. R. 384.

26—In re Brown & Fleming Co., 21 A. B. R. 662.

27—In re Austin, 13 A. B. R. 136.

28—In re Gesas, 146 Fed. 734, 16 A. B. R. 872.

29—National City Bank of New York v. Hotchkiss, 231 U. S. 50, 58 L. ed. 115,

31 A. B. R. 291, aff'g 201 Fed. 664, 29 A. B. R. 289.

30—In re Hull, 115 Fed. 858, 8 A. B. R. 302.

31—Thornhill v. Link, 8 N. B. R. 521, Fed. Cas. No. 13993; Edmondson v. Hyde, 7 N. B. R. 1, 2 Sawy. 205, Fed. Cas. No. 4285.

32—Harvey v. Crane, 5 N. B. R. 218, 2 Biss. 496, Fed. Cas. No. 6178; In re Griffiths, 3 N. B. R. 179,

possession, is void under the bankruptcy proceedings and may be set aside upon suit by the trustee, who becomes vested with the title thereto. Where, however, it is for a present bona fide valuable consideration, and valid under a state law, the mortgagee's title cannot be divested.

Prior to the amendment of 1910 if the lien was valid under the state law as against the bankrupt and his general creditors it was held valid as against the trustee. But this rule has been changed by the amendment of 1910, and the trustee may now avoid liens on property in the custody or coming in the custody of the bankruptcy court if the same could have been avoided by a creditor holding a lien by legal or equitable proceedings, and may avoid liens on property not in the custody of the court if the same could have been avoided by a judgment creditor holding an execution duly returned unsatisfied.<sup>33</sup> He may seize property in the hands of a mortgagee who has failed to file a renewal statement as required by law, or recover its proceeds from such mortgagee who took possession before bankruptcy.<sup>34</sup>

When a mortgage is declared void, the trustee holds the mortgaged property unincumbered by the mortgage, and it is subject to pro rata distribution just as any other property of the bankrupt.<sup>35</sup>

Where the trustee voluntarily submits himself to the jurisdiction of a state court he will be bound by its decision as to the validity of a mortgage involved in the suit.<sup>36</sup>

The interest of the bankrupt, as grantor in property conveyed by a trust deed passes to the trustee in bankruptcy.<sup>37</sup>

#### § 904. — Validity in general.

The lien depends on the state law, as construed by the state courts.<sup>38</sup> Cases, decided both prior and subsequent to the amend-

33—See *ante* § 859. In *re* Geiver, 193 Fed. 128, 28 A. B. R. 413.

In Missouri, an unrecorded trust deed is valid as to judgment creditors and hence as to trustee if recorded before a sale under the judgment. *Sturdivant Bank v. Schade*, 195 Fed. 188, 27 A. B. R. 673, *rev'g* 189 Fed. 636, 26 A. B. R. 915.

34—In *re* Thomas, 199 Fed. 214, 29 A. B. R. 945.

35—In *re* Duggan, 183 Fed. 405, 25 A. B. R. 479, *aff'g* 182 Fed. 252, 25 A. B. R. 105.

36—In *re* Reynolds, 133 Fed. 82, 13 A. B. R. 245.

37—In *re* Jersey Island Packing Co., 138 Fed. 625, 2 L. R. A. (N. S.) 560, 14 A. B. R. 689.

38—*Bank of Dillon v. Murchison*, 213 Fed. 147, 31 A. B. R. 740; In *re* Thomas, 199 Fed. 214, 29 A. B. R. 945; In *re*

ment of 1910, determining the validity of chattel mortgages and trust deeds in the following states, may be found cited in the notes: Alabama,<sup>39</sup> California,<sup>40</sup> Colorado,<sup>41</sup> Georgia,<sup>42</sup> Idaho,<sup>43</sup> Iowa,<sup>44</sup> Kentucky,<sup>45</sup> Minnesota,<sup>46</sup> Michigan,<sup>47</sup> Missouri,<sup>48</sup> Ne-

Ozark Cooperage & Lumber Co., 180 Fed. 105, 24 A. B. R. 835; *Swager v. Smith*, 194 Fed. 762, 27 A. B. R. 660; *Dodge v. Norlin*, 133 Fed. 363, 13 A. B. R. 176; *Dougherty v. First Nat. Bank of Canton*, 197 Fed. 241, 28 A. B. R. 263; *In re Geiver*, 193 Fed. 128, 28 A. B. R. 413; *In re First Nat. Bank of Canton*, 135 Fed. 62, 14 A. B. R. 180; *In re Harrison*, 2 N. B. N. R. 541; *Etherbridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171; see *ante* § 858.

Where the property at the time of the execution of a chattel mortgage thereon is situated in a state other than that where the mortgagor is domiciled and the mortgage executed, the question of the preservation of the mortgage lien under the laws in reference to registration and priority of such lien is to be determined by the laws of the place where the property is situated at the time the mortgage is executed. *In re Nuckols*, 201 Fed. 437, 29 A. B. R. 867.

39—Mortgage without change of possession. *In re Marengo Co. Merc. Co.*, 199 Fed. 474, 29 A. B. R. 46.

40—Unfiled chattel mortgage valid as against general creditors and trustee. *In re Grainger*, 160 Fed. 69, 20 A. B. R. 166. But see *Guras v. Porter*, 118 Fed. 668.

41—Unfiled chattel mortgage void as to other creditors. *In re Leigh Bros.*, 1 N. B. N. 425, 2 A. B. R. 606, s. c. 96 Fed. 806.

42—Unrecorded chattel mortgage is void both as to existing and subsequent creditors. *In re Duggan*, 183 Fed. 405, 25 A. B. R. 479, *aff'g* 182 Fed. 252, 25 A. B. R. 105. But see *In re Josephson*, 116 Fed. 404, 8 A. B. R. 423.

43—Trustee and simple creditors may

attack validity of unfiled chattel mortgage. *In re Hickerson*, 162 Fed. 345, 20 A. B. R. 682.

44—Chattel mortgage void as to creditors becoming such after its execution and prior to its recordation. *Post v. Berry*, 175 Fed. 564, 23 A. B. R. 699.

45—Unrecorded mortgage is valid as against subsequent creditors without notice who have not secured a lien. *Holt v. Crucible Steel Co. of America*, 224 U. S. 262, 56 L. ed. 756, 27 A. B. R. 856, *aff'g* 174 Fed. 127, 23 A. B. R. 302.

The mere failure to record is not conclusive of an agreement between the parties to that effect. *In re Doran*, 154 Fed. 467, 18 A. B. R. 760, *mod'g* 148 Fed. 327, 17 A. B. R. 799.

46—Only subsequent purchasers acquiring the property while the mortgage is unfiled, and creditors laying hold of the property by legal proceedings during that time, can attack an unrecorded chattel mortgage. *Title Guaranty & Surety Co. v. Witmire*, 195 Fed. 41, 28 A. B. R. 235.

47—The statutory invalidity of an unfiled chattel mortgage is not confined to those who obtained judgment or levied attachment before the filing, but extends to all creditors who became such after the giving and before the filing of the mortgage. *In re Ottenwess & Huxoll*, 193 Fed. 851, 27 A. B. R. 579. And see *In re Adams*, 1 N. B. N. 503, 2 A. B. R. 415, 97 Fed. 188; *In re Loud*, 1 N. B. N. 502.

48—Unfiled chattel mortgage void as to persons becoming creditors between the dates of the giving of the mortgage and the filing thereof. *In re Martin*, 173 Fed. 597, 23 A. B. R. 151. And see *In re Frazier*, 117 Fed. 746.

braska,<sup>49</sup> New Mexico,<sup>50</sup> New York,<sup>51</sup> North Carolina,<sup>52</sup> Ohio,<sup>53</sup> Oregon,<sup>54</sup> Rhode Island,<sup>55</sup> South Carolina,<sup>56</sup> Virginia,<sup>57</sup> Washington,<sup>58</sup> West Virginia,<sup>59</sup> and Wisconsin.<sup>60</sup>

A chattel mortgage may under a state law be void for insufficiency of description,<sup>61</sup> or for lack of refileing.<sup>62</sup> In certain states a chattel mortgage, executed long before the bankruptcy but not

49—Unfiled chattel mortgage held void. *In re Perkins Plow Co.*, 112 Fed. 308, 7 A. B. R. 369.

50—Mortgage on stock of goods without change of possession held valid. *In re Harnden*, 200 Fed. 175, 29 A. B. R. 507.

51—Unfiled chattel mortgage is void as to general creditors but they cannot take advantage of invalidity until they obtain judgment and execution thereon is returned. It is sufficient however that the judgment is obtained and the execution levied after the commencement of the bankruptcy proceedings. *In re Beede*, 138 Fed. 441, 14 A. B. R. 697. See also *In re Schmidt*, 181 Fed. 73, 24 A. B. R. 687; *Gove v. Morton Trust Co.*, 96 App. Div. (N. Y.) 177, 12 A. B. R. 297; *In re Beede*, 138 Fed. 441, 14 A. B. R. 697; *Stephens v. Perrine*, 143 N. Y. 476; *Stephens v. Meridian Britannica Co.*, 160 N. Y. 178; *Sheldon v. Wickham*, 161 Id. 500; *In re Harrison*, 2 N. B. N. R. 541.

Trustee may attack unfiled chattel mortgage unaccompanied by change of possession. *In re Gerstman*, 157 Fed. 549, 19 A. B. R. 145; *In re Noethen*, 201 Fed. 97, 29 A. B. R. 234.

The adjudication in bankruptcy does not affect the right of creditors to assert the invalidity of an unfiled mortgage. *In re Beede*, 138 Fed. 441, 14 A. B. R. 697.

52—Unfiled chattel mortgage held void. *In re Tatem*, 110 Fed. 519, 6 A. B. R. 426; *In re Jones*, 116 Fed. 431, 8 A. B. R. 626.

53—Unfiled chattel mortgage held void. *In re Ohio Co-op. Shear Co.*, 1 N. B. N. 477, 2 A. B. R. 775.

54—Unfiled chattel mortgage held

void. *In re Booth*, 2 N. B. N. R. 377, 98 Fed. 975, 3 A. B. R. 574.

55—Unfiled chattel mortgage held void. *In re Wright*, 107 Fed. 428.

56—Mortgage on 'shifting stock not void per se. *Bank of Dillon v. Murchison*, 213 Fed. 147, 31 A. B. R. 740.

Mortgage is good without recording as to the bankrupt and all creditors whose rights accrued prior to its execution, and it is of no effect as to those creditors, whether simple or lien creditors, whose rights accrued between the execution of the mortgage and its recording. *Simmons v. Greer*, 174 Fed. 654, 23 A. B. R. 443, aff'g 164 Fed. 300, 21 A. B. R. 34. See also *Stroud v. McDaniel*, 106 Fed. 493, 5 A. B. R. 695.

57—Unrecorded deed of trust invalid as to trustee. *In re Thorp*, 130 Fed. 371, 12 A. B. R. 195.

58—Unrecorded chattel mortgage is void both as to prior and subsequent creditors. *In re Mission Fixture & Mantel Co.*, 180 Fed. 263, 24 A. B. R. 873.

59—Unrecorded chattel mortgage held valid as against creditors who became such after it was given and without knowledge of it, where none of the other creditors have secured a lien. *In re Charles Town L. & P. Co.*, 199 Fed. 846, 29 A. B. R. 721.

60—Unfiled chattel mortgage held void. *In re Andrae Co.*, 117 Fed. 561, 9 A. B. R. 135.

61—*Stroud v. McDaniel*, 106 Fed. 493, 5 A. B. R. 695; *In re Durham*, 114 Fed. 750, 8 A. B. R. 115.

62—*In re Thomas*, 199 Fed. 214, 29 A. B. R. 945; *In re Watts-Woodward Press, Inc.*, 181 Fed. 71, 24 A. B. R. 684; *In re N. Y. Economical Printing Co.*, 110 Fed. 514, 6 A. B. R. 615.

recorded until a month prior thereto, is void only as to creditors who became such between the execution and record by a new credit or by the extension of an old indebtedness existing at or prior to the execution of said mortgage.<sup>63</sup> The withholding of a mortgage from record is a matter open to explanation.<sup>64</sup> But if it appears that the mortgage was withheld from record to enable the mortgagor to remain in possession of a stock of goods, and to deal with it as his own and thereby aid him in obtaining further credit, the mortgagee will be estopped from asserting his mortgage.<sup>65</sup> Unreasonable delay in the filing of a chattel mortgage executed within four months of the filing of the petition in bankruptcy, may invalidate it as to both prior and subsequent creditors.<sup>66</sup>

A chattel mortgage properly recorded in the state where the chattels are located is not invalidated by the fact that it is not recorded in the state of the residence of the parties thereto.<sup>67</sup>

Where property is transferred to the bankrupt subject to an existing mortgage the mortgage cannot be attacked by the bankrupt's creditors on the ground that the mortgage is not recorded as required by statute.<sup>68</sup>

A chattel mortgage made in good faith to secure a present advance either in money or property is valid though made within four months of the bankruptcy; but, if made within that time with intent to hinder, delay or defraud creditors and not for such present advance, or if for any reason void under the state law as to creditors, as for want of filing, it is avoided by the bankruptcy. If it shows on its face that it was given in part to secure a pre-existing debt, and in part a new advance of money made at the same time with the mortgage, in the absence of actual fraud it is good as to the new advance,<sup>69</sup> though the mortgagee

63—In re Adams, 1 N. B. N. 503, 2 A. B. R. 415, 97 Fed. 188; and see In re Kaufmann, 2 N. B. N. R. 778.

64—Mitchell v. Mitchell, 147 Fed. 280, 17 A. B. R. 382.

65—Mitchell v. Mitchell, 147 Fed. 280, 17 A. B. R. 382.

66—In re Schiebler, 165 Fed. 363, 21 A. B. R. 309.

67—In re Greene, 134 Fed. 137, 13 A. B. R. 504.

68—In re Standard Laundry Co., 112 Fed. 126, 7 A. B. R. 254; In re Columbia Fireproof Door Trim Co., 168 Fed. 159, 21 A. B. R. 714.

69—In re Clifford, 136 Fed. 475, 14 A. B. R. 281; In re Wolf, 98 Fed. 84, 3 A. B. R. 555; In re Barman, 14 N. B. R. 125, Fed. Cas. No. 999; In re Stowe, 6 N. B. R. 429, Fed. Cas. No. 13513; In re Hull, 115 Fed. 858.

knew the mortgagor was financially embarrassed.<sup>70</sup> If on all the debtor's personalty given to secure a much larger sum than is due to protect the property from creditors, and the mortgagee with knowledge of the facts files it with an affidavit that the whole amount is due, it is void,<sup>71</sup> as is one made for a present consideration though not recorded until within four months of the bankruptcy.<sup>72</sup>

Where a creditor invested the amount of his debt in a partnership business, received stock in a corporation organized to take over that business, in exchange, and then allowed the corporation to repurchase the stock by the giving of a chattel mortgage and by the payment of cash, all parties having knowledge of the entire transaction, the payment and mortgage will be held fraudulent.<sup>73</sup>

A chattel mortgage given upon the payment of cash, which goes into the hands of the bankrupt and is used for the purpose of his estate, and of which his creditors have the benefit, is a valid mortgage, even if made within the four months' period, if no actual fraud is shown.<sup>74</sup>

A mortgage of a liquor license has been held to be contrary to public policy.<sup>75</sup>

### § 905. — Change of possession.

Where the mortgagor, by an arrangement, express or implied, is permitted to retain possession of the property with power to sell, the mortgage is unavailing against his creditors,<sup>76</sup> unless

70—In re Rousseau, 2 N. B. N. R. 1066.

71—In re Hugill, 2 N. B. N. R. 433, 100 Fed. 616, aff'g 2 N. B. N. R. 429.

72—In re Barman, 14 N. B. R. 125, Fed. Cas. No. 999.

73—In re Levine, 196 Fed. 589, 28 A. B. R. 481.

74—In re Mahland, 184 Fed. 743, 26 A. B. R. 81.

75—In re McArdle, 126 Fed. 442, 11 A. B. R. 358.

76—In re Noethen, 201 Fed. 97, 29 A. B. R. 234; In re Marengo Co. Merc. Co., 199 Fed. 474, 29 A. B. R. 46; In re Geiver, 193 Fed. 128, 28 A. B. R. 413; Swager v. Smith, 194 Fed. 762, 27 A. B. R. 660; Orr v. Park, 183 Fed. 683, 25

A. B. R. 544; In re Hartman, 185 Fed. 196, 26 A. B. R. 76; In re Standard Tel. & Elec. Co., 216 U. S. 545, 54 L. ed. 610, 24 A. B. R. 761, aff'g 162 Fed. 675, 20 A. B. R. 671; In re Beihl, 176 Fed. 583, 23 A. B. R. 905; In re Bellevue Pipe & Foundry Co., 22 A. B. R. 97; In re Tucker, 161 Fed. 584, 20 A. B. R. 404; In re Gerstman, 157 Fed. 549, 19 A. B. R. 145; Zartman v. First Nat. Bank of Waterloo, 189 N. Y. 267, 12 L. R. A. (U. S.) 1083, 19 A. B. R. 27, aff'g 109 App. Div. (N. Y.) 406, 16 A. B. R. 152; In re Ditsch, 17 A. B. R. 912; Mitchell v. Mitchell, 147 Fed. 280, 17 A. B. R. 382; In re Marine Construction and Dry Dock Co., 144 Fed. 649, 16 A. B. R. 325, modifg. 135 Fed. 921, 14 A. B. R. 466;

the mortgage also requires the mortgagor on making sales to pay over the proceeds thereof and apply them to the payment of the mortgage debt.<sup>77</sup> A mortgage on a shifting stock of merchandise, obviously intended for daily sale, and the proceeds whereof go to the mortgagor, is void as against creditors and as against the receiver in bankruptcy, not only as to stock after acquired,<sup>78</sup> but also as to stock on hand at the time of the delivery of the mortgage<sup>79</sup> and as to fixtures which are included therein.<sup>80</sup> The inference of fraud arising in such case is not rebutted by proof that the debt secured is bona fide, and that the insolvency of the mortgagor was unknown to the mortgagee at the time of the execution of the mortgage.<sup>81</sup> Where such mortgage is voidable as to part of the mortgaged property it is voidable as to all.<sup>82</sup>

Possession taken by the mortgagee after the filing of the petition cannot operate to validate the mortgage as against the trustee.<sup>83</sup>

The trustee is not a party to a chattel mortgage within the meaning of a statute making unrecorded chattel mortgages void as to persons not parties thereto unless there has been a delivery of the property to the mortgagee.<sup>84</sup>

### § 906. — Mortgage of after acquired property.

Whether a mortgage is operative as to after-acquired property must be determined by the laws of the state where executed.<sup>85</sup>

*Skilton v. Codington*, 185 N. Y. 80, 15 A. B. R. 810; *In re First Nat. Bank of Canton*, 135 Fed. 62, 14 A. B. R. 180; *Dodge v. Norlin*, 133 Fed. 363, 13 A. B. R. 176; *Skillen v. Endelman*, 39 Misc. (N. Y.) 261, 11 A. B. R. 766; *In re Leigh Bros.*, 1 N. B. N. 526, 96 Fed. 806, aff'g 1 N. B. N. 425, 2 A. B. R. 606; *In re Ohio Coop. Shear Co.*, 1 N. B. N. 477, 2 A. B. R. 775; *In re Foster*, 18 N. B. R. 64, Fed. Cas. No. 4964; *Bk. v. Hunt*, 4 N. B. R. 198; *Kane v. Rice*, 10 N. B. R. 469, Fed. Cas. No. 7609; *Robinson v. Elliott*, 11 N. B. R. 553, 22 Wall. 513, 22 L. ed. 758; *Smith v. Ely*, 10 N. B. R. 553, Fed. Cas. No. 1344; *In re Gurney*, 15 N. B. R. 373, 7 Biss. 414, Fed. Cas. No. 5873; but see *Harvey v. Crane*, 5 N. B. R. 218, 2 Biss. 496, Fed. Cas. No. 6178; *In re Hull*, 115 Fed. 858. But see *Bank of Dillon v. Murchison*, 213 Fed. 147, 31 A. B. R. 740; *In re Harn-*

*den*, 200 Fed. 175, 29 A. B. R. 507; *In re Kullberg*, 176 Fed. 585, 23 A. B. R. 758.

77—*In re Hartman*, 185 Fed. 196, 26 A. B. R. 76.

78—*In re Noethen*, 195 Fed. 573, 27 A. B. R. 910; *In re Volence*, 197 Fed. 232, 27 A. B. R. 914.

79—*In re Noethen*, 195 Fed. 573, 27 A. B. R. 910.

80—*In re Volence*, 197 Fed. 232, 27 A. B. R. 914.

81—*Mitchell v. Mitchell*, 147 Fed. 280, 17 A. B. R. 382.

82—*Dodge v. Norlin*, 133 Fed. 363, 13 A. B. R. 176. But see *In re Soudan Mfg. Co.*, 113 Fed. 804, 8 A. B. R. 45.

83—*In re Jules & Frederic Co.*, 193 Fed. 533, 27 A. B. R. 136.

84—*In re Jules & Frederic Co.*, 193 Fed. 533, 27 A. B. R. 136.

85—*In re Burnham*, 140 Fed. 926, 15 A. B. R. 548; *Thompson v. Fairbanks*,



The words of the mortgage are to be strictly construed,<sup>86</sup> and it will not be held to cover after-acquired property unless expressly so provided in the mortgage.<sup>87</sup> The indorsement by the debtor upon the back of an otherwise valid chattel mortgage given by him, that such mortgage should cover property acquired after its execution, made with the purpose of delaying creditors, is void.<sup>88</sup>

The enforcement of a lien by the taking of possession, with the consent of the mortgagor, of after-acquired property, covered by a valid mortgage, is not a conveyance or transfer within the meaning of the act,<sup>89</sup> and it is held that a mortgagee of after-acquired property taking possession within the four-month period may hold as against the trustee, though at the time of his taking possession the property was subject to an attachment, such attachment being invalidated by the filing of the petition in bankruptcy.<sup>90</sup>

A mortgagee's right to take possession of after-acquired property covered by his mortgage is terminated by the adjudication,<sup>91</sup> and even though possession be taken before bankruptcy the mortgage may be held void as to the trustee.<sup>92</sup>

It is held that where there are no creditors other than the lien claimant the provision of section 47a (2) as amended in 1910 cannot be invoked in attacking a mortgage covering after-acquired property,<sup>93</sup> but this is contrary to the majority rule.<sup>94</sup>

196 U. S. 516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n; Zartman v. First Nat. Bank, 189 N. Y. 267, 12 L. R. A. (N. S.) 1083, 19 A. B. R. 27, aff'g 109 App. Div. (N. Y.) 406, 16 A. B. R. 152.

After-acquired personal property used in the business of the bankrupt consisting of machinery, tools, and office fittings, held not to pass to mortgagee under after-acquired property clause. In re Niagara Lead & Battery Co., 202 Fed. 298, 29 A. B. R. 788.

86—In re Adamant Plaster Co., 137 Fed. 251, 14 A. B. R. 815.

87—York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 15 A. B. R. 633, rev'g 135 Fed. 52, 14 A. B. R. 52.

88—Whithead v. Pillsbury, 13 N. B. R. 241, Fed. Cas. No. 17572.

89—Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n.

90—Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n; In re Clough, 197 Fed. 185, 28 A. B. R. 828.

91—In re Hurley, 185 Fed. 851, 26 A. B. R. 434.

92—Zartman v. First Nat. Bank, 189 N. Y. 267, 12 L. R. A. (N. S.) 1083, 19 A. B. R. 27, aff'g 109 App. Div. (N. Y.) 406, 16 A. B. R. 152.

93—In re Flatland, 196 Fed. 310, 28 A. B. R. 476.

94—See *ante* §§ 748, 859.

### § 907. — Recital of mortgage in note.

The failure of a note to state that it was secured by chattel mortgage as provided by statutes has been held to invalidate the mortgage as against the trustee in bankruptcy.<sup>95</sup>

### § 908. Equitable assignments and liens.

### § 909. — In general.

The validity of an equitable assignment of or lien against property in the hands of the trustee, is determined by the state law as construed by the highest courts of the state.<sup>96</sup> Such lien or assignment, if valid under the state law, may be enforced against the trustee,<sup>97</sup> and the court of bankruptcy will not hesitate to effectuate the actual intent of transactions honestly had with a bankrupt, without much restraint as to formality or procedure.<sup>98</sup>

An equitable lien never arises nor is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one who has notice of it and is affected with it as a superior right.<sup>99</sup> An equitable lien which involves a fraud upon the law is none the less obnoxious because not in the form a chattel mortgage or a conditional sale.<sup>1</sup>

A personal claim of indebtedness against the bankrupt's estate does not constitute a lien upon property of the estate in the hands of one making such claim,<sup>2</sup> and a general promise of

95—*In re Birek & Co.*, 142 Fed. 438, 15 A. B. R. 694.

96—*Rode & Horn v. Phipps*, 195 Fed. 414, 27 A. B. R. 827; *Godwin v. Murchison Nat. Bank*, 145 N. C. 320, 22 A. B. R. 703.

97—*Gage Lumber Co. v. McEldowney*, 207 Fed. 255, 30 A. B. R. 251; *In re Dunn & Co.*, 193 Fed. 212, 28 A. B. R. 127; *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. 940, 22 A. B. R. 803, 156 Fed. 504, 19 A. B. R. 244; *In re Hanna*, 105 Fed. 587, 5 A. B. R. 127; *Hanson v. Blake & Co.*, 155 Fed. 342, 19 A. B. R. 325. But see *In re Faulhaber Stable Co.*, 170 Fed. 68, 22 A. B. R. 381; *In re*

*Chantler Cloak & Suit Co.*, 151 Fed. 952, 18 A. B. R. 498.

98—*Gage Lumber Co. v. McEldowney*, 207 Fed. 255, 30 A. B. R. 251.

99—*Fourth Street Nat. Bank v. Millbourne Mill Co.'s Trustee*, 172 Fed. 177, 30 L. R. A. (N. S.) 552, 22 A. B. R. 442, aff'g 162 Fed. 988, 20 A. B. R. 746.

1—*In re Liberty Silk Co.*, 152 Fed. 844, 18 A. B. R. 582.

2—*In re Rude*, 2 N. B. N. R. 498; *Goldman v. Smith*, 1 N. B. N. 291, 2 A. B. R. 104; *In re Falls City Shirt Mfg. Co.*, 1 N. B. N. 565, 98 Fed. 592, 3 A. B. R. 437; *In re Brunquest*, 14 N. B. R. 529, 7 Ben. 208, Fed. Cas. No. 2055.

the bankrupt to give security on demand cannot be enforced as a lien against his estate.<sup>3</sup> An agreement made, when a debt is created, to make payment out of a particular fund, or the proceeds of a particular enterprise, does not create a lien upon the fund or the proceeds of the enterprise.<sup>4</sup>

One of whom a bankrupt borrowed money to use in the purchase of property, has an equity in the property purchased which will be recognized by the bankruptcy court,<sup>5</sup> but, it is held that one advancing money to the bankrupt upon an executory contract for future delivery of fish to be caught by the bankrupt has no title to the fish subsequently caught where there had been no delivery to him.<sup>6</sup>

### § 910. — **Parol assignments.**

In both legal and equitable assignments it is essential that the parties contemplate an assignment. While at law a mere agreement is unenforceable, in equity such assignment may be had between the parties and others having notice thereof. Such agreement may be express or implied. Implication must necessarily and exclusively point to an assignment, and not to a mere designation of a fund or assets out of which a payment is to be made. Where enforcement of an agreement to assign is sought against the trustee, it is essential that there was a purpose to presently transfer all that the bankrupt assignor had or was to obtain in the funds or accounts which are the subject of the transaction. The test is whether the transaction, if assented to by the debtor of the assignor, creates an absolute personal indebtedness payable to the assignee, or merely an obligation by such assignor to make payment out of that particular debt. What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention to be gathered from all the circumstances. It is not essential that

3—*Mechanics' & Metals Nat. Bank v. Ernst*, 231 U. S. 60, 58 L. ed. 121, 31 A. B. R. 302, aff'g 201 Fed. 664, 29 A. B. R. 289.

4—*Torrance v. Winfield Nat. Bank*, 66 Kan. 177, 11 A. B. R. 185.

5—*Parker v. Bates*, 203 Fed. 294, 30 A. B. R. 198.

One who has advanced money to the bankrupt to purchase certain property

under an agreement whereby he is to have an interest in the property purchased may enforce his rights as against the trustee and general creditors. In *re McConnell*, 197 Fed. 438, 28 A. B. R. 659.

6—In *re Alaska Fishing & Development Co.*, 167 Fed. 875, 21 A. B. R. 685.

the subject matter be actually in being, if it exists potentially,<sup>7</sup> though in order that an equitable assignment may be effective against the receiver or trustee in bankruptcy, notice to the debtor or fundholder is ordinarily held necessary.<sup>8</sup>

A bill of exchange or draft drawn against a specified fund and accepted by the drawee constitutes an equitable assignment pro tanto of the fund.<sup>9</sup>

A parol assignment of choses in action to be acquired in the future made in good faith more than four months prior to the adjudication for the purposes of security has been held to create a valid lien upon choses of action which came into the possession of the trustee.<sup>10</sup> Where the beneficiaries in a policy on the life of the bankrupt assigned the same to him under an agreement that the same was to be used as third collateral for a loan and reassigned to them in case the primary collateral was sufficient to satisfy the debt, and the policy was used to satisfy the debt in place of the real estate mortgaged, it was held that the beneficiaries were entitled to a lien on the real estate or the proceeds thereof.<sup>11</sup>

### § 911. Factor's lien.

It is essential to the validity of a factor's lien that the property consigned shall be delivered to the consignee.<sup>12</sup>

### § 912. Landlord's lien.

Whether or not the landlord has a lien for the rent and, if so, to what extent, is to be determined by the *lex loci* and the bankruptcy court will recognize and enforce such lien.<sup>13</sup> Where under the state law the landlord is given a right to a lien upon

7—Evidence held in sufficient to show a present appropriation of outstanding book accounts at the time of an alleged equitable assignment, thereof by bankrupt. *In re Steger*, 209 Fed. 148, 31 A. B. R. 634, *aff'g* 202 Fed. 791, 29 A. B. R. 253.

8—*In re The Leader*, 190 Fed. 624, 26 A. B. R. 668.

9—*In re Oliver*, 132 Fed. 588, 12 A. B. R. 694.

10—*Union Trust Co. v. Bulkeley*, 150 Fed. 510, 18 A. B. R. 35.

11—*In re Mac Dougall*, 175 Fed. 400, 23 A. B. R. 762.

12—*Ommen v. Talcott*, 188 Fed. 401, 26 A. B. R. 689.

13—*In re Scruggs*, 205 Fed. 673, 31 A. B. R. 94; *In re Sapinsky & Sons*, 206 Fed. 523, 30 A. B. R. 416; *Des Moines Nat. Bank v. Council Bluffs Sav. Bank*, 150 Fed. 301, 18 A. B. R. 108; *Martin v. Orgain*, 174 Fed. 772, 23 A. B. R. 454; *In re Meyer & Bleuler*, 195 Fed. 653, 28 A. B. R. 17; *In re Jefferson*, 1 N. B. N. 288, 2 A. B. R. 206, 93 Fed. 948; *In re Gerson*, 1 N. B. N. 315, 2 A. B. R. 170; *In re Goldstein*, 1 N. B. N. 422, 2 A. B. R. 603; *In re Cronson*, 1 N. B. N. 474; *In re Shilladay*, 1 N. B. N. 475; *In re*

the execution of the lease and the tenant's entry into possession, his lien will be preserved if the lease is executed and recorded more than four months prior to the bankruptcy proceedings, though it does not actually attach until the levy of a distress warrant within such four-month period.<sup>14</sup>

As said by Lamar, J., in a recent case before the supreme court: "The statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice and subject to which they are presumed to have contracted when they dealt with the insolvent."<sup>15</sup>

Where, however, the lien does not attach until the levying of a distress warrant or the issuance of an execution, the bankruptcy of the tenant within four months thereafter will avoid the lien so acquired.<sup>16</sup>

A lien given the landlord for the term of one year from the date of the insolvency of the lessee cannot be defeated by the trustee's surrendering possession before the expiration of such time.<sup>17</sup>

Goods sold at retail in the ordinary course or conduct of a mercantile business are not sold subject to the landlord's lien, since in such case it is not practicable for the lien to follow the goods.<sup>18</sup>

If at the time the petition<sup>19</sup> is filed the landlord has no lien

Ruppel, 2 N. B. N. R. 88, 3 A. B. R. 233, 97 Fed. 778; In re Arnstein & Bonn, 2 N. B. N. R. 106; but see In re Sunseri, 3 N. B. N. R. 65.

14—In re Robinson & Smith, 154 Fed. 343, 18 A. B. R. 563; Henderson v. Mayer, 225 U. S. 631, 56 L. ed. 1233, 28 A. B. R. 387; Plaut v. Gorham Mfg. Co., 174 Fed. 852, 23 A. B. R. 42; In re West Side Paper Co., 162 Fed. 110, 20 A. B. R. 660, rev'g 159 Fed. 241, 20 A. B. R. 289.

15—Henderson v. Mayer, 225 U. S. 631, 56 L. ed. 1233, 28 A. B. R. 387..

16—In re Whealton Restaurant Co., 143 Fed. 921, 16 A. B. R. 294; In re Dougherty Co., 109 Fed. 480, 6 A. B. R. 457.

17—In re Meyer & Bleuler, 195 Fed. 653, 28 A. B. R. 17.

18—In re Varley & Bowman Clo. Co., 188 Fed. 761, 26 A. B. R. 104.

19—Under the Act of 1867, it was held that the law made no provision for a landlord's lien, but that in its administration it was the court's duty to recognize and enforce any lien that he might have by virtue of the State law (In re McConnell, 9 N. B. R. 387, Fed. Cas. No. 6712); and that a lien for rent would accordingly be respected (In re Trim v. Wagner, 5 N. B. R. 23; 2 Hughes, 355, Fed. Cas. No. 14174; Bowne, 12 N. B. R. 529, Fed. Cas. No. 1741; Barne's Appeal, 13 N. B. R. 543; Longstreth v. Pennock, 7 N. B. R. 449, Fed. Cas. No. 8488); but would not attach to the goods of a bankrupt found on the premises. Bailey v. Loeb, 11 N. B. R. 271, 2 Woods, 578, Fed. Cas. No. 739.

on a bankrupt tenant's goods as against the bankrupt, he has none subsequently against the trustee;<sup>20</sup> nor would the levying of a distress warrant after bankruptcy give the landlord a lien on the property as against the trustee.<sup>21</sup>

A lien created by a mining lease, consisting of a pledge of machinery for the purpose of securing the royalty fixed by the lease, has been held not a conveyance within the recording statutes.<sup>22</sup> Such lien may be waived by re-entering the premises.

### § 913. Livery stable keeper's lien.

In some states, the lien given livery stable keepers by statute is a perfect lien at the time the lien is created and is not voidable because notice thereof is filed within four months of bankruptcy.<sup>23</sup>

### § 914. Materialman's or mechanic's lien.

A materialman's or mechanic's lien is only equivalent to the additional value which the creditor has by his skill given the debtor's property, and does not diminish the assets applicable to the payment of his pre-existing debt, but stands on the same footing as a mortgage, pledge, or any other security given on a new and full consideration, and is not a preference of an antecedent debt. Being created by state statute and not the federal law, the requirements to their validity vary with the provisions of the several state laws with reference thereto, and if valid in accordance with such laws, will be so recognized by the court of bankruptcy, provided they are not in contravention to the bankruptcy law.<sup>24</sup>

A number of situations may arise in bankruptcy proceedings as regards the lien of a mechanic or materialman. (1) The mechanic or materialman may become bankrupt, or (2) the owner of the property on which the lien is filed may become

20—In re Butler, 6 N. B. R. 501, Fed. Cas. No. 2236.

21—In re Cress-McCormick Co., 25 A. B. R. 464; In re Bishop, 153 Fed. 304, 18 A. B. R. 635; Morgan v. Campbell, 11 N. B. R. 529; contra, In re Appold, 1 N. B. R. 178, Fed. Cas. No. 490.

22—In re Gallagher Coal Co., 205 Fed. 183, 29 A. B. R. 766.

23—In re Pratesi, 126 Fed. 588, 11 A. B. R. 319.

24—In re Starks-Ullman Saddlery Co., 171 Fed. 834, 22 A. B. R. 596; In re Coe Powers Co., 109 Fed. 550, 6 A. B. R. 1.

bankrupt, or (3) the contractor employing the mechanic and erecting the building for the owner may become bankrupt. These three situations may arise under two conditions connected with bankruptcy proceedings, that is, the notice of the lien may be filed within four months of the filing of the petition in bankruptcy, or it may be filed after the filing of such petition. If the lien be filed after the filing of the petition in bankruptcy by or against the owner of the property, it is clear that such lien is not effective for the reason that whatever is due in such case to the contractor, the materialman or the mechanic passes to the trustee by virtue of the adjudication in bankruptcy, as of the date of filing the petition. The title of the trustee can in no wise be affected by proceedings instituted thereafter. The property of the bankrupt being then in custodia legis, no lien of any character whatsoever can attach.<sup>25</sup>

The bankruptcy of the contractor does not affect the right of a materialman to perfect his lien by filing notice thereof after bankruptcy,<sup>26</sup> nor is the service of a stop-notice by a workman or materialman upon the owner of a building within four months of bankruptcy to compel the retention of the amount of a claim from the contract price to be paid the bankrupt such a lien as will be avoided.<sup>27</sup>

A lien upon motor vehicles for materials furnished the owner within four months of bankruptcy, has been held valid as against the trustee, though the lien statement is not filed until after bankruptcy.<sup>28</sup>

Materials brought by a contractor upon the owner's premises and appropriated to the building contracted for, are to be considered as so far delivered into the possession of the owner as to make them security for advances made by him on the contract, and to vest in him a qualified right of property in the same, con-

25—*In re Roeber*, 121 Fed. 449, 9 A. B. R. 303; *Lazzari v. Havens*, 39 Misc. 255, 79 N. Y. S. 375; see *In re Huston*, 7 A. B. R. 92; but see *In re Georgia Handle Co.*, 109 Fed. 632, 6 A. B. R. 472; *Mott v. Wissler Mining Co.*, 135 Fed. 697, 14 A. B. R. 321; *Henderson v. Mayer*, 225 U. S. 631, 56 L. ed. 1233, 28 A. B. R. 387.

26—*Hildreth Granite Co. v. Watervliet*,

146 N. Y. S. 449, 31 A. B. R. 703, rev'g 30 A. B. R. 789; *In re Grissler*, 136 Fed. 754, 13 A. B. R. 508; *Crane Co. v. Smythe*, 94 App. Div. (N. Y.) 53, 11 A. B. R. 747.

27—*Fehling v. Goings*, 67 N. J. Eq. 375, 13 A. B. R. 154.

28—*In re McAllister-Newgord Co.*, 193 Fed. 265, 27 A. B. R. 459.

sistent with the right of the owner to use them in the fulfillment of his contract.<sup>29</sup>

A lien may be waived or be avoided by the omission of any of the things directed by the state statute to be done or to be included in the notice which must be filed,<sup>30</sup> or if not filed within the time required by the statute, or by such delay in demanding payment as will amount to a waiver of the lien.<sup>31</sup> Neither would there be any right to a lien where the building contract expressly provided that there should be no lien or right of lien thereunder, and such contract has been recorded in compliance with the provisions of a state law.<sup>32</sup>

Where a mechanic's lien statute requires notice to the owner without any language to indicate that a written notice is intended, an oral notice is sufficient.<sup>33</sup>

An artisan performing work upon the property of the bankrupt after the filing of the petition but before the adjudication is entitled to a lien upon the proceeds of the property.<sup>34</sup>

### § 915. Mortgage liens.

The bankruptcy law does not prohibit a person from loaning money at legal rates, or selling goods or other property to one whom he has reason to believe is insolvent, and taking security for the same, provided it be bona fide and without intent or participation in any intent to defraud or defeat the execution of the law.<sup>35</sup> Section 67 of the law contains several specific pro-

29—*Duplan Silk Co. v. Spencer*, 115 Fed. 689, 8 A. B. R. 367.

30—In *re Emslie*, 2 N. B. N. R. 992, 102 Fed. 291, 4 A. B. R. 126, rev'g 2 N. B. N. R. 324, 98 Fed. 716, 3 A. B. R. 516, 2 N. B. N. R. 171, 97 Fed. 929, 3 A. B. R. 282; In *re Drolesbaugh*, 2 N. B. N. R. 1079; In *re Beck Provision Co.*, 2 N. B. N. R. 532; In *re Kerby-Denis Co.*, 1 N. B. N. 399, 95 Fed. 116, 2 A. B. R. 402, aff'g 1 N. B. N. 337, 94 Fed. 818, 2 A. B. R. 218; In *re Dey*, 9 Blatch. 285, Fed. Cas. No. 3871; In *re Coulter*, 5 N. B. R. 64, 2 Sawy. 42, Fed. Cas. No. 3276; *Sabin v. Connor*, Fed. Cas. No. 12197; In *re Cook*, 3 Biss. 116 Fed. Cas. No. 3151.

31—See In *re Lowensohn*, 2 N. B. N. R. 871, 100 Fed. 776, 4 A. B. R. 79;

*The Kimball*, 3 Wall, 37, 43, 18 L. ed. 50.

32—*Ludowici Roofing Tile Co. v. Penna Inst.*, 116 Fed. 661, 8 A. B. R. 739.

33—In *re Farmers' Supply Co.*, 170 Fed. 502, 22 A. B. R. 460.

34—In *re Rich*, 15 Ohio Fed. Dec. 255, 17 A. B. R. 893.

35—*Grinstead v. Union Savings & Trust Co.*, 190 Fed. 546, 27 A. B. R. 123. *Crook v. Bk.*, 1 N. B. N. 530; *Darby v. Boatman's Sav. Inst.*, 4 N. B. R. 195, Fed. Cas. No. 3571; *Barbour v. Priest*, 19 N. B. R. 518, 103 U. S. 293, 26 L. ed. 478; In *re Morrison*, 10 N. B. R. 106, Fed. Cas. No. 9839; *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245, 18 Wall. 375, 21 L. ed. 868, *Potter v. Coggeshall*, 4 N. B. R. 19, Fed. Cas. No. 11322; *Camp-*



visions under which a mortgage, although valid as between the mortgagor and mortgagee, would be avoided on the subsequent adjudication of the mortgagor as a bankrupt. Thus, under subdivision "a," if under the laws of the state, such mortgage must have been recorded in order to have been a valid lien as against the claims of the creditors of the bankrupt, such mortgage will not be a lien against his trustee unless a record was duly made.<sup>36</sup> In some states, an unrecorded mortgage is void as to those creditors who extended credit to the bankrupt after it was made and before it was recorded, but to avoid the mortgage as to other creditors, actual fraud in which the mortgagee participated, as distinguished from a mere preferential transfer or constructive fraud, must be shown.<sup>37</sup> In others, neglecting to promptly record a mortgage is not in itself fraudulent as against other creditors, and it is not made fraudulent by the additional fact that brothers-in-law are adverse parties to the mortgage.<sup>38</sup> In Georgia, the failure to attest renders a mortgage void as against subsequent and younger lienors.<sup>39</sup>

Under subdivision "e," any mortgage or encumbrance on the property of a person adjudged a bankrupt within four months prior to the filing of the petition either by or against him, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, will be null and void as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration, and such property will remain a part of the assets and estate of the bankrupt and passes to his trustee,<sup>40</sup> whose duty it is to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. Hence, a mortgage made by the bankrupt within four months of the bankruptcy proceedings to secure an antecedent debt, is void if given with intent to hinder, delay or defraud creditors,

bell v. Waite, 16 N. B. R. 93, 9 Ben. 166, Fed. Cas. No. 2374; Clark v. Iselin, 9 N. B. R. 19, 10 Blatch. 204, Fed. Cas. No. 2825; Gattman v. Honea, 12 N. B. R. 493, Fed. Cas. No. 5271; In re Soudans Mfg. Co., Stiles v. Dunnahoo, 113 Fed. 804, 8 A. B. R. 45; In re Davidson, 109 Fed. 882, 5 A. B. R. 528; McDaniel v. Stroud, 106 Fed. 486, 5 A. B. R. 685.

<sup>36</sup>—In re Pettingill & Co., 137 Fed. 143, 14 A. B. R. 728.

<sup>37</sup>—McAtie v. Shade, 185 Fed. 442, 26 A. B. R. 151.

<sup>38</sup>—Bean v. Orr, 182 Fed. 599, 25 A. B. R. 400.

<sup>39</sup>—In re Moore, 19 A. B. R. 271.

<sup>40</sup>—For a full discussion of the question of fraudulent conveyances by mortgage or otherwise, see *ante* § 782.

or with the intent to interfere with the operation of the bankruptcy law or to prefer the mortgagee.<sup>41</sup> A mortgage will also be void if it be given to secure one creditor and it covers all the property then available for the general creditors;<sup>42</sup> or if given for an amount much larger than the debt, the balance being intended to protect bankrupt or for his secret benefit;<sup>43</sup> or where the debtor transfers his property to a third person who executes a mortgage thereon to secure a creditor of the insolvent.<sup>44</sup>

If an obligation be assumed upon a valid agreement that the bankrupt will execute a mortgage upon certain specific property to secure the assumed liability, a mortgage executed and delivered in pursuance of such agreement, within a reasonable time thereafter, is valid, and the liability assumed will be deemed a present consideration for the conveyance.<sup>45</sup>

In Pennsylvania as between judgment creditors and general creditors in bankruptcy, machinery of a factory, which is a necessary part of it, is a fixture subject to the lien of a mortgage on the realty, regardless of the fact that the machinery has been conveyed to the owner by a bill of sale.<sup>46</sup>

Although a person may have been solvent, a mortgage made by him with intent to hinder, delay or defraud his creditors, will become null and void if bankruptcy proceedings are instituted against the mortgagor within four months thereafter. If a mortgage is given to cover a pre-existing debt as well as a new advance, it will be upheld to the extent of the advance,<sup>47</sup> or if given to secure present and future advances, it will be upheld unless given with an intent to hinder, delay or defraud cred-

41—*Powell v. Gate City Bank*, 178 Fed. 609, 24 A. B. R. 316; *American Wood Working Mach. Co. v. Norment* 157 Fed. 801, 19 A. B. R. 679; *In re Glieman*, 1 N. B. N. 58; *In re Jacobs*, 1 N. B. N. 183, 1 A. B. R. 518; *In re Teague*, 1 N. B. N. 310, 2 A. B. R. 168; *In re Stendts*, 1 N. B. N. 509; *In re Tine*, 1 N. B. N. 402, 95 Fed. 425, 2 A. B. R. 493; *In re Durham*, 114 Fed. 750, 8 A. B. R. 115; *In re Eagan State Bank v. Rice*, 119 Fed. 107; *In re Barrett*, 6 A. B. R. 48.

42—*In re McLane*, 97 Fed. 922, 3 A. B. R. 245; *In re Steininger Mercantile Co.*, 107 Fed. 669, 6 A. B. R. 68; *In re Schuller*, 108 Fed. 591, 6 A. B. R. 278.

43—*In re Hugill*, 100 Fed. 616, 3 A. B. R. 686.

44—*Gibson v. Dabil*, 14 N. B. R. 165, 5 Biss. 198, Fed. Cas. No. 5394.

45—*In re Farmers' Supply Co.*, 170 Fed. 502, 22 A. B. R. 460.

46—*In re Beeg*, 184 Fed. 522, 25 A. B. R. 572.

47—*In re Rousseau*, 2 N. B. N. R. 1066; *City National Bank v. Bruce*, 109 Fed. 69, 6 A. B. R. 311; *In re Davidson*, *supra*; *In re Sanderlin*, 109 Fed. 857, 6 A. B. R. 384; *Steadman v. Bank of Monroe*, 117 Fed. 237.

itors.<sup>48</sup> The same is true where a mortgage is made shortly before bankruptcy in pursuance of a parol agreement made long before upon a valuable consideration,<sup>49</sup> but a general promise made at the time a debt is contracted to give security if required, cannot be executed after the debtor has become insolvent.<sup>50</sup> A mortgage executed in blank and in which the blanks are subsequently filled takes effect from the latter date, and if within four months and for an antecedent debt will be void.<sup>51</sup>

Where sureties receive an indemnity mortgage from their principal, the bankrupt, to secure them against liability incurred in his behalf during a fixed period and to a limited amount, such security is not confined to the existing debts or mere renewals, but extends to new debts within the amount limited for which they become liable within the fixed period.<sup>52</sup>

A mortgage given by a partnership on its property is not affected by bankruptcy proceedings against one partner, though after the mortgage is given, the firm was dissolved and such partner took the assets and assumed its liabilities.<sup>53</sup>

The taking possession of mortgaged property by the mortgagee and omission to sell within a reasonable time operates as a satisfaction of the debt to the extent of the value of the property when the mortgagee took possession.<sup>54</sup>

Formal defects in a mortgage executed by the bankrupt prior to his bankruptcy may be corrected.<sup>55</sup> Where a mortgage is defective for want of acknowledgment or attestation, and the property passes into the hands of the trustee in bankruptcy before any proceedings are taken to reform the instrument, the trustee takes the property in the plight in which it then stood, and the instrument must be reformed to render it enforceable against him.<sup>56</sup> One who, in reliance upon the agreement of the

48—Ex p. Ames, 7 N. B. R. 230, Fed. Cas. No. 332.

49—Sabin v. Camp, 98 Fed. 974, 2 N. B. N. R. 375, 3 A. B. R. 578; Burdick v. Jackson, 15 N. B. R. 318; Post v. Corbin, 5 N. B. R. 11; In re Wood, 5 N. B. R. 421, Fed. Cas. No. 17937; but see Graham v. Stark, 3 N. B. R. 92, Fed. Cas. No. 5676.

50—Lloyd v. Strobridge, 16 N. B. R. 197, Fed. Cas. No. 8435; Ex p. Ames, 7 N. B. R. 8435, Fed. Cas. No. 323.

51—In re Barrett, 6 A. B. R. 48.

52—Courier Journal Job Printing Co. v. Brewing Co., 101 Fed. 699, 4 A. B. R. 183; Curry v. McCauley, 20 Fed. 583.

53—In re Sanderlin, 109 Fed. 857, 6 A. B. R. 384; McDaniel v. Stroud, 106 Fed. 486, 5 A. B. R. 685; McNair v. McIntyre, 113 Fed. 113, 7 A. B. R. 638.

54—In re Haake, 7 N. B. R. 61, 2 Sawy. 381, Fed. Cas. No. 5883.

55—In re International Mahogany Co., 147 Fed. 147, 16 A. B. R. 797.

56—Foerstner v. Citizens' Sav. & Trust Co., 186 Fed. 1, 26 A. B. R. 377.

bankrupt to give him a first lien on the latter's property to secure his repayment, loans money to pay off a prior incumbrance and takes a defective mortgage or other security, may be subrogated to the rights of the prior creditor to secure the payment of his claim.<sup>57</sup>

The trustee takes property mortgaged or pledged, subject to the amount legally due thereon. It is his duty to investigate the liens claimed to be held against the property and the value of the property on which held; and in case of doubt test the validity of the liens by suit.<sup>58</sup> The trustee should plead usury as long as any part of the debt on which usurious interest was paid remains unpaid.<sup>59</sup> If he finds there is any interest in the property which might be obtained for the general creditors, he should intervene in the suit to foreclose the security, or take other steps to realize such interest.<sup>60</sup> Where a state court has rendered a decree fixing the mortgagor's liability and orders a sale prior to the bankruptcy, he is entitled to any surplus proceeds and takes the title subject to such decree;<sup>61</sup> or to the proceeds of the sale of mortgaged property in the possession of a state court, not carried there by final process to enforce the mortgage, and the mortgagee must assert his claim in the bankruptcy court.<sup>62</sup>

Unless there is some benefit to be gained for the estate, it is not necessary for the trustee to move in the matter of a mortgage.<sup>63</sup>

Where the legal title to a bankrupt's mortgaged property is held by the trustee, the federal court has jurisdiction to hear and determine a question as to the validity and amount of the mortgage lien.<sup>64</sup> After a petition in bankruptcy is filed the court will punish either the mortgagor or the mortgagee for

57—In re Lee, 182 Fed. 579, 25 A. B. R. 436.

58—In re N. Y. Kerosene Oil Co. 3 N. B. R. 31, Fed. Cas. No. 7726; In re Metzger, 2 N. B. R. 114, Fed. Cas. No. 9510.

59—In re Prescott, 9 N. B. R. 385, 5 Biss. 523, Fed. Cas. No. 11389.

60—In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344; Heath v. Shaffer, 1 N. B. N. 399, 93 Fed. 647; 2 A. B. R. 98; In re

Holloway, 1 N. B. N. 264, 93 Fed. 638; 1 A. B. R. 659.

61—In re Gerdes, 102 Fed. 318, 4 A. B. R. 346, 2 N. B. N. R. 131.

62—Morris v. Davidson, 11 N. B. R. 454.

63—In re Lambert, 2 N. B. R. 138, Fed. Cas. No. 8026; In re Gibbs, 109 Fed. 627, 6 A. B. R. 485.

64—In re Kellogg, 113 Fed. 120, 7 A. B. R. 623.

interfering with the mortgaged property,<sup>65</sup> as the title to such property has then passed to the trustee.<sup>66</sup>

A creditor who relinquishes a security by mistake, either of law or fact, should be reinstated in his security by the court of bankruptcy, if the estate will be left by the reinstatement no worse off than if the security had been originally retained.<sup>67</sup>

Redemption, see ante, § 726.

### § 916. Liens held by officers of bankrupt corporation.

A lien acquired by an officer of the bankrupt who is also a creditor, to the detriment of other creditors, by reason of the official position of such officer, is unenforceable.<sup>68</sup>

### § 917. Pawnbroker's lien.

A pledge redeemed from a pawnbroker by a third party is no longer the subject of the pawnbroker's lien.<sup>69</sup>

### § 918. Pledges and warehouse receipts.

The present law differs from the act of 1867 in that it makes a distinction between the liens created by the pledge of property and those created by mortgage.<sup>70</sup> A pledge being a bailment of personal property as security for some debt or engagement in which delivery of possession is generally essential, it may cover not only goods and chattels and money, but negotiable paper, choses in action, patent rights, bonds, policies of insurance, and other things of like nature.<sup>71</sup> If made within more than four months prior to bankruptcy, in fraud of creditors,<sup>72</sup> upon suit of the trustee it will be set aside. If made within four

65—In re Arnett, 112 Fed. 770, 7 A. B. R. 522.

66—In re Gutman, 114 Fed. 1009, 8 A. B. R. 252.

67—In re Swift, 111 Fed. 503, 7 A. B. R. 117; In re Condon, 9 Ch. App. 609; Oil Co. v. Hawkins, 74 Fed. 395; Bank v. McKey, 102 Fed. 662; In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10754.

68—In re Richards, Inc., 28 A. B. R. 636.

69—In re Rudd, 180 Fed. 312, 25 A. B. R. 35.

70—Under the Act of 1867 the rights of a pledgee were not impaired or affected by any provision of the bankrupt law (Yeatman v. Sav. Inst., 17 N. B. R. 187; Brandenburg—44

95 U. S. (5 Otto) 764, 24 L. ed. 589); nor could proceedings in bankruptcy deprive creditors of their just possession of property held as security for a debt without discharging the debt (Davis v. R. R. Co., 12 N. B. R. 253, 1 Woods, 661, Fed. Cas. No. 3648). Where stock was pledged to secure call loans, leave of court was not necessary on the pledgor's bankruptcy, to sell the pledged stock and pay the surplus into court (In re Grinnell, 9 N. B. R. 137, Fed. Cas. No. 5829).

71—See In re Webb, 2 N. B. N. R. 289, 98 Fed. 404, 3 A. B. R. 386.

72—See In re Woodward, 1 N. B. N. 352, 2 A. B. R. 233.

months for a present fair consideration and not with intent to give the pledgee or one creditor an advantage over another or in fraud of the law, it will be preserved and the trustee may either redeem the pledge or suffer its disposition and reclaim for the benefit of the estate the amount obtained therefor in excess of the pledgee's claim, which may include reasonable expenses incurred in keeping and caring for the pledged property.<sup>73</sup> A pledge of insurance policies by a solvent corporation to certain stockholders as collateral security for loans, is valid, although the policies expire and are renewed during the insolvency of the corporation and within four months of its bankruptcy.<sup>74</sup> Where a creditor has a general lien, and the debtor, on receiving an advance or other accommodation from the creditor, deposits with him a particular security, specially intended or appropriated, or even pledged, to meet such advance or cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien.<sup>75</sup>

The questions of the validity and extent of a pledge are local questions.<sup>76</sup> In those states where a pledge is merely security for the debt, and the superior title remains in the pledgor, it passes to the trustee on the bankruptcy of the pledgor or mortgagor.<sup>77</sup> A pledge of property to secure notes executed within four months of the bankruptcy is not a preference, such notes being renewals of notes given prior to the four months and secured by a pledge of the same property and, under the *lex loci contractus*, each original pledge being valid.<sup>78</sup>

The United States alone can complain of a transaction whereby a national bank accepts pledge of its own stock.<sup>79</sup>

73—*Gregory v. Pike*, 67 Fed. 837; *In re Peacock*, 178 Fed. 851, 24 A. B. R. 159; *Love v. Export Storage Co.*, 143 Fed. 1, 16 A. B. R. 171; *Jones v. Coates*, 196 Fed. 860, 28 A. B. R. 249.

74—*In re Little River Lumber Co.*, 1 N. B. N. 307, 92 Fed. 585, 1 A. B. R. 483.

75—*Sparhawk v. Drexel*, 12 N. B. R. 450, Fed. Cas. No. 13204; *In re Peebles*, 13 N. B. R. 149, 2 Hughes 394, Fed. Cas. No. 10902.

76—*Hiscock v. Varick Bank*, 206 U. S.

28, 51 L. ed. 945, 18 A. B. R. 1, *aff'g*, 144 Fed. 818, 15 A. B. R. 362, *rev'g*. 134 Fed. 101, 14 A. B. R. 226.

77—*In re Coffin*, 1 N. B. N. 507, 2 A. B. R. 344.

78—*Chattanooga Nat. Bk. v. Rome Iron Co.*, 102 Fed. 755, 4 A. B. R. 441.

79—*First Nat. Bank v. Lanz*, 202 Fed. 117, 29 A. B. R. 247. Under R. S. 5201 a national bank may accept a pledge of its own stock when necessary to secure the payment of an unsecured, pre-existing debt. *Id.*

To preserve the lien of a pledge in bankruptcy, the essentials of a pledge must appear, to which delivery of possession or its equivalent is indispensable, there being no lien as there is no pledge, without it.<sup>80</sup> Whether any agreement which seeks to transfer the title to personal property is to be construed as a formal sale or a formal pledge, it is in either case ineffective against creditors unless there is a visible change of possession.<sup>81</sup> A transaction invalid as a pledge for want of delivery, cannot give rise to an equitable lien enforceable against the trustee.<sup>82</sup> A delivery of possession at any time before bankruptcy has been held sufficient, the rights of creditors not having intervened.<sup>83</sup>

In determining the sufficiency of delivery in a pledge, the nature of the property, the surrounding circumstances, the objects of the pledge, and the reasonable convenience of the pledgor and pledgee should be considered. There need not in all cases be an actual moving of the property, but only such a delivery as the property is reasonably capable of, and as is reasonably suitable under the circumstances.<sup>84</sup>

A delivery of stock may constitute a sufficient pledge without a transfer on the books of the corporation,<sup>85</sup> though it is held that certificates of stock deposited with a creditor as security but not assigned to him belong to the trustee.<sup>86</sup>

A transfer or indorsement of warehouse receipts is a sufficient delivery,<sup>87</sup> and possession by the pledgee will be held sufficient

80—In re Shulman, 206 Fed. 129, 30 A. B. R. 238; In re Grozinger, 199 Fed. 935, 28 A. B. R. 732; In re Bartlett, 172 Fed. 679, 22 A. B. R. 981; Fourth Street Bank v. Millbourne Mills Co., 172 Fed. 177, 30 L. R. A. (N. S.) 552, 22 A. B. R. 442, aff'g 162 Fed. 988, 20 A. B. R. 746; Security Warehouse Co. v. Hand, 206 U. S. 415, 51 L. ed. 117, 19 A. B. R. 291, aff'g 143 Fed. 32, 16 A. B. R. 49; Ryttenberg v. Schefer, 131 Fed. 313, 11 A. B. R. 652.

81—In re Gebbie & Co., 167 Fed. 609, 21 A. B. R. 694.

82—Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 30 L. A. (N. S.) 552, 22 A. B. R. 442, aff'g 162 Fed. 988, 20 A. B. R. 746.

83—Where under state law contract of

pledge was valid between parties without change of possession, claimant's title held superior to trustee's where former took possession prior to bankruptcy and before rights of creditors had intervened. In re East End Mantel & Tile Co., 202 Fed. 275, 29 A. B. R. 793.

84—Bush v. Export Storage Co., 136 Fed. 918, 14 A. B. R. 138; Chatt. Nat. Bank v. Rome Iron Co., 102 Fed. 755, 4 A. B. R. 441.

Tagging and numbering piles of lumber held sufficient symbolic delivery to complete pledge. Ward v. First National Bank, 202 Fed. 609, 29 A. B. R. 312.

85—First Nat. Bank v. Lanz, 202 Fed. 117, 29 A. B. R. 247.

86—French v. White, 78 Vt. 89, 22 L. R. A. (N. S.) 804, 18 A. B. R. 905.

87—Bush v. Export Storage Co., 136

where the warehouse whose receipts he holds has the goods under lock and key in a place to which it has legal title and right of access by lease.<sup>88</sup> Warehouse receipts are, however, only quasi negotiable securities, and the fact that a person takes a transfer of them in good faith gives him no right over the property on which they purport to be issued, if it was not, in fact, in the custody or possession of the warehouseman at the time when the receipts were issued.<sup>89</sup> An actual warehouse is not essential to the warehousing of goods, the only essential being a change of possession from the owner to the warehouseman,<sup>90</sup> and a warehouseman may obtain exclusive control and possession of property by means of placards.<sup>91</sup> An innocent pledgee of a bonded warehouse receipt can get a good title to the whiskey without taking actual possession within the four months.<sup>92</sup>

A pledgee does not lose his lien by a surrender of the pledged property to the receiver in bankruptcy;<sup>93</sup> nor is title to pledged property lost by a mixture with other property of the pledgor where its identity is not lost thereby.<sup>94</sup>

The trustee takes title to property pledged subject to the superior title of the pledgee,<sup>95</sup> and subject to the pledgee's right to sell the property and apply the proceeds to the debt.<sup>96</sup> Hence, a sale by the pledgee of property of the bankrupt held by him under a valid agreement of pledge, made pursuant to the terms of the pledge, cannot be restrained,<sup>97</sup> though it has been held

Fed. 918, 14 A. B. R. 138; *Union Trust Co. & Security Warehouse Co. v. Wilson*, 198 U. S. 530, 49 L. ed. 1154, 14 A. B. R. 109.

Delivery of warehouse receipts held to create a valid pledge of whiskey in bonded warehouse. *Pattison v. Dale*, 196 Fed. 5, 27 A. B. R. 807.

88—*Union Trust Co. v. Wilson*, 198 U. S. 530, 49 L. ed. 1154, 14 A. B. R. 109.

89—*Whitney v. Wenman*, 140 Fed. 959, 14 A. B. R. 591.

90—*Love v. Export Storage Co.*, 143 Fed. 1, 16 A. B. R. 171.

91—*Love v. Export Storage Co.*, 143 Fed. 1, 16 A. B. R. 171.

92—*In re Miller Pure Rye Distilling Co.*, 176 Fed. 606, 23 A. B. R. 890.

See also, *Pathison v. Dale*, 196 Fed. 5, 27 A. B. R. 897.

93—*In re Stroum*, 192 Fed. 762, 27 A. B. R. 721.

Delivery, by the secured creditor to the receiver for the purposes of collection, of certain insurance policies pledged to it held not an abandonment of its lien. *Ward v. First Nat. Bank*, 202 Fed. 609, 29 A. B. R. 312.

94—*In re Stroum*, 192 Fed. 762, 27 A. B. R. 721.

95—*In re Twining*, 185 Fed. 555, 26 A. B. R. 200.

96—*In re Peacock*, 178 Fed. 851, 24 A. B. R. 159.

97—*In re Mayer*, 157 Fed. 836, 19 A. B. R. 356.



that the right of a pledgee to dispose of the property pledged will be stayed from the filing of the petition in bankruptcy against or by the pledgor, and until consent is obtained of the court of bankruptcy or the trustee signifies his purpose to abandon any claim thereto.<sup>98</sup> If the sale of property pledged by the bankrupt, is, either in respect to time, place, manner or price, improvident or regardless of the rights of the trustee, the pledgee is liable for the loss occasioned thereby.<sup>99</sup>

In case of an alleged invalid pledge of the bankrupt's property, the trustee may elect to repudiate the loan and pledge, surrendering title to and possession of the property to the claimant, or to retain the property and ratify the loan. But he cannot claim the property and at the same time repudiate the loan as security for which the pledge was made.<sup>1</sup> Securities delivered by an insolvent bank to a creditor as collateral for a loan, must be surrendered to the trustee, who may reduce them to money when the court of bankruptcy will determine the right of the creditor to priority.<sup>2</sup> Where there has been a valid pledge of goods, the money paid to redeem them cannot be recovered.<sup>3</sup>

Where a license owned by a bankrupt and converted into money by his trustee had previously been pledged by the bankrupt, the pledgee is entitled to intervene in the bankruptcy proceedings to assert his right to payment from the proceeds.<sup>4</sup> Where the bankrupt pledged certain liquor-license certificates which it held as security for a loan to a third person, any money collected by the trustee from such third person should be surrendered to the pledgee to extinguish its debt and cannot be retained by the trustee for the benefit of the estate.<sup>5</sup> If an insurance policy had been given as security for the indorsement of a note, negotiated by bankrupt, the cash surrender value should be applied by the trustee first to the payment of such note;<sup>6</sup> and the same is true where moneys are advanced upon the pledge of such policies.<sup>7</sup>

98—In re Grinnell, 9 N. B. R. 29, 7 Ben. 42, Fed. Cas. No. 5830.

99—In re Peacock, 178 Fed. 851, 24 A. B. R. 159.

1—In re Automobile Livery Service Co., 176 Fed. 792, 23 A. B. R. 799.

2—In re Cobb, 1 N. B. N. 557, 96 Fed. 821, 3 A. B. R. 129.

3—Jenkins v. Mayer, 3 N. B. N. R. 189, 2 Biss. 303, Fed. Cas. No. 7272.

4—In re Fisher, 103 Fed. 860, 51 L. R. A. 292, 4 A. B. R., 646.

5—In re Elm Brewing Co., 132 Fed. 299, 12 A. B. R. 623.

6—In re Weil, 2 N. B. R. 295.

7—In re Little River Lumber Co., 92

Where securities are pledged to the bankrupt, who without authority repledges them, the right of the trustee to the securities is no greater than that of the bankrupt.<sup>8</sup> The maker of a note who pledges as security collateral fraudulently obtained by a co-maker is not entitled to the collateral upon payment of the note as against the trustee in bankruptcy of the person who made the fraudulent transfer.<sup>9</sup>

### § 919. Lien for taxes.

While property in the course of administration is not exempted from taxation, or freed from tax liens or claims theretofore fastened upon it, it is nevertheless in custodia legis, and a pre-existing tax lien or claim cannot be converted into full title by the procurement of a tax deed without the court's sanction.<sup>10</sup>

A municipality is not entitled to a lien for taxes where the property assessed never passed into the hands of the trustee.<sup>11</sup>

### § 920. Lien on trust fund or property devised to bankrupt.

A lien upon property devised to the bankrupt follows the property or its proceeds.<sup>12</sup> A lien procured against the income from a trust fund payable to the bankrupt within four months of bankruptcy has been held voidable.<sup>13</sup>

### § 921. Vendor's liens.

#### § 922. — In general.

The lien of an unpaid vendor will be recognized<sup>14</sup> though acquired within four months of bankruptcy,<sup>15</sup> unless procured through fraud.<sup>16</sup> A lien waived by the extension of credit to

Fed. 585, 1 A. B. R. 483, 1 N. B. N. 307; *In re Sands Ale Brewing Co.*, 6 N. B. R. 101, 3 Biss. 175, Fed. Cas. No. 12307.

8—*In re McIntyre*, 181 Fed. 955, 24 A. B. R. 626.

9—*In re Zinner*, 202 Fed. 197, 29 A. B. R. 860.

10—*In re Epstein*, 156 Fed. 42, 17 L. R. A. (N. S.) 465, 19 A. B. R. 89.

11—*City of Waco v. Bryan*, 127 Fed. 79, 11 A. B. R. 481.

12—*In re L'Hommedieu*, 146 Fed. 708, 16 A. B. R. 850.

13—*In re Tiffany*, 133 Fed. 799, 13 A. B. R. 310.

14—*In re Portunodo Co.*, 135 Fed. 592, 14 A. B. R. 337. See also *ante*, § 844.

15—The statutory lien of an unpaid vendor of personalty is not affected though acquired within four months of bankruptcy. *Norris v. Trenholm*, 209 Fed. 827, 31 A. B. R. 353.

16—Lien asserted by vendor by virtue of agreement upon back of bill of sale to which bankrupt's attention was not called cannot be enforced against trustee. *In re Hassam & Son*, 153 Fed. 932, 18 A. B. R. 745.

the vendee, revives upon expiration of the term, even though the vendee may not then be insolvent.<sup>17</sup> The vendor's suing for the purchase price is a waiver of his right to claim title as against the bankrupt or his trustee,<sup>18</sup> and a vendor delivering a chattel to the bankrupt under a contract calling for cash on delivery cannot rescind the sale and recover the property from the trustee.<sup>19</sup>

A vendor of real estate may be entitled to a lien for the unpaid purchase price upon land sold though he has, prior to bankruptcy, commenced no action to foreclose his lien.<sup>20</sup>

### § 923. — Reclamation.

See ante, § 844.

### § 924. — Stoppage in transitu.

The right of stoppage in transitu which is an equitable extension of the seller's lien for the price of goods of which the buyer has acquired the property but not the possession, recognized by the courts of common law, is also recognized in the courts of bankruptcy. Hence, if a purchaser becomes bankrupt previous to the receipt of the goods, or is insolvent at the time of their purchase and has actually filed his petition prior to their receipt;<sup>21</sup> or while insolvent actually employed counsel in contemplation of bankruptcy proceedings, and then purchased and had delivered to him goods, no title can be considered to have passed and the seller may retake them;<sup>22</sup> or if goods are ordered upon false representations and are received shortly before the purchaser's bankruptcy, the sale may be rescinded as fraudulent.<sup>23</sup> The right of stoppage in transitu continues until the delivery at the final point of destination as determined by the contract between the parties,<sup>24</sup> but cannot be exercised after

17—*In re Fortunado Co.*, 135 Fed. 592, 14 A. B. R. 337.

18—*In re Cohn*, 18 A. B. R. 786.

19—*Guarantee Title & Trust Co. v. First Nat'l Bank*, 185 Fed. 373, 26 A. B. R. 85.

20—*In re Lane Lumber Co.*, 210 Fed. 82, 31 A. B. R. 792.

21—*In re Christensen*, 2 N. B. N. R. 670; *In re Foot*, 11 N. B. R. 158, 11 Blatch. 530.

22—*In re McPeck*, 2 N. B. N. R. 172;

*Donaldson v. Farwell*, 15 N. B. R. 277; *Stewart v. Emerson*, 8 N. B. R. 462; *In re Alsberg*, 16 N. B. R. 116, Fed. Cas. No. 261; *In re Rogers*, 3 N. B. R. 139, 1 Lowell 123, Fed. Cas. No. 12001.

23—*In re Weil*, 111 Fed. 897, 7 A. B. R. 90, and cases there cited; *Bloomington v. Empire Rubber Mfg. Co.*, 114 Fed. 1016, 8 A. B. R. 74.

24—*In re Burke & Co.*, 140 Fed. 971, 15 A. B. R. 495.

delivery of the goods to the receiver in bankruptcy,<sup>25</sup> or if a prior demand is made by the receiver or trustee in bankruptcy or any creditor of the bankrupt.<sup>26</sup> Notice must be given by the consignor to the person in charge of the property sought to be reclaimed or served on the principal in time to permit notice to be communicated to its agent in charge. Notice to the principal not in possession is not sufficient.<sup>27</sup>

Where a bankrupt bought wine (to arrive) and it was stored in bond in the seller's name, a part being withdrawn with the seller's consent prior to the bankruptcy, the remainder was held to be stored subject to the right of stoppage in transitu.<sup>28</sup>

25—In re Allen, 178 Fed. 879, 24 A. B. R. 574.

27—In re White, 205 Fed. 393, 29 A. B. R. 385.

26—In re White, 205 Fed. 393, 29 A.

28—In re Bearns, 18 N. B. R. 500, Fed. B. R. 358; In re Darlington, 163 Fed. Cas. No. 1191.

385, 20 A. B. R. 800.

## CHAPTER XXIII

### PREFERENCES

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- § 983. Payments to attorney in contemplation of bankruptcy.
- § 984. Actions affecting preferences.

## § 925. Nature and elements of preferences in general.

Section 60(a) defines a preference as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."<sup>1</sup>

This subdivision expressly defines a preference and provides that the existence of three elements in any transaction shall make it a preference. These are "insolvency," "procuring or suffering a judgment or making a transfer," provided the preference occurred within four months before the filing of the petition, or after the filing of the petition and before the adjudication, and "that it result in one creditor receiving more than others of the same class." It constitutes a rule of evidence in

1—Subdivision "a" was amended by the Act of February 5, 1903, by the substitution of the matter in the text for the following: "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in

favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

bankruptcy proceedings and makes it a conclusive presumption that the debtor intended to give a preference if he does any one of the three and the result is as stated without reference to the intent.<sup>2</sup>

Subdivision "b" of the same section "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or the entry of the judgment, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."<sup>3</sup> The two subdivisions must be construed together, and a preference under section "a" is not voidable unless the elements enumerated in section "b" exist.<sup>4</sup>

To bring a transaction within their requirements (1) the debtor must have been insolvent at the time; (2) he must have procured or suffered the judgment, or made the transfer; (3) its result must be to give one creditor a greater percentage of his claim than others; (4) such creditor must have had reasonable cause to believe such would be the result; and (5) it must have been within four months of the filing of the petition, or

2—In re Piper, 2 N. B. N. R. 7. See also *post* § 929.

3—Subdivision "b" was amended by the Act of June 25, 1910, by the substitution of the matter in the text for the following: "If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Prior to the amendment of 1903 the

subdivision read: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition, and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

4—In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

between the filing and adjudication.<sup>5</sup> All the foregoing propositions involve questions of fact.<sup>6</sup>

A preference involves no element of moral or actual fraud. It is simply a constructive fraud established by law upon the existence of certain facts and prohibited by it. There is nothing dishonest or illegal in a creditor obtaining payment of a debt due him from a failing debtor; nor in his attempting by proper and ordinary effort to secure an honest debt, though such act may afterwards become a constructive fraud by reason of the filing of a petition and adjudication in bankruptcy.<sup>7</sup>

It will be observed that the latter subdivision makes preferences under the conditions named voidable by the trustee. Another provision of the act<sup>8</sup> provides that "a lien created by . . . any proceeding at law . . . including attachment on mesne process or a judgment by confession, which was begun within four months before the filing of a petition . . . shall be dissolved by the adjudication . . ." if (1) such lien was

5—In re Chicago Car Equipment Co., 211 Fed. 638, 31 A. B. R. 617; Newman v. Tootle-Campbell Co., 31 A. B. R. 399; Debus v. Yates, 193 Fed. 427, 30 A. B. R. 823; In re Sam Z. Lorch & Co., 199 Fed. 944, 28 A. B. R. 784. See also, Rodolf v. First Nat. Bank of Tulsa, 30 Okla. 631, 28 A. B. R. 897; Utah Ass'n of Credit Men v. Boyle Furn. Co., 39 Utah 518, 26 A. B. R. 867; Boswell Nat'l Bank v. Simmons, 190 Fed. 735, 26 A. B. R. 865; Kimmerle v. Farr, 189 Fed. 295, 26 A. B. R. 818; Brown v. City National Bank, 72 Misc. (N. Y.) 201, 26 A. B. R. 638; Morris v. Tannenbaum, 26 A. B. R. 368; Sparks v. Marsh, 177 Fed. 739, 24 A. B. R. 280; Harder v. Clark, 66 Misc. (N. Y.) 584, 23 A. B. R. 756; Taylor v. Nichols, 134 App. Div. (N. Y.) 787, 23 A. B. R. 310; In re Leech, 171 Fed. 622, 22 A. B. R. 599; In re Neill-Pickney-Maxwell Co., 170 Fed. 481, 22 A. B. R. 401; Tumlin v. Bryan, 165 Fed. 166, 21 L. R. A. (N. S.) 960, 21 A. B. R. 319; McDonald v. Clearwater Shortline Ry. Co., 264 Fed. 1007, 21 A. B. R. 182; In re Armstrong, 145 Fed. 202, 16 A. B. R. 583; In re Alden, 15 Ohio Fed. Dec. 120, 16 A. B. R. 362; In re Montague, 143 Fed. 428, 16 A. B.

R. 18; Hastings v. Fithian, 71 N. J. L. 311, 13 A. B. R. 676; Brittain Dry Goods Co. v. Bertenshaw, 68 Kan. 734, 11 A. B. R. 629; In re Broich, 15 N. B. R. 11, 7 Biss. 303, Fed. Cas. No. 1921, decided under the act as existing prior to the amendment of 1910.

6—Utah Ass'n of Credit Men v. Boyle Furn. Co., 39 Utah 518, 26 A. B. R. 867.

7—Des Moines Savings Bank v. Morgan Jewelry Co., 123 Iowa 432, 12 A. B. R. 781; Sherman v. Luckhardt, 67 Kan. 682, 11 A. B. R. 26; In re Jacobs, 1 N. B. N. 183, 1 A. B. R. 518; In re Baker, 2 N. B. N. R. 195; Whithed v. Pillsbury, 13 N. B. R. 241, Fed. Cas. No. 17572; In re Riorden, 14 N. B. R. 332, Fed. Cas. No. 11852; In re Bousefield & Poole Mfg. Co., 16 N. B. R. 489, Fed. Cas. No. 1703; Kohlsatt v. Hoguet, 5 N. B. R. 159, 4 Ben. 565, Fed. Cas. No. 7919; In re Lewis, 2 N. B. R. 145; Sharpe v. Warehouse Co., 19 N. B. R. 378; Waring v. Buchanan, 19 N. B. R. 502, Fed. Cas. No. 17176; Sedgwick v. Place, 5 N. B. R. 168, 5 Ben. 184, Fed. Cas. No. 12620; In re Tonkin, 4 N. B. R. 13, Fed. Cas. No. 14094; In re Rosenfield, 1 N. B. R. 161, Fed. Cas. No. 12058.

8—Section 67c, Act of 1898.



obtained while defendant was insolvent and will work a preference, or (2) the party benefited had reasonable cause to believe defendant was insolvent and in contemplation of bankruptcy, or (3) such lien is in fraud of the act; and still another provision provides that "all . . . liens obtained through legal proceedings . . . within four months prior to the filing of the petition . . . shall be . . . void:" and yet another,<sup>9</sup> that "all conveyances, transfers . . . within four months prior to the filing of a petition, with intent . . . to hinder, delay or defraud his creditors . . . shall be void." Thus a preference given by a bankrupt within four months of the filing of a petition is voidable by the trustee if the party benefited had reasonable cause to believe a preference was intended.<sup>10</sup> But a preference is the procuring or suffering a judgment the enforcement of which enables a creditor to get a greater percentage of his debt than any other creditor of like class,<sup>11</sup> which if the proceeding was begun within the four months would by the provision above<sup>12</sup> be rendered void by the adjudication and by the other provision<sup>13</sup> the same effect is produced by the adjudication without regard to the time the proceeding was commenced. So, too, if the preference is by "transfer of property" it would, in many cases, come within the provision<sup>14</sup> avoiding transfers which hinder, delay or defraud creditors.

As far as possible, however, the act should be construed so as to give effect to every part of it, and this to some extent may be accomplished by limiting section 60b to preferential judgments and transfers including payments of money, where the party benefited had reasonable cause to believe that a preference was thereby intended; section 67e to conveyances, transfers, assignments or incumbrances of property other than money which were not made in good faith and supported by a present consideration; section 67c to liens obtained through legal proceedings begun within four months of the filing of the petition; and section 67f to liens acquired within four months of the filing of the petition through legal proceedings without regard to when such proceedings were commenced.<sup>15</sup> The provisions over-

9—Sections 67f and e, Act of 1898.

10—Section 60b, Act of 1898.

11—Section 60a, Act of 1898.

12—Section 67c, Act of 1898.

13—Section 67f, Act of 1898.

14—Section 67e, Act of 1898.

15—Blakey v. Bank, 1 N. B. N. 411,  
95 Fed. 267, 2 A. B. R. 459,

lap, but this may have been done for greater certainty; and since these inconsistencies cannot be reconciled, under the rule of construction that the last provision is to be preferred, the facts of each case should be tried by each of the provisions set forth, commencing at the last, which is also the broadest;<sup>16</sup> or the conflict between the provisions may be due to their being taken from different proposed bills and not having been examined as a whole.

### § 926. As of what date determined.

The questions of insolvency, reasonable cause to believe, and the operation of the transfer as a preference may be determined as of the time of the transfer or of the entry of judgment, or of the recording or registering of the transfer if by law recording or registering is required.<sup>17</sup> If these elements existed at either time the transaction will be held a preference.<sup>18</sup> A different rule prevailed prior to the amendment of 1910.<sup>19</sup>

In determining whether a payment by certified note operated as a preference, the date of certification is controlling.<sup>20</sup>

### § 927. Transferee must have been a creditor.

Only a creditor can be preferred, and if the person who receives the benefit is not a creditor, the question of preference does not arise.<sup>21</sup> A creditor is defined as "any one who owns a demand or claim provable in bankruptcy,"<sup>22</sup> and it is only with reference to claims provable that preferences can be declared. On the other hand, anything which can be proved for a dividend is within the purview of the act, whether or not it is strictly shadowed out by the words "creditor" and "debt" as especially defined in the act or as otherwise reasonably under-

16—In re Richards, 2 N. B. N. 38, 96 Fed. 935, 3 A. B. R. 145.

17—Act of 1898 § 60b as amended June 25, 1910.

18—In re Watson, 201 Fed. 962, 30 A. B. R. 871; Ogden v. Reddish, 200 Fed. 977, 29 A. B. R. 531.

19—Debus v. Yates, 193 Fed. 427, 30 A. B. R. 823; In re Watson, 201 Fed. 962; 30 A. B. R. 871; Dougherty v. First Nat. Bank of Canton, 197 Fed. 241, 28 A. B. R. 263.

20—In re Frazin & Oppenheim, 201 Fed. 86, 29 A. B. R. 214.

21—In re Hersey, 171 Fed. 1004, 22 A. B. R. 863; McAtee v. Shade, 185 Fed. 442, 26 A. B. R. 151; In re Rudnick, 2 N. B. N. R. 975, 102 Fed. 750, 4 A. B. R. 531; Darby's Tr. v. Lucas, 5 N. B. R. 437, Fed. Cas. No. 3572.

Transfer to creditors of his wife cannot be set aside as preferential. In re Kayser, 177 Fed. 383, 24 A. B. R. 174.

22—Section 1 (9), Act of 1898.

stood.<sup>23</sup> The mere fact that one has commenced a suit against the bankrupt does not make him a creditor.<sup>24</sup> A transfer by the bankrupt to himself as trustee<sup>25</sup> or a payment to a municipality<sup>26</sup> may constitute a preference. An attorney is in no better position than any other creditor. Payment to him in settlement of a running account may be preferential if made within the four month period.<sup>27</sup>

An indorser, an accommodation maker, a guarantor, or a surety on the obligation of the bankrupt is a creditor and may be considered to have received a preference,<sup>28</sup> and it is held that a surety of a co-maker of a note executed by the bankrupt is a person benefited by the bankrupt's taking up the note,<sup>29</sup> but a second indorser of a note of the bankrupt is not a person benefited by the assignment of a mortgage to secure the first-endorser of the same note.<sup>30</sup> The sureties on a bond of the bankrupt the conditions of which have been broken is a creditor within the meaning of the section though his claim is unliquidated.<sup>31</sup>

A bailor is not a creditor within the meaning of the act,<sup>32</sup> and the return of property prior to bankruptcy, by the bankrupt to his vendor under an unrecorded conditional sale contract cannot constitute a preference, since the vendor in such case takes back the property under the assertion of a paramount title, and not as a creditor,<sup>33</sup> on the same theory, taking possession within four months under a valid contract made prior to four months

23—Clarke v. Rogers, 183 Fed. 518, 26 A. B. R. 413, aff'd 228 U. S. 534, 57 L. ed. 953, 30 A. B. R. 39.

24—In re Crafts-Riordan Shoe Co., 185 Fed. 931, 26 A. B. R. 449.

25—Clarke v. Rogers, 228 U. S. 534, 57 L. ed. 953, 30 A. B. R. 39, aff'g 183 Fed. 518, 26 A. B. R. 413.

26—Painter v. Napoleon Tp., 156 Fed. 289, 19 A. B. R. 412.

27—In re Shiebler & Co., 163 Fed. 545, 20 A. B. R. 777. See, *post*, § 983.

28—Lazarus v. Eagan, 206 Fed. 518, 30 A. B. R. 287. Kobusch v. Hand, 156 Fed. 660, 18 L. R. A. (N. S.) 660, 19 A. B. R. 379; Stern v. Paper, 198 Fed. 64, 28 A. B. R. 592, aff'g 183 Fed. 228, 25 A. B. R. 451; Bank of Wayne v. Gold, 146 App. Div. (N. Y.) 2896, 26 A. B. R. 722; Kobusch v. Hand, 156 Fed. 660,

18 L. R. A. (N. S.) 660, 19 A. B. R. 379; Swarts v. Siegel, 117 Fed. 13, 8 A. B. R. 689; In re Christopher Bailey & Son, 166 Fed. 982, 21 A. B. R. 911; McAtee v. Shade, 185 Fed. 442, 26 A. B. R. 151; Crandall v. Coats, 133 Fed. 965, 13 A. B. R. 712.

29—Huntington v. Baskerville, 192 Fed. 813, 27 A. B. R. 219.

30—Page v. Moore, 179 Fed. 988, 24 A. B. R. 745.

31—Wood v. United States, 143 Fed. 424, 16 A. B. R. 21; United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 24 A. B. R. 726.

32—Walther v. Williams Mercantile Co., 169 Fed. 270, 22 A. B. R. 328.

33—Hart v. Emerson-Brantingham Co., 203 Fed. 60, 30 A. B. R. 218.

is not a preference<sup>34</sup> and a delivery within four months of bankruptcy by the bankrupt of property to one who has an equitable lien thereon by reason of advances made prior to the four months' period is not a preference.<sup>35</sup>

The relation of a broker and his customer is not that of debtor and creditor, and the turning over of stock held by a broker upon demand of the customer cannot create a preference.<sup>36</sup>

The fact that an indebtedness arose through a conversion of property left in the hands of the bankrupt does not constitute the transfer of other property to the owner of that converted any less a preference,<sup>37</sup> and, one taking a mortgage upon the bankrupt's property to secure the repayment of funds misappropriated by the latter as agent cannot thereafter assert that he was not a creditor.<sup>38</sup> However, a warehouseman from whom property belonging to his bailors is stolen by employees of the bankrupt has been held not a creditor of the bankrupt so as to constitute a payment to him by the bankrupt to cover the loss, a voidable preference.<sup>39</sup>

### § 928. Immaterial whether voluntary or involuntary.

Whether the preference given is voluntary or involuntary is immaterial, or whether done by reason of threats or coercion.<sup>40</sup> So, an assignment to one creditor, though made under pressure, is a preference,<sup>41</sup> and a creditor may obtain a preference by legal proceedings without any affirmative action on the debtor's part.<sup>42</sup>

34—*In re East End Mantel & Tile Co.*, 202 Fed. 275, 29 A. B. R. 793; *Mills v. Virginia-Carolina Lumber Co.*, 164 Fed. 168, 21 L. R. A. (N. S.) 901, 20 A. B. R. 750.

35—*Gage Lumber Co. v. McEldowney*, 207 Fed. 255, 30 A. B. R. 251.

36—*Richardson v. Shaw*, 209 U. S. 365, 52 L. ed. 835, 19 A. B. R. 717, aff'g 147 Fed. 659, 16 A. B. R. 842.

37—*Atherton v. Green*, 179 Fed. 806, 30 L. R. A. (N. S.) 1053, 24 A. B. R. 650.

38—*Burgoyne v. McKillip*, 182 Fed. 452, 25 A. B. R. 387.

39—*Keystone Warehouse Co. v. Bissell*, 203 Fed. 652, 30 A. B. R. 213.

40—*Stern v. Paper*, 198 Fed. 642, 28 A. B. R. 592, aff'g 183 Fed. 228, 25 A. B. R. 451; *Strain v. Gourdin*, 11 N. B. R. 156, 2 Woods 380, Fed. Cas. No. 13521.

41—*In re Batchelder*, 3 N. B. R. 37, 1 Lowell 313, Fed. Cas. No. 1098; *Grow v. Ballard*, 2 N. B. R. 69, Fed. Cas. No. 5848.

42—*In re Crafts-Riordan Shoe Co.*, 185 Fed. 931, 26 A. B. R. 449; *Rutland Co. Nat. Bank v. Graves*, 156 Fed. 168, 19 A. B. R. 446; *contra*, *Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897. See also, § 949.

## § 929. Intent to prefer.

Prior to the amendment of 1910 there was much diversity of opinion as to whether an intent to prefer on the part of the bankrupt was essential to a voidable preference. Section 60b of the act then required that the creditor have "reasonable cause to believe that it was intended thereby to give a preference." The rule most generally adopted was that the intent was essential,<sup>43</sup> subject, however, to the qualification, that the intention to give a preference might be shown not merely by proof of actual intent, but by proof that the necessary result of the transaction was to create a preference.<sup>44</sup> This presumption was held not to arise from the fact alone that the debtor knew he was insolvent.<sup>45</sup>

The act as it now stands merely requires that the creditor had "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference," and seems to obviate entirely the necessity of proving an intent to prefer.<sup>46</sup>

43—*Debus v. Yates*, 193 Fed. 427, 30 A. B. R. 823; *Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897; *Kimmerle v. Farr*, 189 Fed. 295, 26 A. B. R. 818; *In re Sayed*, 185 Fed. 962, 26 A. B. R. 444; *Reber v. Louis Shulman & Bro.*, 183 Fed. 564, 25 A. B. R. 475, aff'g 179 Fed. 574, 24 A. B. R. 782; *Rutland Co. Nat. Bank v. Graves*, 156 Fed. 168, 19 A. B. R. 446; *In re First Nat. Bank of Louisville*, 155 Fed. 100, 18 A. B. R. 766; *In re Andrews*, 144 Fed. 922, 16 A. B. R. 387, aff'g 135 Fed. 599, 14 A. B. R. 247; *In re Hall*, 2 N. B. N. R. 1126; *contra*, *Schmidt v. Bank of Commerce*, 15 N. M. 470, 25 A. B. R. 904.

44—*Wilson v. Mitchell-Woodbury Co.*, 31 A. B. R. 837; *In re Hirshowitz*, 199 Fed. 202, 28 A. B. R. 571; *In re Dorr*, 196 Fed. 292, 28 A. B. R. 505; *Kimmerle v. Farr*, 189 Fed. 295, 26 A. B. R. 818; *In re Crafts-Riordan Shoe Co.*, 185 Fed. 931, 26 A. B. R. 455; *In re McDonald & Sons*, 178 Fed. 487, 24 A. B. R. 446; *Harder v. Clark*, 66 Misc. (N. Y.) 584, 23 A. B. R. 756; *Brewster v. Goff Lumber Co.*, 164 Fed. 124, 21 A. B. R. 106; *Pittsburgh Plate Glass Co. v. Edwards*, 148 Fed. 377, 17 A. B. R. 447; *Parker v. Black*, 143 Fed. 560, 16 A. B. R. 202; *Upson v. Mount Morris Bank, Brandenburg*—45

103 App. Div. (N. Y.) 367, 14 A. B. R. 6; *Crandall v. Coats*, 133 Fed. 965, 13 A. B. R. 712; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 13 A. B. R. 447, rev'g 129 Fed. 728, 12 A. B. R. 111; *Hackney v. Hargreaves Bros.*, 68 Neb. 633, 13 A. B. R. 164; *Benedict v. Deshel*, 177 N. Y. 1, 11 A. B. R. 20, rev'g 77 App. Div. (N. Y.) 276. See also *Dougherty v. First Nat. Bank of Canton*, 197 Fed. 241, 28 A. B. R. 263; *Wickwire v. Webster City Savings Bank*, 153 Iowa 225, 27 A. B. R. 157; *In re Martin*, 27 A. B. R. 151; *In re Hines*, 144 Fed. 543, 16 A. B. R. 495; *In re Bloch*, 17 Fed. 674, 15 A. B. R. 748; *In re Griffin Pants Factory v. Nelms Racket Store Co.*, 2 N. B. N. R. 630; *In re Piper*, 2 N. B. N. R. 7, 8; *In re Conhaim*, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249; *In re Bashline*, 109 Fed. 965, 6 A. B. R. 194.

45—*Kimmerle v. Farr*, 189 Fed. 295, 26 A. B. R. 878; *Irish v. Citizens' Trust Co. of Utica*, 163 Fed. 880, 21 A. B. R. 39; *In re Mayo Contracting Co.*, 157 Fed. 469, 19 A. B. R. 551. But see, *In re Thomas Deutschle & Co.*, 182 Fed. 435, 25 A. B. R. 348.

46—*Rogers v. American Halibut Co.*, 31 A. B. R. 576; *Herron Co. v. Moore*,

### § 930. Creditor's intent.

The creditor's intent to receive a preference may be inferred from circumstances.<sup>47</sup>

### § 931. Insolvency.

### § 932. — As of what time determined.

Insolvency at the time the transfer was made,<sup>48</sup> or recorded, if recording is required,<sup>49</sup> or the judgment entered, is essential under the act as amended in 1910.<sup>50</sup> Insolvency at the time of making a transfer is not established by proof of insolvency on the day of the transfer but after the making thereof. In such case the time of the transaction must be considered though it involves consideration of fractions of a day.<sup>51</sup>

### § 933. — How determined.

Insolvency exists "whenever the aggregate of one's property, exclusive of any property conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay creditors, is not at a fair valuation sufficient to pay his debts."<sup>52</sup>

This statutory definition of "insolvency" differs so widely from the judicial definition heretofore given to it, viz.: "inability to pay one's debts in the ordinary course of business," that it will be readily seen that one may be insolvent under the judicial definition who would not be so under the statutory definition and vice versa.<sup>53</sup> Fair valuation, as used in the statutory definition,

208 Fed. 134, 31 A. B. R. 221; In re Harrison Bros. 28 A. B. R. 684.

47—Utah Ass'n of Creditmen v. Boyle Furniture Co., 43 Utah 523, 31 A. B. R. 488.

48—In re Chicago Car Equipment Co., 211 Fed. 638, 31 A. B. R. 617; In re Sayed, 185 Fed. 962, 26 A. B. R. 444; In re Wittenberg Veneer & Panel Co., 108 Fed. 593, 6 A. B. R. 71.

49—In re Watson, 201 Fed. 962, 30 A. B. R. 871; Ogden v. Reddish, 200 Fed. 977, 29 A. B. R. 531. A different rule prevailed prior to 1910. See Dougherty v. First Nat. Bank of Canton, 197 Fed. 241, 28 A. B. R. 263; In re Sayed, 185 Fed. 962, 26 A. B. R. 444; McEl-

vain v. Hardesty, 169 Fed. 31, 22 A. B. R. 320.

50—Act of 1898, § 60b as amended June 25, 1910.

51—Upson v. Mount Morris Bank, 103 App. Div. (N. Y.) 367, 14 A. B. R. 6.

52—Section 1 (15), Act of 1898. Stern v. Paper, 198 Fed. 642, 28 A. B. R. 592, aff'g 183 Fed. 228, 25 A. B. R. 451.

53—Harder v. Clark, 66 Misc. (N. Y.) 584, 23 A. B. R. 756; Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 17 A. B. R. 511; Upson v. Mount Morris Bank, 103 App. Div. (N. Y.) 367, 14 A. B. R. 6; Martin v. Bigelow, 36 Misc. (N. Y.) 298, 7 A. B. R. 218.

means such a price as a capable and diligent business man could presently obtain for his property after conferring with those accustomed to buy such property,<sup>54</sup> and must relate to the conditions when the transfer was made and not to conditions after bankruptcy intervened.<sup>55</sup> The actual value of book accounts as they stand is to be taken, not their face value.<sup>56</sup>

Exempt property may be included,<sup>57</sup> but property that was transferred in fraud of creditors, and which can only be reached through litigation, cannot be considered as property of the bankrupt.<sup>58</sup> A liability upon a guaranty is to be considered in determining the bankrupt's financial status.<sup>59</sup>

### § 934. — Insolvency of partnership.

The insolvency of a partnership and the members thereof are essential elements of a voidable preference by a partnership.<sup>60</sup> To constitute insolvency on the part of a partnership the property of the firm together with that of all partners applicable to partnership debts, must be insufficient to pay such debts.<sup>61</sup>

### § 935. — Question of fact.

Insolvency at the time of the judgment or transfer is a question of fact,<sup>62</sup> and in the event that it is denied by the creditor, the trustee must prove it.<sup>63</sup>

54—*Stern v. Paper*, 183 Fed. 228, 25 A. B. R. 451.

55—*Dougherty v. First Nat. Bank of Canton*, 197 Fed. 241, 28 A. B. R. 263.

Value should not be computed on the basis of the proceeds of the bankrupt auction sale. *Rutland Co. Nat. Bank v. Graves*, 156 Fed. 168, 19 A. B. R. 446.

In determining the solvency of a manufacturing plant, the valuation must relate to conditions, as a going concern, at the time of the transfer. *Butler Paper Co. v. Goembel*, 143 Fed. 295, 16 A. B. R. 26.

56—*Benjamin v. Chandler*, 142 Fed. 217, 15 A. B. R. 439.

57—*Utah Ass'n of Credit men v. Boyle Furniture Co.*, 43 Utah 523, 31 A. B. R. 488.

58—*Utah Ass'n of Credit Men v. Boyle*

*Furniture Co.*, 39 Utah 518, 26 A. B. R. 867.

59—*Huntington Mfg. Co. v. Edwards*, 160 Fed. 619, 20 A. B. R. 349.

60—*Crancer & Co. v. Wade*, 26 Okla. 757, 25 A. B. R. 880; *Tumlin v. Bryan*, 165 Fed. 166, 21 L. R. A. (N. S.) 960, 21 A. B. R. 319.

61—*Worrell v. Whitney*, 179 Fed. 1014, 24 A. B. R. 749.

62—*Utah Ass'n of Credit Men v. Boyle Furniture Co.*, 39 Utah 518, 26 A. B. R. 867; *Butler Paper Co. v. Goembel*, 143 Fed. 295, 16 A. B. R. 26; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 A. B. R. 781.

63—*In re Chappel*, 113 Fed. 545, 7 A. B. R. 608.

**§ 936. — Evidence.**

In an action in a court other than that of bankruptcy, the court will not take judicial notice of the existence and contents of all papers filed in the bankruptcy proceeding,<sup>64</sup> and it is held that the bankrupt's petition for a discharge, his schedules and testimony as to his financial condition given in the bankruptcy proceedings are inadmissible to prove his insolvency at the time of the alleged preference.<sup>65</sup>

The uncorroborated testimony of bankrupt as to assets and liabilities may be considered in determining insolvency.<sup>66</sup> Considerable latitude should be allowed in examining the bankrupt so far at least as the inquiry relates to his property and the extent of his liabilities, and a question asked the bankrupt as to how much he was indebted to a particular creditor at a particular time, or whether he had paid him all he owed him, is not objectionable.<sup>67</sup>

**§ 937. — Conclusiveness of adjudication.**

An adjudication is conclusive as to insolvency in an action by the trustee against a creditor who appeared in the bankruptcy proceedings and contested the adjudication,<sup>68</sup> but not in an action against one who was not a party to the bankruptcy proceedings.<sup>69</sup>

**§ 938. Depletion of bankrupt's estate.****§ 939. — In general.**

To constitute a preferential transfer there must be a parting with the bankrupt's property for the benefit of creditors, and a consequent diminution of the bankrupt's estate. The fact that

64—*McDonald v. Clearwater Shortline Ry. Co.*, 164 Fed. 1007, 21 A. B. R. 182.

65—*Taylor v. Nichols*, 134 App. Div. (N. Y.) 787, 23 A. B. R. 310; *contra*, *Utah Ass'n of Credit Men v. Boyle Furn. Co.*, 39 Utah 518, 26 A. B. R. 867; *Hackney v. Hargreaves Bros.*, 68 Neb. 633, 13 A. B. R. 164.

66—*Collett v. Bronx Nat. Bank*, 200 Fed. 111, 29 A. B. R. 454.

67—*Utah Ass'n of Credit Men v. Boyle Furn. Co.*, 39 Utah 518, 26 A. B. R. 867.

68—*Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 A. B. R. 781.

69—*Cullinane v. State Bank of Waverly*, 123 Iowa 340, 12 A. B. R. 776; *Contra*: an adjudication in involuntary proceedings establishes insolvency at the date of the act of bankruptcy relied on, even as against a creditor or lienor having no actual notice of the bankruptcy proceedings. *Lazarus v. Eagan*, 206 Fed. 518, 30 A. B. R. 287.



what was done worked for the benefit of the creditor, and in a sense gave him a preference, is not enough, unless the estate of the bankrupt was thereby diminished.<sup>70</sup>

### § 940. — Where right of set-off exists.

A surrender of a note by the bankrupt to the maker thereof does not constitute an unlawful preference where the maker holds a legal or equitable off-set against the bankrupt's claim on the note.<sup>71</sup> A deposit of money with a bank within four months of bankruptcy is not a preference though the bank at the time holds obligations of the depositor which may be set-off against the deposit.<sup>72</sup>

### § 941. Advantage over other creditors.

### § 942. — Creditors of the same class.

Whether or not a transaction is a preference depends upon the result merely. If it will result in the benefit or advantage of one creditor over any other of a like class it constitutes a preference.<sup>73</sup> It is the benefit or advantage which one creditor obtains over another and not the purpose or intent of the parties which determines the effect and constitutes the transaction a preference and means the same whether given or received.<sup>74</sup> It is therefore essential that a creditor have knowledge, actual or constructive,

70—Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435, 57 L. ed. 1268, 30 A. B. R. 624; Nat. Bank of Newport v. Nat. Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 28 A. B. R. 218.

Where an indorser of a note of the bankrupt discounted same at a bank depositing its own collateral and within the four month period took up the note and received back its collateral, its payment to the bank held not to constitute a preference since the estate of the bankrupt was not thereby depleted. National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 28 A. B. R. 218.

71—Taylor v. Nichols, 134 App. Div. (N. Y.) 783, 23 A. B. R. 306.

72—Irish v. Citizens' Trust Co., 163

Fed. 880, 21 A. B. R. 39; In re George M. Hill Co., 130 Fed. 315, 66 L. R. A. 68, 12 A. B. R. 221; N. Y. County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 11 A. B. R. 42; Tomlinson v. Bank of Lexington, 145 Fed. 824, 16 A. B. R. 632; Booth v. Prete, 81 Conn. 636, 22 A. B. R. 579; Studley v. Boylston Nat. Bank, 200 Fed. 249, 29 A. B. R. 649; Walsh v. First Nat. Bank, 201 Fed. 522, 29 A. B. R. 118.

73—Hewit v. Boston Straw Board Co., 214 Mass. 260, 31 A. B. R. 652; In re Conhaim, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249; In re Fixen, 2 N. B. N. R. 885, 102 Fed. 295, 50 L. R. A. 605, 4 A. B. R. 10; In re Read & Knight, 7 A. B. R. 111.

74—In re Conhaim, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249; Swarts

that he is receiving a greater percentage of his debt than other creditors of the same class,<sup>75</sup> and if there is any other creditor of the same class who, by the enforcement of the transfer in question, will obtain a less percentage of his debts than the transferee, the transfer is voidable, even though there are some creditors who received larger percentages through other payments made to them within the four-month period.<sup>76</sup> Conversely, a pro rata payment among all creditors even though the debtor is insolvent, cannot be held to create a preference,<sup>77</sup> and a mortgage is not a preference if the property covered thereby is not a greater percentage of bankrupt's property than other creditors of the same class will receive on distribution.<sup>78</sup> Several notes maturing at different times are not necessarily to be considered as a single debt in determining whether in receiving payment of one of the notes in full the holder received a greater percentage of his debt than other creditors.<sup>79</sup>

The test of the classification of creditors is the percentage of their claims they are entitled to draw out of the bankrupt's estate, and not the relation of the creditors to parties other than the bankrupt. If entitled to the same percentage they are in the same class, even though certain of them are secured by indorsement or guaranty and others are not.<sup>80</sup>

A security given for a present loan is not a preference, no matter how insolvent the debtor may be, since one who receives security in exchange for a present consideration is not of the same class as an existing creditor.<sup>81</sup> Workmen, clerks and servants constitute a distinct class, and if the assets are sufficient to pay them in full, payments on account before bankruptcy but during insolvency, are not preferential.<sup>82</sup>

If the debt preferred is the individual debt of a partner, it is not a preference of which a partnership creditor can complain, for the debt paid is entitled to preference over every partner-

v. Fourth Nat. Bank of St. Louis, 117 Fed. 1, 8 A. B. R. 673. See also, *ante* § 929.

75—In re Alden, 15 Ohio Fed. Dec. 120, 16 A. B. R. 362.

76—In re Mayo Contracting Co., 157 Fed. 469, 19 A. B. R. 551.

77—In re Varley & Bauman Clothing Co., 191 Fed. 459, 26 A. B. R. 840.

78—Ogden v. Reddish, 200 Fed. 977, 29 A. B. R. 531.

79—Wilson v. Mitchell-Woodbury Co., 31 A. B. R. 837.

80—Swarts v. Fourth Nat. Bank of St. Louis, 117 Fed. 1, 8 A. B. R. 673.

81—In re Sayed, 185 Fed. 962, 26 A. B. R. 444.

82—In re Read & Knight, 7 A. B. R. 111.

ship debt.<sup>83</sup> A dation en paiement, made by husband to wife in Louisiana, and delivered within four months of bankruptcy cannot be set aside as a preference, since there are no other creditors of the "same class."<sup>84</sup>

### § 943. — Exchange of property or securities.

The bankruptcy law does not intend to interfere with or disturb the orderly business of the country.<sup>85</sup> Hence the substitution of one piece of property for another, the exchange of properties or securities of equal value, the sale for a present consideration, the giving of security for a present advance or loan, the transfer of property in carrying out a prior valid contract, and generally transfers which do not give one creditor an advantage over others or diminish the estate, are not preferences.<sup>86</sup>

An exchange of securities within the four months is not a fraudulent preference, even when the debtor and creditor know that the former is insolvent, if the security given up is a valid one when the exchange is made and is of equal value with the substituted security.<sup>87</sup> Giving a mortgage or deed of trust to secure a debt previously secured by a statutory lien is merely a change of security and not a preference;<sup>88</sup> and so is the exchanging within four months of bankruptcy of new secured notes for old secured notes;<sup>89</sup> or the giving of a new mortgage, the old

83—*Miller v. New Orleans Acid & Fertilizer Co.*, 211 U. S. 496, 53 L. ed. 300, 21 A. B. R. 416, aff'g 117 La. 821; *Mills v. Fisher & Co.*, 159 Fed. 897, 16 L. R. A. (N. S.) 656, 20 A. B. R. 237.

84—*Gomila v. Wilcombe*, 151 Fed. 470, 18 A. B. R. 143.

85—*Crook v. Bk.*, 1 N. B. N. 530, 3 A. B. R. 238.

86—*Ernst v. Mechanic's and Metals Nat. Bank*, 201 Fed. 664, 29 A. B. R. 289; *McDonald v. Clearwater Shortline Ry Co.*, 164 Fed. 1007, 21 A. B. R. 182; *In re Noel*, 137 Fed. 694, 14 A. B. R. 715; *Darby v. Boatman's Sav. Inst.*, 4 N. B. R. 195, Fed. Cas. No. 3571; *In re Davidson*, 109 Fed. 882, 5 A. B. R. 528.

Transfer of property in consideration of the cancellation of notes of the bankrupt indorsed by a responsible indorser

held not a preference under the New York law. *Perry v. Van Norden Trust Co.*, 192 N. Y. 189, 20 A. B. R. 190, rev'g 118 App. Div. (N. Y.) 288, 18 A. B. R. 370.

Conveyance within four months to a surety company which had contemporaneously given a bond for the discharge of an attachment against the bankrupt held based on present consideration. *In re Federal Biscuit Co.*, 203 Fed. 37, 29 A. B. R. 393.

87—*In re Reese-Hammond Fire Brick Co.*, 181 Fed. 641, 25 A. B. R. 323.

88—*In re Lynn Camp Coal Company*, 168 Fed. 998, 22 A. B. R. 60; *In re Weaver*, 9 N. B. R. 132, Fed. Cas. No. 17307.

89—*Bernhisel v. Firman*, 11 N. B. R. 505, 22 Wall. 170, 22 L. ed. 766.

mortgage having been given more than four months before the bankruptcy, if no greater value is inserted;<sup>90</sup> or the transfer to a lessor, who held as security for the rent, chattel mortgages good between the parties but void as to creditors, of real estate in payment of the rent, such chattel mortgages being thereupon released;<sup>91</sup> or the substitution of a note and mortgage for bonds held as a special deposit for a customer;<sup>92</sup> but if new securities of greater value are given,<sup>93</sup> or if new securities are exchanged for void ones,<sup>94</sup> the rule that an exchange of securities is not a preference does not apply.

### § 944. — Transfers for present consideration.

Section 60a does not apply to transactions whereby the bankrupt receives a present consideration for the transfer.<sup>95</sup> If the transfer is made in consideration of both an antecedent and a new consideration, it will be upheld to the extent of the value of the new consideration given by the creditor at the time.<sup>96</sup>

Though the knowledge of insolvency will not avoid a mortgage given for a present loan,<sup>97</sup> yet a mortgage executed in favor

90—*Deland v. Miller & Cheney Bank*, 119 Iowa, 368, 11 A. B. R. 744; *In re Shepherd*, 6 A. B. R. 725; *Brett v. Carter*, 14 N. B. R. 301, 2 Lowell 458, Fed. Cas. No. 1844; *Sawyer v. Turpin*, 5 N. B. R. 339, 2 Lowell 29, Fed. Cas. No. 12410. *Contra*, *In re Jordan*, 9 N. B. R. 16, Fed. Cas. No. 7529; *Hardy v. Chandler*, 175 Fed. 138, 23 A. B. R. 717.

91—*Stewart v. Platt*, 19 N. B. R. 347, 101 U. S. (11 Otto) 731, 25 L. ed. 816.

92—*Cook v. Tullis*, 9 N. B. R. 433, 18 Wall. 332, 21 L. ed. 933.

93—*Waring v. Buchanan*, 19 N. B. R. 502, Fed. Cas. No. 17176.

94—*First Nat. Bank v. Lanz*, 202 Fed. 117, 29 A. B. R. 247.

95—*Debus v. Yates*, 193 Fed. 427, 30 A. B. R. 823; *In re Clifford*, 136 Fed. 475; 14 A. B. R. 281; *Young v. Upson*, 115 Fed. 192, 8 A. B. R. 377.

Giving of security for present loan not a preference. *In re Sayed*, 185 Fed. 962, 26 A. B. R. 444; *In re Noel*, 137 Fed. 694, 14 A. B. R. 715; *Mills v. Virginia-Carolina Lumber Co.*, 164 Fed. 168, 21

L. R. A. (N. S.) 901, 20 A. B. R. 750, modif'g 151 Fed. 642, 18 A. B. R. 218.

A lien given to secure a present loan not a preference. *Crim v. Woodford*, 136 Fed. 34, 14 A. B. R. 302.

Deed of trust given to secure a present loan, and not for an antecedent indebtedness not a voidable preference, even though the instrument is not recorded immediately upon its execution. *In re Jackson Brick & Tile Co.*, 189 Fed. 636, 26 A. B. R. 915.

Mortgages given for bona fide cash advances do not constitute preferences though debtor is insolvent and mortgagees know it. *Lindley v. Ross*, 200 Fed. 733, 29 A. B. R. 610.

96—*Farmers' Bank of Edgefield v. Carr & Co.*, 127 Fed. 690, 11 A. B. R. 733; *Crim v. Woodford*, 136 Fed. 34, 14 A. B. R. 302; *In re Dismal Swamp Contracting Co.*, 135 Fed. 415, 14 A. B. R. 175; *In re Porterfield*, 138 Fed. 192, 15 A. B. R. 11.

97—*Lindley v. Ross*, 200 Fed. 733, 29 A. B. R. 610.

of the president of a bank to which the bankrupt was heavily indebted the proceeds thereof being immediately applied to the indebtedness to the bank, has been held voidable.<sup>98</sup> Security given for a present loan, the lender knowing that the loan is to be used for giving a preference to a creditor will not be set aside as a preference to the lender; nor will it be set aside as fraudulent in the absence of proof of an actual knowledge on the part of the lender of an intent to defraud on the part of the bankrupt.<sup>99</sup> However, a mortgage or trust deed covering the entire property of the bankrupt given by him to secure a present loan with which to prefer certain creditors is voidable both as a preference and as a fraudulent conveyance under 67e, where the lender knows of the bankrupt's insolvency and seeks merely to extricate the debtor from embarrassment by paying a pressing debt. The security given in such case will be regarded as a mere substitution for the old debt, and not to constitute a novation.<sup>1</sup>

A mortgage given several days after a loan made to the bankrupt in pursuance of an agreement made on the date of the loan has also been held a preference.<sup>2</sup>

The surrender of dower is a sufficient consideration for a transfer.<sup>3</sup>

A creditor of a firm, who receives the transfer of the individual property of a partner who is insolvent, cannot, by releasing the other partner from liability, create a consideration that will save the transaction from being a preference.<sup>4</sup>

### § 945. Within four months.

### § 946. — In general.

A preference is only created if the act complained of was within four months before the filing of a petition, or after the filing of the petition and before the adjudication.<sup>5</sup>

98—*Walters v. Zimmerman*, 208 Fed. 62, 30 A. B. R. 776.

99—*Van Iderstine v. National Discount Co.*, 227 U. S. 575, 57 L. ed. 652, 29 A. B. R. 478, aff'g, 174 Fed. 518, 23 A. B. R. 345.

1—*Dean v. Davis*, 212 Fed. 88, 31 A. B. R. 808.

2—*In re Thomas*, 199 Fed. 214, 29 A. B. R. 945.

3—*In re Porterfield*, 138 Fed. 192, 15 A. B. R. 11.

4—*Burgoyne v. McKillip*, 182 Fed. 452, 25 A. B. R. 387.

5—Section 60a Act of 1898; *In re Siegel-Hillman Dry Goods Co.*, 2 N. B. N. R. 933; *In re Kindt*, 101 Fed. 107, 4 A. B. R. 148, rev'g 2 N. B. N. R. 369.

In 1903, the clause respecting the four months' limitation was transferred to section 60a from section 60b. The effect of this transfer was to make the four months' period an element of the preference referred to in both of the sections. Section 60b therefore does not authorize a recovery by the trustee where the preference was made more than four months before the filing of the petition,<sup>6</sup> whether the creditor had reasonable cause to believe a preference was intended or not.<sup>7</sup>

A transfer may, however, be set aside as preferential though made more than four months prior to bankruptcy if it is void under a state law, prohibiting a transfer of the property of a corporation when insolvent with intent to give a preference.<sup>8</sup>

### § 947. — Computation of time.

In computing the time the first day is excluded and the last included, unless it fall on a Sunday or a holiday, in which case it also is excluded;<sup>9</sup> and the same rule is applied in counting months or years.<sup>10</sup> In such computation fractions of a day are not considered,<sup>11</sup> though they have been considered in a case where a bankrupt's goods had been seized on execution or attachment and the question was whether more or less than a certain number of months had elapsed between the seizure and the time when he went into bankruptcy,<sup>12</sup> but such decision is contrary to the weight of authority.<sup>13</sup> Where the petition is defective on its face because of failure to show the requisite number of petitioning creditors, the time does not commence to run until

6—*Manning v. Evans*, 156 Fed. 106, 19 A. B. R. 217.

7—See also *In re Kindt*, 101 Fed. 107, 4 A. B. R. 148; *rev'g* 2 N. B. N. R. 369; *In re Woodward*, 1 N. B. N. 352, 2 A. B. R. 233; *In re Dow*, 6 N. B. R. 10, Fed. Cas. No. 4036; *Potter v. Coggeshall*, 4 N. B. R. 19, Fed. Cas. No. 11322; *In re Ferguson*, 95 Fed. 429, 2 A. B. R. 586; *In re Folb*, 1 N. B. N. 134, 91 Fed. 107, 1 A. B. R. 22.

8—*In re Salvator Brewing Co.*, 183 Fed. 910, 25 A. B. R. 536.

9—Section 31, Act of 1898; *Whitley Grocery Co. v. Roach*, 115 Ga. 918, 8 A. B. R. 505.

10—*In re Stevenson*, 1 N. B. N. 313,

94 Fed. 110, 2 A. B. R. 66; *In re Dupree*, 1 N. B. N. 513, 97 Fed. 28; *In re Lang*, 2 N. B. R. 151, Fed. Cas. No. 8056.

11—*Whitley Grocery Co. v. Roach*, 115 Ga. 918, 8 A. B. R. 505; *Dutcher v. Wright*, 94 U. S. (4 Otto) 553, 24 L. ed. 130; see also *Richards v. Clark*, 124 Mass. 491; *Cooley v. Cook*, 125 Mass. 406.

12—*Godsin v. Sanctuary*, 4 B & Ad. 255; *Westbrook Mfg. Co. v. Grant*, 60 Me. 88.

13—*Jones v. Stevens*, 48 Atl. 170, 5 A. B. R. 570; *In re Tonawanda Street Planing Mill Co.*, 6 A. B. R. 38.

the petition is made sufficient by the appearance and joinder of a sufficient number of creditors.<sup>14</sup>

The term "holiday" is meant to cover January first, February twenty-second, May thirtieth, July fourth, Labor day (being the first Monday in September), Thanksgiving day, Christmas and any other day appointed by the President or congress as a holiday or as a day of public fasting.<sup>15</sup>

### § 948. — Date of transfer.

The four months begin to run from the time the preference took effect; which depends on the state law as to what is required to render the judgment or transfer effective, as docketing, delivery, filing, acknowledging or recording as the case may be;<sup>16</sup> but it is the actual, not conditional or partial, taking effect.

Under the act as originally enacted, a transfer dated as of the time it was actually made, without regard to the date of filing or recording. Cases consequently arose in which preferential transfers, though fraudulent and constituting acts of bankruptcy, could not be successfully attacked, even though the instruments evidencing them were filed or recorded within four months of the filing of the petition. To correct this defect in the law, the amendment of 1903 was made, whereby the words "within four months before the filing of the petition, or, after the filing of the petition and before adjudication," were eliminated from section 60b and inserted in section 60a, and also the words "Where the preference consists of a transfer, such period of four months shall not expire until four months after the date

<sup>14</sup>—*Manning v. Evans*, 156 Fed. 106, 19 A. B. R. 217.

<sup>15</sup>—Section 1 (14), Act of 1898; Act June 28, 1894, 2 Supp. R. S. 193.

<sup>16</sup>—*Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 14 A. B. R. 74, rev'g 184 Mass. 361, 12 A. B. R. 62; *In re James White*, 22 A. B. R. 200; *In re McKane*, 155 Fed. 674, 19 A. B. R. 103; *In re Jackson Brick and Tile Co.*, 189 Fed. 636, 26 A. B. R. 915; *Morgan v. First Nat. Bank of Mannington*, 145 Fed. 466, 16 A. B. R. 639; *Ragan v. Donovan*, 189 Fed. 138, 26 A. B. R. 311; *In re Mission Fixture & Mantel Co.*, 180 Fed. 263, 24 A. B. R. 873; *Page v. Rogers*,

211 U. S. 575, 53 L. ed. 332, 21 A. B. R. 496, rev'g 140 Fed. 596, 15 A. B. R. 502; *First Nat. Bank v. Connett*, 142 Fed. 33, 5 L. R. A. (N. S.) 148, 15 A. B. R. 662; *In re Reynolds*, 153 Fed. 295, 18 A. B. R. 666; *In re Dundore*, 26 A. B. R. 100. See *Sawyer v. Turpin*, 13 N. B. R. 371, 91 U. S. (1 Otto) 114, 23 L. ed. 235; *Clark v. Iselin*, 9 N. B. R. 19, 10 Blatch. 204, 11 N. B. R. 337, 21 Wall. 360, 22 L. ed. 568; *Wood v. Owings*, 1 Cranch 239; *In re Wynne*, 4 N. B. R. 5, Fed. Cas. No. 18117; *Matthews v. Westphall*, 1 McCrary 446; *Seaver v. Spink*, 8 N. B. R. 218; under the Act of 1867 as illustrative.

of recording or registering the transfer, if by law such recording or registering is required," were added at the end of section 60a.

As the amendment passed the House of Representatives the words "or permitted, or if not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property transferred" followed the word "required" and ended the sentence, but such clause was stricken out by the Senate.<sup>17</sup> Though such action on the part of the Senate may be regarded as showing that it did not regard the omitted clause as surplusage,<sup>18</sup> the better rule seems to be that if registering or recording is "required" or "permitted" by the state law for any purpose, or to give an instrument validity as against certain classes of persons, though not as to other classes, it is an instrument "required" to be registered or recorded within the meaning of section 60a. A failure to record or register when required may entail a consequence which does not result from the state law alone. A transfer good as to the bankrupt and his general creditors while not of record may nevertheless be voidable as to the trustee representing them if the instrument be of the class required to be recorded or registered. The amendment was directed against secret liens and was intended to change the rule of prior decisions upon that subject.<sup>19</sup> However, "recording or registering" is not deemed to be "required" within the meaning of section 60a unless failure to record or register invalidates the transfer as to some one, and a statute which merely provides that an unrecorded assignment or transfer shall be presumptively

17—First Nat. Bank of Buchanan Co. v. Connett, 142 Fed. 33, 5 L. R. A. (N. S.) 148, 15 A. B. R. 662.

18—In re Hunt, 139 Fed. 283, 14 A. B. R. 416.

19—Mattley v. Giesler, 187 Fed. 970, 26 A. B. R. 116; Ragan v. Donovan, 189 Fed. 138, 26 A. B. R. 311; In re Beckhaus, 177 Fed. 141, 24 A. B. R. 380; Loeser v. Savings Deposit Bank & Trust Co., 148 Fed. 975, 18 L. R. A. (N. S.) 1233, 17 A. B. R. 628, rev'g 140 Fed. 674, 15 Ohio Fed. Dec. 202, 15 A. B. R. 528; English v. Ross, 140 Fed. 630, 15 A. B. R. 370; First Nat. Bank of Buchanan Co. v. Connett, 142 Fed. 33, 5 L. R. A. (N. S.) 148, 15 A. B. R. 662;

contra, Laurel Oil & Fertilizer Co. v. Horne, 101 Miss. 629, 28 A. B. R. 932; Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 14 A. B. R. 477; In re Hunt, 139 Fed. 283, 14 A. B. R. 416. And see In re McIntosh, 150 Fed. 546, 18 A. B. R. 169.

Recording within four months held a preference where statute made unrecorded transfer void as to purchasers and creditors without notice. Dulany v. Morse, 39 App. Cas. D. C. 523, 29 A. B. R. 275.

The word "required" is sufficiently comprehensive to include an unregistered deed which under the laws of Ohio is effective from delivery against all but



fraudulent prescribes a mere rule of evidence and does not require a "recording or registering."<sup>20</sup>

A chattel mortgage executed in good faith before the four-month period, though recorded within that period, will be upheld where under the local law such recording is not essential to the validity of the mortgage as against third persons.<sup>21</sup>

The provision that the period of four months shall not expire until four months after recording or registering does not apply to transfers made prior to the four-month period in good faith and not with the purpose of creating a preference,<sup>22</sup> and if there has been an equitable mortgage given prior to the four-month period the date of recording is not material;<sup>23</sup> but the mere fact that a mortgage or deed is executed or delivered within the four months in pursuance of a prior oral agreement will not save it.<sup>24</sup> So, a deed delivered with the understanding that it should not take effect until the grantee should so elect and he did not make such election until within the four months, is voidable;<sup>25</sup> as is a preferential deed withheld from record until within four months.<sup>26</sup>

The filing of a conditional sale contract within the four-month period,<sup>27</sup> or the enforcement of a valid lien acquired more than four months before the filing of the petition by execution within the four-month period,<sup>28</sup> or a sale within the four months pursuant to a pledge executed prior thereto,<sup>29</sup> does not constitute an illegal preference.

The provision in section 3b that where recording is not required the four-month period in which the petition must be

bona fide purchasers. *Carey v. Donohue*, 209 Fed. 328, 31 A. B. R. 210.

20—*Telford v. Henrickson*, 122 Minn. 531, 31 A. B. R. 866.

21—*In re Sturtevant*, 188 Fed. 196, 26 A. B. R. 574.

22—*Bradley Clark & Co. v. Benson*, 93 Minn. 91, 13 A. B. R. 170.

23—*In re United States Food Co.*, 15 A. B. R. 329.

24—*In re Herman*, 207 Fed. 594, 31 A. B. R. 243; *Lathrop Bank v. Holland*, 205 Fed. 143, 30 A. B. R. 62; *In re Smith*, 176 Fed. 426, 23 A. B. R. 864; *In re Dismal Swamp Contracting Co.*, 135 Fed. 415, 14 A. B. R. 175.

25—*Bank v. Conway*, 14 N. B. R. 175, 1 Hughes 37, Fed. Cas. No. 1037.

26—*Bank v. Harris*, 14 N. B. R. 510, Fed. Cas. No. 4595.

27—*Big Four Implement Co. v. Wright*, 207 Fed. 535, 47 L. R. A. (N. S.) 1223, 31 A. B. R. 125; *In re Farmers Co-operative Co. of Barlow*, 202 Fed. 1005, 30 A. B. R. 187; *Bradley Clark & Co. v. Benson*, 93 Minn. 91, 13 A. B. R. 170.

28—*Woods v. Klein*, 223 Pa. St. 256, 22 A. B. R. 722.

29—*First Nat. Bank v. Lanz*, 202 Fed. 117, 29 A. B. R. 247.

filed, shall begin to run from the time the beneficiary of a preferential transfer takes notorious, exclusive or continuous possession of the premises, has no application to the avoidance of preferences under section 60.<sup>30</sup> Accordingly, it is held, that the taking of possession in the exercise of a pre-existing right well founded in equity, although occurring within the prescribed period,<sup>31</sup> or the delivery of property within the four-month period in pursuance to a sale, pledge or equitable assignment thereof made for a present consideration more than four months before bankruptcy,<sup>32</sup> or the taking of possession within the prohibited period under a mortgage upon after acquired property executed more than four months prior to the filing of the petition,<sup>33</sup> or a payment to a surety upon a bond the conditions of which had been broken, made in pursuance to an indemnity agreement executed more than four months prior to the filing of the petition<sup>34</sup> does not constitute a voidable preference. Where, however, the circumstances are such as to create a presumption of fraud, a transfer or delivery of possession within the prohibited period may be set aside though made in pursuance of an agreement ante-dating such period.<sup>35</sup>

A second pledge to one creditor of property already pledged to another creditor made more than four months prior to the bankruptcy cannot be avoided as a preference though the second pledgee never had actual possession of the property.<sup>36</sup>

30—Little v. Holley Brooks Hdwe. Co., 133 Fed. 874, 13 A. B. R. 422.

31—Sexton v. Kessler & Co., Ltd., 172 Fed. 535, 40 L. R. A. (N. S.) 639, 21 A. B. R. 807.

32—Sexton v. Kessler & Co., Ltd., 225 U. S. 90, 56 L. ed. 995, 28 A. B. R. 85; In re Automobile Livery Service Co., 176 Fed. 792, 23 A. B. R. 799; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 22 A. B. R. 703; Christ v. Zehner, 212 Pa. St. 188, 16 A. B. R. 788.

Payment within the prohibited period of money covered by an assignment made prior to that period cannot be recovered as a preference. Smedley v. Speckman, 157 Fed. 815, 19 A. B. R. 694, aff'g 153 Fed. 771, 18 A. B. R. 717; Lowell v. International Trust Co., 158 Fed. 781, 19 A. B. R. 853.

33—Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 13 A. B. R. 437, aff'g 70 Vt. 558, 13 A. B. R. 75n; In re Rogers & Woodward, 132 Fed. 560, 13 A. B. R. 75; Fisher v. Zollinger, 149 Fed. 54, 17 A. B. R. 618, aff'g 140 Fed. 679, 15 A. B. R. 524.

34—Wood v. United States, 143 Fed. 424, 16 A. B. R. 21.

35—Roy v. Salisbury, 134 N. Y. S. 733, 27 A. B. R. 892; Tilt v. Citizens' Trust Co., 191 Fed. 441, 27 A. B. R. 320; Vitzthum v. Large, 162 Fed. 685, 20 A. B. R. 666; In re Great Western Mfg. Co., 152 Fed. 123, 18 A. B. R. 259; Torrance v. Winfield Nat. Bank, 66 Kan. 177, 11 A. B. R. 185; In re Sheridan, 98 Fed. 406, 3 A. B. R. 554.

36—In re Bird, 180 Fed. 229, 25 A. B. R. 23.

Where the bankrupt more than four months prior to bankruptcy transferred to a creditor its interests under certain unrecorded trust deeds upon the property of a third person, the four-month period was held to begin to run from the transfer of the bankrupt's interests therein and not from the date of the recording of the trust deed.<sup>37</sup>

An assignment of a debt owing to the bankrupt is complete in relation to the question of preference when made, and is not affected by want of notice to the debtor.<sup>38</sup> Where a contract of sale of the bankrupt's stock calls for payment to third persons, the date of the contract and not of the payments has been held to govern in determining whether there had been a preference within four months.<sup>39</sup>

A deed executed without authority by an officer of a corporation more than four months before the bankruptcy but ratified within that period must be considered in the light of the situation when ratified.<sup>40</sup>

If insurance policies be assigned as collateral security, the lien dates from the assignment, and not from the actual delivery.<sup>41</sup> The payment by the bankrupt within the four-month period of the amount collected under a fire insurance policy in pursuance of an agreement to keep his property insured and pay over the proceeds of the policy in case of loss is a voidable preference though the agreement was entered into more than four months prior to the filing of the petition.<sup>42</sup>

An inchoate lien by garnishment cannot be tacked on to the lien of an execution on the judgment against the defendant, and levied upon the indebtedness owing by the garnishee, so as to make up the period of four months.<sup>43</sup>

### § 949. Preference from procuring or suffering a judgment.

To constitute a preference from procuring or suffering a judgment to be entered in favor of a creditor, intent and active agency

37—*Sturdivant Bank v. Schade*, 195 Fed. 188, 27 A. B. R. 673, rev'g 189 Fed. 636, 26 A. B. R. 915.

38—*In re Wilson*, 23 A. B. R. 814.

39—*Fitch v. Bank of Grand Rapids*, 146 Wis. 439, 26 A. B. R. 879.

40—*In re Kansas City S. & Mfg. Co.*, 9 N. B. R. 76, Fed. Cas. No. 7610.

41—*McDonald v. Daskam*, 116 Fed. 276, 8 A. B. R. 543.

42—*Long v. Farmers' State Bank*, 147 Fed. 360, 9 L. R. A. (N. S.) 585, 17 A. B. R. 103.

43—*Marsh v. Wilson Bros.*, 124 Minn. 254, 31 A. B. R. 874.

on the part of the debtor are not necessary, but only a state of insolvency coupled with an act on the part of one creditor the effect of which will be a preference, even though the proceedings are regular judicial proceedings upon a debt which is due and to which there is no just defense.<sup>44</sup> The failure of the debtor to prevent the securing of such a preference as by filing a petition in voluntary bankruptcy is sufficient.<sup>45</sup> The several courts which have made an apparently contrary decision<sup>46</sup> merely hold that failure to prevent the entry of judgment on a warrant of attorney is not sufficient, but they do not go so far as to say that permitting such judgment to be enforced is not, which latter is held sufficient to create a preference.<sup>47</sup>

A preference is not created, however, by a levy or sale under a judgment unless the judgment debtor at the time of the levy was insolvent, regardless of the fact that the sale rendered

44—In re Koslowski, 153 Fed. 823, 18 A. B. R. 723; In re Meyer, 1 N. B. N. 207, 1 A. B. R. 1; Mather v. Coe, 1 N. B. N. 554, 92 Fed. 333, 1 A. B. R. 504.

45—In re Reichman, 1 N. B. N. 556, 1 A. B. R. 17, 91 Fed. 624; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Spacht, 2 N. B. N. R. 238; In re Richards, 2 A. B. R. 518, 95 Fed. 258; In re Huffman, 1 A. B. R. 587; In re Whalen, 1 N. B. N. 228; In re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812; In re Moyer, 1 N. B. N. 260, 1 A. B. R. 577, 93 Fed. 188; In re Cliffe, 1 N. B. N. 510, 2 A. B. R. 317, 94 Fed. 354; In re Burrus, 97 Fed. 926, 3 A. B. R. 296; In re Arnold, 1 N. B. N. 334, 2 A. B. R. 180, 94 Fed. 1001; but see In re Ogles, 1 A. B. R. 671, 93 Fed. 426; see also In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4948; In re Gallinger, 4 B. R. 729, 1 Sawy. 224, Fed. Cas. No. 5192; In re Craft, 1 N. B. R. 89, 2 Ben. 214, Fed. Cas. No. 3316; In re Black, 1 N. B. R. 81, 2 Ben. 196, Fed. Cas. No. 1457; In re Dibblee, 2 N. B. R. 617, 3 Ben. 283, Fed. Cas. No. 3884; Buchanan v. Smith, 4 B. R. 397, 8 Blatch. 153; In re Sutherland, 1 B. R. 531, 1 Deady 344, Fed. Cas. No. 13638; In re Houghton, 1 B. R. 460; Warren v. D. L. & W. Ry. Co., 7 N. B. R. 451, Fed. Cas.

No. 17194; In re Lord, 5 N. B. R. 318, Fed. Cas. No. 8503; Vogle v. Lathrop, 4 N. B. R. 146, Fed. Cas. No. 16985; Hyde v. Corrigan, 9 N. B. R. 466, Fed. Cas. No. 6968; Beattie v. Gardner, 4 N. B. R. 106, Fed. Cas. No. 1195; Christman v. Haynes, 8 N. B. R. 528, Fed. Cas. No. 2703; Haskell v. Ingalls, 5 N. B. R. 200, 1 Hask. 341, Fed. Cas. No. 6193; In re Baker, 14 N. B. R. 433; In re Schick, 2 Ben. 5 Fed. Cas. No. 12455, 1 N. B. R. 177; In re Dibblee, 3 Ben. 283; Fitch v. McGill, 2 Biss. 163; In re Dunkle, 7 N. B. R. 72, Fed. Cas. No. 4160; In re Heller, 3 Biss. 153; In re Wells, 3 N. B. R. 95, Fed. Cas. No. 17388; Wilson v. Brinkman, 2 N. B. R. 149, Fed. Cas. No. 17794; Smith v. Buchanan, 4 N. B. R. 397, 8 Blatch. 153; Vanderhoof v. Bk., 1 Dill. 476; Anderson v. Strassberger, 6 Ben. 672; Warren v. Bank, 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. No. 17202.

46—Johnson v. Anderson, 70 Neb. 233, 11 A. B. R. 294; In re Nelson, 1 N. B. N. 567, 98 Fed. 76, 1 A. B. R. 63.

47—In re Spacht, 2 N. B. N. R. 238; In re Richards, 2 A. B. R. 518, 95 Fed. 258; In re Huffman, 1 A. B. R. 587; see Wilson v. Bank, 17 Wall. 473, 21 L. ed. 723.

him so.<sup>48</sup> A preference is created where notes are given with a cognovit to confess judgment thereon by an insolvent debtor to a creditor who a few days later entered up judgment and issued execution;<sup>49</sup> and it is immaterial whether such action was expected or not by the debtor;<sup>50</sup> or a judgment entered, upon a warrant of attorney attached to a note which the creditor had been renewing, and execution issued thereon just prior to the bankruptcy;<sup>51</sup> or the confession of judgment, the issuing of an execution and the seizure and sale of property under it,<sup>52</sup> or entering judgments on warrants held by near relatives of the bankrupt and issuing execution thereon immediately on learning that the creditors were pressing;<sup>53</sup> or giving a note by an insolvent and causing it to be sued upon to prevent an attachment;<sup>54</sup> or giving individual notes in exchange for notes secured by the signature and indorsement of others, resulting in an execution on the judgment of such notes;<sup>55</sup> or where a state ordinance gave new debts a preference over old, and a father gave his son a new note to take the place of the old one, judgment being entered thereon.<sup>56</sup> A preference is created if judgment be recovered and execution issue thereon, though the creditor had no knowledge of the debtor's insolvency.<sup>57</sup>

The taking of property by a receiver appointed by a state court is a taking under legal process.<sup>58</sup>

48—Chicago Title & Trust Co. v. Roeb-  
ling's Sons Co., 107 Fed. 71, 5 A. B. R.  
368.

49—Haughey v. Albin, 2 N. B. R. 129,  
2 Bond 244, Fed. Cas. No. 6222; Fitch  
v. McGie, 2 N. B. R. 164, Fed. Cas. No.  
4835; In re Terry & Cleaver, 4 N. B. R.  
33, Fed. Cas. No. 13835; Vogel v. Lath-  
rop, 4 N. B. R. 146, Fed. Cas. No. 16985.

50—Bank v. Jones, 11 N. B. R. 38, 21  
Wall. 325, 22 L. ed. 542.

51—Golson v. Neihoff, 5 N. B. R. 56, 2  
Biss. 434, Fed. Cas. No. 5524; In re Her-  
pich, 15 N. B. R. 426, 7 Biss. 387, Fed.  
Cas. No. 6418.

52—Grant v. National Bank of Auburn,  
197 Fed. 581, 28 A. B. R. 712; Benjamin  
v. Chandler, 142 Fed. 217, 15 A. B. R.  
439; Zahn v. Fry, 9 N. B. R. 546, Fed.  
Cas. No. 18198; Catlin v. Hoffman, 9 N.  
B. R. 342, 3 Sawy. 486, Fed. Cas. No.  
2521; Webb v. Sachs, 15 N. B. R. 168, 4

Sawy. 158, Fed. Cas. No. 17325; Bk. v.  
Campbell, 6 N. B. R. 352, 14 Wall. 87, 20  
L. ed. 832.

53—Shimer v. Huber, 19 N. B. R. 414,  
Fed. Cas. No. 12787; Rogers v. Palmer,  
19 N. B. R. 471, 102 U. S. 263, 26 L. ed.  
164; Zahn v. Fry, 9 N. B. R. 546, Fed.  
Cas. No. 18198; In re Dibble, 2 N. B. R.  
185, 3 Ben. 203, Fed. Cas. No. 3884; In  
re Baker, 14 N. B. R. 433, Fed. Cas. No.  
763; Shaffer v. Fritchery, 4 N. B. R. 179,  
Fed. Cas. No. 12697.

54—In re Williams, 3 N. B. R. 74,  
1 Lowell 406, Fed. Cas. No. 17703.

55—Sage, Jr., v. Wyncoop, 68 N. B.  
R. 63, Fed. Cas. No. 12215.

56—Little v. Alexander, 12 N. B. R.  
134, 21 Wall. 500, 22 L. ed. 625.

57—In re Metzger Toy & Novelty Co.,  
114 Fed. 957, 8 A. B. R. 307.

58—Hardy v. Clark, 3 N. B. R. 99, 7  
Blatch. 262, Fed. Cas. No. 6058.

### § 950. Foreign attachment.

An attachment within four months of bankruptcy under the law of a foreign country not recognizing the Bankruptcy Act does not constitute a voidable preference, which should be surrendered before proof of claim.<sup>59</sup>

### § 951. Transfer of property.

#### § 952. — In general.

The transfer of any kind of property may constitute a preference.<sup>60</sup> By the express provisions of the act a transfer includes<sup>61</sup> "the sale<sup>62</sup> and every other and different mode of disposing of or parting with property,<sup>63</sup> or the possession of property, absolutely or conditionally, as payment, pledge, mortgage,<sup>64</sup> gift or security."

Any transfer of property by an insolvent, direct or indirect, by which one creditor obtains an advantage over others is a preference and it does not matter that the motive is commendable, as to save the property from attachment, or the like; as also any transfer by which the insolvent's estate is diminished, which includes those the consideration for which is a pre-existing debt.<sup>65</sup> The transfer of securities to a bank by a bankrupt

<sup>59</sup>—In re Boden & Haas v. Lovell, 203 Fed. 234, 30 A. B. R. 353.

<sup>60</sup>—In re Schacht Motor Car Co., 31 A. B. R. 624.

<sup>61</sup>—Section 1 (25), Act of 1898.

<sup>62</sup>—Stern v. Louisville Trust Co., 112 Fed. 501, 7 A. B. R. 305.

<sup>63</sup>—Stern v. Louisville Trust Co., *supra*; Frank v. Musliner, 78 N. Y. S. 369, 9 A. B. R. 229.

<sup>64</sup>—Brooks v. Bank of Beaver City, 82 Kan. 597, 25 A. B. R. 890; Coder v. Arts, 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513, mod'f'g 145 Fed. 202, 16 A. B. R. 583, aff'd 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1; In re Ed. W. Wright Lumber Co., 114 Fed. 1011, 8 A. B. R. 345; Sebring v. Wellington, 63 App. Div. (N. Y.) 498, 6 A. B. R. 671; In re Beerman, 112 Fed. 663, 7 A. B. R. 434; In re Jones, 118 Fed. 673, 9 A. B. R. 262.

<sup>65</sup>—See Section 67, Act of 1898; In re Taylor, 1 N. B. N. 412; In re Woodward, 2 A. B. R. 233; Toof v. Martin, 6 N. B. R. 49, 13 Wall. 40, 20 L. ed. 481; s. c. 4 N. B. R. 158, Fed. Cas. No. 9164; Foster v. Hackley, 2 N. B. R. 131, Fed. Cas. No. 497; In re Rogers, 2 N. B. R. 129, Fed. Cas. No. 12002; In re Pierson, 10 N. B. R. 107, Fed. Cas. No. 11153; Barker v. Smith, 12 N. B. R. 474, 2 Woods 87, Fed. Cas. No. 986; Brock v. Terrell, 2 N. B. R. 190, Fed. Cas. No. 1914; In re Batchelder, 3 N. B. R. 37, 1 Lowell 373, Fed. Cas. No. 1098; In re Lewis, 2 N. B. R. 145; Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, Fed. Cas. No. 2521; Smith v. Little, 9 N. B. R. 11, 5 Ben. 490, Fed. Cas. No. 13072; Pirie v. Chicago Title & Trust Co., 182 U. S. 444, 45 L. ed. 1176, 5 A. B. R. 814; Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 7 A. B. R. 142; West v. Bank of Lahoma, 16 Okla. 328, 16 A. B. R. 733.

depositor as collateral<sup>66</sup> or the seizure of property by writ of replevin<sup>67</sup> constitutes a transfer, but a conditional sale does not.<sup>68</sup>

### § 953. — Creditor must receive property.

It is absolutely essential that the bankrupt or his agent transfer some portion of his property to the creditor. If the creditor receives none of the bankrupt's property, there is no preference.<sup>69</sup> Accordingly, payment of the bankrupt's note by the indorser who upon such payment credits the amount against an indebtedness due by such indorser to the bankrupt, does not constitute a preference.<sup>70</sup>

### § 954. — Indirect transfer to creditor.

The transaction assailed as a preference must be determined by its effect, not its form.<sup>71</sup> It is immaterial to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others, and such creditor be benefited thereby.<sup>72</sup> Nor is it material that the payment is

66—National City Bank of New York v. Hotchkiss, 231 U. S. 50, 58 L. ed. 115, 31 A. B. R. 291, aff'g 201 Fed. 664, 29 A. B. R. 289.

67—Bank of North America v. Penn Motor Car Co., 235 Pa. 194, 31 A. B. R. 395.

68—Big Four Implement Co. v. Wright, 207 Fed. 535, 47 L. R. A. (N. S.) 1223, 31 A. B. R. 125; In re Farmers Co-operative Co. of Barlow, 202 Fed. 1005, 30 A. B. R. 187.

69—Aiello v. Crampton, 201 Fed. 891, 29 A. B. R. 1; Catchings v. Chatham Nat. Bank, 180 Fed. 103, 24 A. B. R. 843; Mason v. Nat. Herkimer County Bank, 172 Fed. 529, 22 A. B. R. 733, rev'g 163 Fed. 920, 21 A. B. R. 98.

Transfer by bankrupt to corporation held not a preference to its president and principal stockholder. Aiello v. Crampton, 201 Fed. 891, 29 A. B. R. 1.

Where bankrupt had a revocable privilege entitling him to sell newspapers and same was revoked by publishers against his will and transferred to a creditor of

the bankrupt who resold the privilege, held that the amount received by the creditor in excess of the advances made to the bankrupt did not constitute a preference, since bankrupt did not transfer anything to defendants, and could not therefore have an intent to prefer, and defendant could not be charged with knowledge of non-existing intent. In re Martin, 200 Fed. 940, 29 A. B. R. 623.

70—Catchings v. Chatham Nat. Bank, 180 Fed. 103, 24 A. B. R. 843; Mason v. Nat. Herkimer County Bank, 172 Fed. 529, 22 A. B. R. 733, rev'g 163 Fed. 920, 21 A. B. R. 98.

71—Roberts v. Johnson, 151 Fed. 567, 18 A. B. R. 132; Rogers v. Fidelity Savings Bank & Loan Co., 172 Fed. 735, 23 A. B. R. 1; In re McDonald & Sons, 178 Fed. 487, 24 A. B. R. 446.

72—In re Harrison Bros., 28 A. B. R. 684; National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 28 A. B. R. 218; In re Lynden Mercantile Co., 156 Fed. 713, 19 A. B. R. 444; Bank of Wayne v. Gold,

not made directly by the bankrupt. If he assigns an account due him, and his debtor makes a payment of the account to the assignee,<sup>73</sup> or if payment is made by a third person having funds belonging to him at his direction,<sup>74</sup> or if a debt is paid by the purchaser of the bankrupt's property,<sup>75</sup> the transaction will be held to constitute a preference. It has been held, however, that a payment to a creditor of the bankrupt by a firm of which he has ceased to be a member does not constitute a voidable preference.<sup>76</sup>

### § 955. — Assignments.

A general assignment may constitute an unlawful preference.<sup>77</sup>

An order which operates as an assignment of the fund upon which it is drawn is a transfer,<sup>78</sup> as is the assignment of a land

146 App. Div. (N. Y.) 296, 26 A. B. R. 722; *In re Jacob L. Bartheleme*, 11 A. B. R. 67; *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 10 A. B. R. 213.

Fact that mortgage was given to third party and by him transferred to the creditor is immaterial. *In re McDonald & Sons*, 178 Fed. 487, 24 A. B. R. 446.

A sale of the bankrupt's property under an agreement whereby the purchaser was to deduct the amount of a creditor's claim from the purchase price and pay the same to the latter is a preference. *Hackney v. Hargreaves Bros.*, 68 Neb. 633, 13 A. B. R. 164.

Mortgage on bankrupt's entire property given to brother of creditor, proceeds turned over to creditor in payment of his claim, held a preference. *Roberts v. Johnson*, 151 Fed. 567, 18 A. B. R. 132.

The conveyance of the property of a corporation in which the bankrupt is a large stockholder in consideration of the cancellation of the vendee's indebtedness to the bankrupt may be set aside as preferential. *Greenhall v. Carnegie Trust Co.*, 180 Fed. 812, 25 A. B. R. 300.

A payment by the bankrupt of notes given by him to third parties discounted by a bank constitutes a preference to the bank. *In re Hill Co.*, 130 Fed. 315, 66 L. R. A. 68, 12 A. B. R. 221.

Mortgage executed in favor of president of bank the proceeds thereof being immediately applied to the indebtedness to the bank held voidable. *Walters v. Zimmerman*, 208 Fed. 62, 30 A. B. R. 776.

Where the payee of a note, within four months of the bankruptcy of the maker thereof, indorses it to a bank which has discounted it, a payment of the note by the maker to the bank will be held to inure to the benefit of the payee and to constitute a preference. *In re Matthews & Rosenkranz*, 15 A. B. R. 721.

73—*Collett v. Bronx Nat. Bank*, 200 Fed. 111, 29 A. B. R. 454; *Nat. Bank of Newport v. Nat. Herkimer County Bank*, 225 U. S. 178, 56 L. ed. 1042, 28 A. B. R. 218.

74—*Johnson v. Hanley, Hoyer Co.*, 188 Fed. 752, 26 A. B. R. 748.

75—*Rogers v. Fidelity Savings Bank & Loan Co.*, 172 Fed. 735, 23 A. B. R. 1; *Wickwire v. Webster City Savings Bank*, 153 Iowa 225, 27 A. B. R. 157.

76—*In re Hines*, 144 Fed. 543, 16 A. B. R. 495.

77—*Eichholz v. Polack*, 140 App. Div. (N. Y.) 551, 25 A. B. R. 243. But see *Gill v. Bell's Knitting Mills*, 128 App. Div. (N. Y.) 691, 21 A. B. R. 282.

78—*In re Hines*, 144 Fed. 543, 16 A. B. R. 495.



contract,<sup>79</sup> or the assignment of a claim under an insurance policy.<sup>80</sup> So, the assignment of book accounts is considered a transfer,<sup>81</sup> and a payment to a creditor of the bankrupt of an account owing to the bankrupt will be held a preference.<sup>82</sup>

### § 956. — Deposit of money.

A deposit of money with a bank within four months of bankruptcy is not a preference within the meaning of the act, though the bank at the time holds obligations of the depositor which may be set off against the deposit upon the latter's bankruptcy,<sup>83</sup> unless it was the intention of the parties to accumulate deposits for the purpose of preferring the bank.<sup>84</sup> Nor is the application by a bank of deposits made by the bankrupt to his indebtedness to it a voidable preference unless it had reasonable cause to believe a preference would be thereby effected.<sup>85</sup> So, a deposit made within four months of bankruptcy by a lessee to be held by his landlord as security for the faithful performance of the covenants of the lease will not be regarded as a preference.<sup>86</sup>

### § 957. — Transfer of exempt property.

The transfer of the homestead or other exempt property cannot be treated as a preference, since in no event would the

79—*In re Sayed*, 185 Fed. 962, 26 A. B. R. 444.

80—*Hanson v. Blake & Co.*, 155 Fed. 342, 19 A. B. R. 325.

81—*In re Richards, Inc.*, 28 A. B. R. 636; *In re Gibson*, 191 Fed. 665, 27 A. B. R. 401.

82—*National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 178, 56 L. ed. 1042, 28 A. B. R. 218.

83—*Studley v. Boylston Nat. Bank*, 200 Fed. 249, 29 A. B. R. 649; *Walsh v. First Nat. Bank*, 201 Fed. 522, 29 A. B. R. 118; *Tomlinson v. Bank of Lexington*, 145 Fed. 824, 16 A. B. R. 632; *Irish v. Citizens' Trust Co. of Utica*, 163 Fed. 880, 21 A. B. R. 39; *In re Hill Co.*, 130 Fed. 315, 66 L. R. A. 68, 12 A. B. R. 221; *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 11 A. B. R. 42; *Tomlinson v. Bank of Lexington*, 145 Fed. 824, 16 A. B. R. 632. But see *In re Stege*, 116 Fed. 342, 8 A. B. R. 515;

*Ridge Avenue Bank v. Sundheim*, 145 Fed. 798, 16 A. B. R. 863.

84—*Germania Savings Bank & Trust Co. v. Loeb*, 188 Fed. 285, 26 A. B. R. 238; *Schmidt v. Bank of Commerce*, 15 N. M. 470, 25 A. B. R. 904. And see *Ernst v. Mechanic's and Metals Nat. Bank*, 201 Fed. 664, 29 A. B. R. 289.

Payment to a bank by a check which it required the bankrupt to give in payment of notes not due held to constitute a preference. *Shale v. Farmers' Bank of Morrill*, 82 Kan. 649, 25 A. B. R. 888.

85—*Studley v. Boylston Bank*, 229 U. S. 523, 57 L. ed. 313, 30 A. B. R. 161, aff'g 200 Fed. 249, 29 A. B. R. 649; *In re Percy Ford Co.*, 199 Fed. 334, 28 A. B. R. 919; *West v. Bank of Lahoma*, 16 Okla. 328, 16 A. B. R. 733; *Lowell v. International Trust Co.*, 158 Fed. 781, 19 A. B. R. 853.

86—*In re Sherwood's, Inc.*, 210 Fed. 754, 31 A. B. R. 769.

trustee in bankruptcy be entitled thereto.<sup>87</sup> A preferential mortgage covering both exempt and non-exempt property is only voidable as to the non-exempt property.<sup>88</sup>

### § 958. — Transfer by partnership or members.

A transfer by a partnership to secure the individual debt of partner is voidable.<sup>89</sup> A payment to a creditor of the bankrupt by a firm of which he has ceased to be a member has been held not to constitute a preference.<sup>90</sup>

A transfer by a partner, while the partnership is insolvent, of his individual property in payment of a firm debt, is a preference not by the firm but by the individual partner.<sup>91</sup>

### § 959. — Payment of money.

The word "transfer" in section 60 is used in its most comprehensive sense and includes the transfer of money as well as property.<sup>92</sup> So, the payment of wages may be a preference, notwithstanding that part of them were entitled to priority, for that can only be settled in the bankruptcy proceedings;<sup>93</sup> or payment for goods delivered without the collection of the price, though the terms be cash, since the title passed on delivery, the payments not being for a present consideration.<sup>94</sup>

The payment of the rent of the premises in which the business is carried on is not necessarily a preference,<sup>95</sup> but if made with the purpose of carrying on the business in fraud of creditors, it

87—*Huntington v. Baskerville*, 192 Fed. 813, 27 A. B. R. 219; *Vitzthum v. Large*, 162 Fed. 685, 20 A. B. R. 666.

88—*First Nat. Bank v. Lanz*, 202 Fed. 117, 29 A. B. R. 247; *In re Bailey*, 176 Fed. 990, 24 A. B. R. 201.

89—*In re Floyd & Co.*, 156 Fed. 206, 19 A. B. R. 438.

90—*In re Hines*, 144 Fed. 543, 16 A. B. R. 495.

91—*Mayes v. Palmer*, 208 Fed. 97, 31 A. B. R. 225.

92—*In re Starkweather & Albert*, 206 Fed. 797, 30 A. B. R. 743; *In re Pfaffinger*, 154 Fed. 523, 18 A. B. R. 807; *West v. Bank of LaHoma*, 16 Okla. 328, 16 A. B. R. 733; *Parker v. Black*, 143 Fed. 560, 16 A. B. R. 202; *In re Rouk*, 111 Fed. 154, 7 A. B. R. 31; *Carson*,

*Pirie, Scott & Co. v. Trust Co.*, 182 U. S. 438, 45 L. ed. 1171, 5 A. B. R. 814; *Sherman v. Luckhardt*, 9 A. B. R. 307; *Laundry v. Andrews*, 22 R. I. 597, 6 A. B. R. 281.

93—*In re Kohn*, 2 N. B. N. R. 367, 7 A. B. R. 111n; *In re Jones*, 2 N. B. N. R. 961, 110 Fed. 736, 4 A. B. R. 563; *In re Proctor*, 6 A. B. R. 660; *In re Henry C. King Co.*, 116 Fed. 110, 7 A. B. R. 619; *In re Kenyon*, 6 N. B. R. 238; contra, *In re Feuerlicht*, 8 A. B. R. 550; *In re Read*, 7 A. B. R. 111.

94—*In re Durham*, 2 N. B. N. R. 1101; *In re Arndt*, 3 N. B. N. R. 101, 104 Fed. 234, 4 A. B. R. 773; and see *In re Morrow & Co.*, 134 Fed. 686, 13 A. B. R. 392.

95—*Reed v. Phinney*, 2 N. B. N. R. 1007; *In re Barrett*, 6 A. B. R. 199.

should be so regarded.<sup>96</sup> Where an insolvent leaseholder with the proceeds of a sale of such lease pays debts charged thereon or necessarily payable to secure a fair price, such payments are not a preference; so payment of back rent on a lease non-assignable without the landlord's consent is proper because necessary to secure its value for creditors.<sup>97</sup>

The payment of one of several notes held by a bank against an insolvent debtor out of the collateral security given to secure the note is not a preference; nor the payment of interest for the renewal of a note.<sup>98</sup> If a debtor entering into a composition with his creditors, secretly pays one of them more than the amount stated in the composition, the preference is fraudulent and voidable.<sup>99</sup>

The payment within the prohibited period of an amount of money equivalent to that borrowed by the bankrupt for a special purpose, and not so used, may be avoided as a preference, where the identical money is not returned.<sup>1</sup>

A payment made by a clearing house association of which the bankrupt is a member, out of the credits of the bankrupt in its possession is a transfer of property of the bankrupt,<sup>2</sup> but a payment by the check of the bankrupt's attorney on his individual account is not a preference if he does not hold sufficient of the bankrupt's funds to pay the debt.<sup>3</sup> The collection by a stock exchange, under its rules, of the balance due from an insolvent member within four months of the filing of a petition in bankruptcy constitutes a preference, and the creditors receiving the benefit thereof are liable to the trustee in bankruptcy for the amount of payments made to them.<sup>4</sup>

Prior to the decision of the supreme court<sup>5</sup> a payment of money was generally held to constitute a preference, if made by

96—*In re Lange*, 2 N. B. N. R. 85, 97 Fed. 197, 3 A. B. R. 231.

97—*In re Pearson*, 1 N. B. N. 402, 95 Fed. 425, 2 A. B. R. 482; but see *In re Merchants' Ins. Co.*, 6 N. B. R. 43, 3 Biss. 162, Fed. Cas. No. 9441.

98—*Reed v. Phinney*, 2 N. B. N. R. 1007.

99—*In re Chaplin*, 115 Fed. 162, 3 A. B. R. 121.

1—*In re Kearney*, 167 Fed. 995, 21 A. B. R. 721.

2—*Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. ed. 527, 15 A. B. R. 336; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. ed. 533, 15 A. B. R. 347.

3—*Upson v. Mount Morris Bank*, 103 App. Div. (N. Y.) 367, 14 A. B. R. 6.

4—*Cohen v. Budd*, 17 A. B. R. 329.

5—*Jacquith v. Alden*, 189 U. S. 78, 47 L. ed. 717, 9 A. B. R. 773.

an insolvent debtor, with the effect of enabling the creditor to obtain a greater percentage of his debt than other creditors of like class, without regard to whether it was made innocently in the usual course of business or not;<sup>6</sup> whether on a running account with the creditor, so that the balance was to be considered one debt;<sup>7</sup> or if the different transactions constituted debts which should be stated as distinct causes of action in a complaint, as notes, and the payment was of one or more in full.<sup>8</sup> The rule is now settled, however, that the receipt by a creditor of payments upon an account current in the usual course of business, whether followed by new credits or not, does not constitute a preference, if the net result is to increase the indebtedness of the bankrupt.<sup>9</sup>

6—In re Arndt, 3 N. B. N. R. 101, 104 Fed. 234, 4 A. B. R. 773; In re Christensen, 2 N. B. N. R. 695, 101 Fed. 802, 4 A. B. R. 202; In re Fixen, 2 N. B. N. R. 885, 102 Fed. 295, 4 A. B. R. 10; In re Sloan, 102 Fed. 116, 4 A. B. R. 356; Strobel v. Knost, 99 Fed. 409, 1 N. B. N. 403, 2 A. B. R. 471; In re Kamsler, 2 N. B. N. R. 97, 97 Fed. 194; In re Jourdan, 2 N. B. N. R. 581; In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 Fed. 923; In re Cain, 1 N. B. N. 389, 2 A. B. R. 378; In re Tirre, 2 A. B. R. 493, 1 N. B. N. 402, 95 Fed. 425; In re Wise, 2 N. B. N. R. 151; Shutts v. Bk., 2 N. B. N. R. 320, 3 A. B. R. 492, 98 Fed. 705; Blakey v. Bk., 1 N. B. N. 411, 2 A. B. R. 460, 95 Fed. 267; In re Hoffman, 2 N. B. N. R. 554; In re Thompson, 2 N. B. N. R. 1016; In re Fort Wayne Elec. Corp., 2 N. B. N. R. 434, 99 Fed. 400, s. c. 3 A. B. R. 186, 96 Fed. 803, citing and overruling In re Piper, 2 N. B. N. R. 7, but see In re Ryan, 2 N. B. N. R. 693; contra, In re Smoke, 2 N. B. N. R. 996, 4 A. B. R. 434, 104 Fed. 289, aff'g 2 N. B. N. R. 831; In re Alexander, 2 N. B. N. R. 997, 4 A. B. R. 376, 102 Fed. 464; In re Piper, 2 N. B. N. R. 7, 8; see also In re Baker, 2 N. B. N. R. 195; In re Nathan, 2 N. B. N. R. 613; In re Jones, 2 N. B. N. R. 961, 110 Fed. 736, 4 A. B. R. 563; In re Warner, 5 N. B. R. 414, Fed. Cas. No. 17177; Far-

rin v. Crawford, 2 N. B. R. 181, Fed. Cas. No. 4686; In re Dibble, 2 N. B. R. 185, 3 Ben. 283, Fed. Cas. No. 3884; Phelan v. Bk., 16 N. B. R. 308, 4 Dill. 88, Fed. Cas. No. 11069; Rison v. Knapp, 4 N. B. R. 114, 1 Dill. 186, Fed. Cas. No. 11861; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4948; Maurer v. Frantz, 4 N. B. R. 142; In re Ore. Bull. Pr. & Pub. Co., 13 N. B. R. 503; In re Doyle, 3 N. B. R. 158, Fed. Cas. No. 4051; In re Gay, 2 N. B. R. 114, 1 Hask. 108, Fed. Cas. No. 5279; In re Foster, 2 N. B. R. 81, Fed. Cas. No. 4961; In re Finn, 8 N. B. R. 525, Fed. Cas. No. 4795; In re Jones, 12 N. B. R. 48, Fed. Cas. No. 7452; In re Burgess, 3 N. B. R. 47, Fed. Cas. No. 2153; In re Clark, 19 N. B. R. 301, Fed. Cas. No. 2812; In re Edelstein, 1 N. B. N. 168.

7—In re Wise, 2 N. B. N. R. 151; In re Teslow, 2 N. B. N. R. 1024.

8—In re Wise, 2 N. B. N. R. 151; Reed v. Phinney, 2 N. B. N. R. 1007; In re Castle, 2 N. B. N. R. 985, 4 A. B. R. 357n; In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Berswick, 2 N. B. N. R. 808; In re Rogers Milling Co., 2 N. B. N. R. 973, 102 Fed. 687, 4 A. B. R. 540; In re Myers v. Charni, 2 N. B. N. R. 765; contra, In re Jourdan, 2 N. B. N. R. 581; In re Hoffman, 2 N. B. N. R. 554.

9—Jacquith v. Alden, 189 U. S. 78,

**§ 960. — Payment by bankrupt or agent to himself.**

A payment by the bankrupt as an individual to himself as trustee for an estate may constitute a voidable preference,<sup>10</sup> as may a payment of an agent of the bankrupt to himself with knowledge of the insolvency of the principal.<sup>11</sup>

**§ 961. — Performance of labor.**

The performance of labor by an insolvent debtor for his creditor,<sup>12</sup> is not a transfer within the meaning of the act.

**§ 962. — Reclamation by vendor.**

The return of property to the vendor thereof under a conditional sale contract is not a preference.<sup>13</sup> Where the bankrupt uses lumber obtained through fraudulent representations as to his solvency in constructing a barge, a transfer by him to his vendor upon the rescission by the latter of his sale of the lumber will constitute a preference, it appearing that other lumber was also used in the construction of the barge.<sup>14</sup>

**§ 963. — Restoration of stolen money.**

A corporation which has restored to it money which has been stolen from it and applied to the use of the bankrupt corporation by an agent of both corporations, cannot be said to have received a preference.<sup>15</sup> So, a warehouseman from whom property belonging to his bailors has been stolen by employees of the bankrupt has been held not a creditor, so as to constitute a payment to him by the bankrupt to cover the loss, a voidable preference.<sup>16</sup>

47 L. ed. 717, 9 A. B. R. 733; *Wild & Co. v. Provident Life & Trust Co.*, 214 U. S. 292, 53 L. ed. 1003, 22 A. B. R. 109, rev'g 153 Fed. 562, 18 A. B. R. 506; *In re Hill Co.*, 130 Fed. 315, 66 L. R. A. 68, 12 A. B. R. 221; *Yaple v. Dahl-Millikan Groc. Co.*, 193 U. S. 526, 48 L. ed. 776, 11 A. B. R. 596; see also *In re Morrow & Co.*, 134 Fed. 686, 13 A. B. R. 392; *In re Watkinson*, 142 Fed. 782, 16 A. B. R. 38; *Merklein v. Hurley*, 197 Fed. 183, 28 A. B. R. 841.

10—*Clarke v. Rogers*, 183 Fed. 518, 26 A. B. R. 413, aff'd 228 U. S. 534, 57 L. ed. 953, 30 A. B. R. 39.

11—*In re Plaut*, 148 Fed. 37, 17 A. B. R. 272.

12—*In re Abraham Steers Lumber Co.*, 110 Fed. 738, 6 A. B. R. 315.

13—*Hart v. Emerson-Brantingham Co.*, 203 Fed. 60, 30 A. B. R. 218.

14—*American Lumber & Mfg. Co. v. Taylor*, 137 Fed. 321, 14 A. B. R. 231.

15—*McNaboe v. Columbian Mfg. Co.*, 153 Fed. 967, 18 A. B. R. 684.

16—*Keystone Warehouse Co. v. Bissell*, 203 Fed. 652, 30 A. B. R. 213.

### § 964. — Retention of funds held in trust.

The retention by a creditor of funds held in trust for the bankrupt does not constitute a preference.<sup>17</sup>

### § 965. — Stoppage in transitu.

The right of stoppage in transitu is a legal right and exists in the vendor until delivery of the goods to the vendee, who though insolvent may consent to the vendor retaking the goods without giving him a preference.<sup>18</sup>

### § 966. — Taking possession under a contract of purchase.

The taking of specific property by a creditor under a claim that he is entitled to that property by virtue of a contract of purchase cannot be construed into a payment upon an existing debt.<sup>19</sup>

### § 967. Reasonable cause to believe a preference would be effected.

### § 968. — In general.

Prior to the amendment of 1910 a preference, given within four months before the filing of a petition, or after the filing of the petition and before the adjudication, was voidable if the person receiving it, or to be benefited thereby, or his agent acting therein, had reasonable cause to believe a preference was intended.<sup>20</sup>

17—Deductions made by a creditor from its payrolls of the amount due by its employees to the bankrupt, in pursuance of an agreement between the bankrupt and the creditor, held not a preference it appearing that the creditor had agreed to remit to the bankrupt the amount so deducted. But the court held that the amounts deducted constituted a trust fund which could be recovered from the creditor, without giving to it the right to set off any indebtedness due it from the bankrupt. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 13 A. B. R. 447, rev'g 129 Fed. 728, 12 A. B. R. 111.

18—See *Stoppage in Transitu*, under *ante* § 924.

19—In *re East End Mantel & Tile Co.*,

202 Fed. 275, 29 A. B. R. 793; *Mills v. Virginia-Carolina Lumber Co.*, 164 Fed. 168, 21 L. R. A. (N. S.) 901, 20 A. B. R. 750.

20—*Levor v. Seiter*, 69 App. Div. (N. Y.) 33, 8 A. B. R. 459; *In re Ratliff*, 107 Fed. 80, 5 A. B. R. 713; *Coleman v. Decatur Egg Case Co.*, 186 Fed. 136, 26 A. B. R. 248; *In re Houghton Web Co.*, 185 Fed. 213, 26 A. B. R. 202; *Reber v. Louis Shulman & Bro.*, 183 Fed. 564, 25 A. B. R. 475, aff'g 179 Fed. 574, 24 A. B. R. 782; *Powell v. Gate City Bank*, 178 Fed. 609, 24 A. B. R. 316; *Harder v. Clark*, 66 Misc. (N. Y.) 584, 23 A. B. R. 756; *Sharpe v. Allender*, 170 Fed. 589, 22 A. B. R. 431, aff'g 164 Fed. 448, 21 A. B. R. 73; *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed.

The amendment obviates the necessity of proving (1) the debtors intent to prefer, (2) the cause for belief on the part of the creditor that a preference was intended, and (3) that the debtor knew of his insolvency. The test now is, whether the person receiving the payment, or to be benefited thereby, or his agent acting therein, at the time of the payment, had reasonable cause to believe that a preference would be effected, or, in other words, that the debtor was then insolvent and that in accepting and retaining such payment, he would receive a larger percentage of his debts than other creditors of the same class.<sup>21</sup> Reasonable cause to believe that a transfer will effect a preference within the meaning of the amendment, is reasonable cause to believe that it will operate as a preference, and necessarily involves reasonable cause for belief in insolvency.<sup>22</sup>

The question is not one of knowledge or belief, but of reasonable cause for belief,<sup>23</sup> and where there is reasonable cause to believe, that at the date of the transfer the debtor is insolvent, and payment is accepted on a debt overdue, it is immaterial whether the creditor actually believes what may have been disclosed as to the true state of affairs.<sup>24</sup>

### § 969. — As of what date determined.

Under the law as it existed prior to the amendment of 1910, the reasonable cause to believe a preference was intended must

943, 18 A. B. R. 513, mod'f'g 145 Fed. 206, 16 A. B. R. 583; *Stuart v. Farmers' Bank of Cuba City*, 137 Wis. 66, 21 A. B. R. 403; *Hussey v. Richardson Roberts Dry Goods Co.*, 148 Fed. 598, 17 A. B. R. 511; *Pittsburgh Plate Glass Co. v. Edwards*, 148 Fed. 377, 17 A. B. R. 447; *In re Armstrong*, 145 Fed. 202, 16 A. B. R. 583; *In re Bailey*, 144 Fed. 214, 16 A. B. R. 289; *Gullinane v. State Bank of Waverly*, 123 Iowa 340, 12 A. B. R. 776.

21—Section 11, amended June 25, 1910; *Ogden v. Reddish*, 200 Fed. 977, 29 A. B. R. 531; *In re Herman*, 207 Fed. 594, 31 A. B. R. 243; *In re Harrison Bros.*, 28 A. B. R. 684; *In re Sam Z. Lorch & Co.*, 199 Fed. 944, 28 A. B. R. 784; *Dougherty v. First Nat. Bank of Canton*, 197 Fed. 241, 28 A. B. R. 263; *In re Martin*, 27 A. B. R. 151.

Preferential transfers made in good faith though for a past consideration not voidable if transferee had no reason to believe a preference would be effected. *In re Chicago Car Equipment Co.*, 211 Fed. 638, 31 A. B. R. 617.

22—*Ogden v. Reddish*, 200 Fed. 977, 29 A. B. R. 531; see *post* § 971.

23—*Shale v. Farmers' Bank of Morrill*, 82 Kan. 649, 25 A. B. R. 888; *In re The Leader*, 190 Fed. 624, 26 A. B. R. 668; *In re Martin*, 27 A. B. R. 151; *In re Pfaffinger*, 154 Fed. 523, 18 A. B. R. 807; *Dulany v. Waggaman*, 37 Wash. L. Rep. 370, 22 A. B. R. 36; *Pratt v. Columbia Bank*, 157 Fed. 137, 18 A. B. R. 406.

24—*Hewitt v. Boston Straw Board Co.*, 214 Mass. 260, 31 A. B. R. 652.

have been existing at the time of the making of the transfer, not merely at the time when it was recorded or registered,<sup>25</sup> but under the amendment it is sufficient if it exists at the latter date.<sup>26</sup>

In determining whether a payment by certified note operated as a preference, the date of certification is controlling.<sup>27</sup>

The delivery by a stockholder to a bank of securities at the end of the banking day in payment of a day or clearance loan made at the beginning of the day has been held to constitute a preference where the bank during the day obtained knowledge of insolvency of the stockholder.<sup>28</sup>

### § 970. — What constitutes.

The creditor is not charged with knowledge of his debtor's financial condition from the mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; nor is it essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent. He has reasonable cause so to believe if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, for he is charged with knowledge of the facts which such inquiry should reasonably be expected to disclose; or if he has knowledge of facts and circumstances which would cause a reasonably prudent man so to believe.<sup>29</sup> Notice of

25—*Debus v. Yates*, 193 Fed. 427, 30 A. B. R. 823, 193 Fed. 427; *In re Watson*, 201 Fed. 962, 30 A. B. R. 871; *Dougherty v. First Nat. Bank of Canton*, 197 Fed. 241, 28 A. B. R. 263.

26—*In re Watson*, 201 Fed. 962, 30 A. B. R. 871; *Ogden v. Reddish*, 200 Fed. 977, 29 A. B. R. 531.

27—*In re Frazin & Oppenheim*, 201 Fed. 86, 29 A. B. R. 214.

28—*Ernst v. Mechanic's and Metals Nat. Bank*, 201 Fed. 664, 29 A. B. R. 289.

29—*In re Schacht Motor Car Co.*, 31 A. B. R. 624; *Rogers v. American Halibut Co.*, 31 A. B. R. 576; *In re Pfaffinger*, 154 Fed. 523, 18 A. B. R. 807; *Stern v. Paper*, 183 Fed. 228, 25 A. B. R. 451; *Spencer v.*

*Nekemoto*, 24 A. B. R. 517; *In re McDonald & Sons*, 178 Fed. 487, 24 A. B. R. 446; *Rogers v. Fidelity Savings Bank & Loan Co.*, 172 Fed. 735, 23 A. B. R. 1; *Brewster v. Goff Lumber Co.*, 164 Fed. 124, 21 A. B. R. 106; *In re Mills Co.*, 162 Fed. 42, 20 A. B. R. 501; *Wright v. William Skinner Mfg. Co.*, 161 Fed. 644, 20 A. B. R. 527; *Stevens v. Oscar Holway Co.*, 156 Fed. 90, 19 A. B. R. 399; *Crandall v. Coats*, 133 Fed. 965, 13 A. B. R. 712; *Dougherty v. First Nat. Bank of Canton*, 197 Fed. 241, 28 A. B. R. 263; *Bardes v. First Nat. Bank of Hawarden*, 122 Iowa 443, 12 A. B. R. 771; *Stevenson v. Milliken-Tomlinson*, 99 Me. 320, 13 A. B. R. 201; *In re Hines*, 144 Fed. 543, 16 A. B. R. 495; *Sundheim v. Ridge*



facts which would incite a man of ordinary prudence to an inquiry under ordinary circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.<sup>30</sup> An inquiry of the debtor alone has been held insufficient.<sup>31</sup>

The diligence required in the inquiry is proportioned to the suspiciousness of the transaction.<sup>32</sup>

While constructive notice is sufficient ground for such belief, yet the circumstances upon which such notice is predicated must be of a character to induce belief as distinguished from mere

Ave. Bank, 138 Fed. 951, 15 A. B. R. 132; In re Virginia Hardwood Mfg. Co., 139 Fed. 209, 15 A. B. R. 135; Butler Paper Co. v. Goembel, 143 Fed. 295, 16 A. B. R. 26; Suffel v. McCartney Nat. Bank, 127 Wis. 208, 16 A. B. R. 259; Coder v. McPherson, 152 Fed. 951, 18 A. B. R. 523; In re McMurtry & Smith, 142 Fed. 853, 15 A. B. R. 427; In re Eggert, 2 N. B. N. R. 185; s. c. 2 N. B. N. R. 390, 98 Fed. 843, 3 A. B. R. 541, aff'd 102 Fed. 735, 4 A. B. R. 449; In re Jacobs, 1 N. B. N. R. 183, 1 A. B. R. 518; Crittenden v. Barton, 59 App. Div. (N. Y.) 555, 5 A. B. R. 775; Grant v. Bank, 97 U. S. (7 Otto) 80, 81, 24 L. ed. 971; Barbour v. Priest, 103 U. S. (13 Otto) 293, 296, 26 L. ed. 478; Stucky v. Bk., 108 U. S. 74, 27 L. ed. 640; Toof v. Martin, 13 Wall. 40, 20 L. ed. 481, 6 N. B. R. 49; Buchanan v. Smith, 16 Wall. 277, 21 L. ed. 280, 7 N. B. R. 513; Wager v. Hall, 16 Wall. 584, 600, 21 L. ed. 504, s. c. 5 N. B. R. 131, 3 Biss. 28, Fed. Cas. No. 5951; Dutcher v. Wright, 94 U. S. (4 Otto) 553, 557, 24 L. ed. 130, 16 N. B. R. 331; Bank v. Cook, 95 U. S. (5 Otto) 343, 346, 24 L. ed. 412, 16 N. B. R. 391; In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 434, 99 Fed. 400, 3 A. B. R. 634; Nat. Exch. Bk. v. Pepperdine, 2 N. B. N. R. 675; In re Rudnick, 2 N. B. N. R. 769; In re Blair, 2 N. B. N. R. 890, 102 Fed. 987, 4 A. B. R. 220; Taft v. 4th Nat. Bk., 2 N. B. N. R. 1145; Bk. v. Hunt, 4 N. B. R. 198; Lloyd v. Strobbridge, 16 N. B. R. 197, Fed. Cas. No. 8435; In re Hauck, 17 N. B. R. 158, Fed. Cas. No. 6219; In re McDonough, 3 N.

B. R. 53, Fed. Cas. No. 8775; Burfee v. Bk., 9 N. B. R. 314; Armstrong v. Rickey Bros., 2 N. B. R. 150, Fed. Cas. No. 546; Boothe v. Brooks, 12 N. B. R. 398, Fed. Cas. No. 1650; Singer v. Sloan, 12 N. B. R. 208, 3 Dill. 110, Fed. Cas. No. 12898; Loudon v. Bk., 15 N. B. R. 476, 2 Hughes 420, Fed. Cas. No. 8525; Seammon v. Cole, 5 N. B. R. 257, 3 Cliff. 472, Fed. Cas. No. 12432; Webb v. Sachs, 15 N. B. R. 168, Fed. Cas. No. 17325; Rice v. Melendy, 41 Iowa 399; Graham v. Stark, 3 B. R. 357, 3 Ben. 250; Otis v. Hadley, 112 Mass. 100; Alderdice v. Bk., 11 N. B. R. 398, 1 Hughes 47, Fed. Cas. No. 154; In re Wright, 2 B. R. 490; Hill v. Simpson, 7 Ves. 170; Brooke v. McCracken, 10 N. B. R. 461, Fed. Cas. No. 1932; Grow v. Ballard, 2 N. B. R. 69, Fed. Cas. No. 5848; Bucknam v. Goss, 13 N. B. R. 337, 1 Hask. 630, Fed. Cas. No. 2097; Stranahan v. Gregory, 4 N. B. R. 142, Fed. Cas. No. 13522; In re Ratliff, 107 Fed. 80, 5 A. B. R. 713; In re Dundas, 111 Fed. 500, 7 A. B. R. 129; Brown v. Guichard, 37 Misc. (N. Y.) 78, 7 A. B. R. 515; McNair v. McIntyre, 113 Fed. 113, 7 A. B. R. 638; Pirie v. Trust Co., 182 U. S. 446, 45 L. ed. 1177, 5 A. B. R. 814; In re Harrison Bros., 28 A. B. R. 684.

30—Tilt v. Citizens' Trust Co., 191 Fed. 441, 27 A. B. R. 320; Coder v. McPherson, 152 Fed. 951, 18 A. B. R. 523.  
31—McGirr v. Humpreys Grocery Co., 192 Fed. 55, 26 A. B. R. 518.

32—Schulenberg v. Kabureck, 2 Dill. 132, Fed. Cas. No. 12487; Wilson v. Stoddart, 4 N. B. R. 76, Fed. Cas. No. 17838.

suspicion.<sup>33</sup> Circumstances may seem suspicious after the bankruptcy occurs, that would not appear unusual at the time of their occurrence, and would then have presented no reasonable cause on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside upon slight proof or mere suspicion.<sup>34</sup> While mere suspicion is not sufficient, yet if the degree of knowledge is such as to create fear as to insolvency and as to the creation of a preference by the transfer, so strong that the creditor refrains from investigating the true state of affairs, in order to keep himself in the dark in regard thereto, and to be in a position to claim that he had no reasonable cause to believe in insolvency or that a preference would be effected, the case is within the statute.<sup>35</sup>

Decisions under the act of 1867 construing the phrase "reasonable cause to believe" are equally applicable in determining the meaning of such phrase under the act of 1898.<sup>36</sup>

### § 971. — Knowledge of or belief in insolvency.

While knowledge or reasonable cause to believe that the debtor was insolvent is necessary<sup>37</sup> such knowledge or belief or cause for belief, alone has been held insufficient to charge the creditor with knowledge that a preference was intended.<sup>38</sup> Nor

33—*Taft v. Bank*, 2 N. B. N. R. 1145.

34—*Carey v. Donohue*, 209 Fed. 328, 31 A. B. R. 210; *In re Carlile*, 199 Fed. 612, 29 A. B. R. 373; *Tumlin v. Bryan*, 165 Fed. 166, 21 L. R. A. (N. S.) 960, 21 A. B. R. 319; *Stern v. Paper*, 198 Fed. 642, 28 A. B. R. 592, aff'g 183 Fed. 228, 25 A. B. R. 451; *In re The Leader*, 190 Fed. 624, 26 A. B. R. 668; *Sparks v. Marsh*, 177 Fed. 739, 24 A. B. R. 280; *Powell v. Gate City Bank*, 178 Fed. 609, 24 A. B. R. 316; *First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436; *Newman v. Tootle-Campbell Co.*, 31 A. B. R. 399; *In re Pfaffinger*, 154 Fed. 523, 18 A. B. R. 807; *In re Nassau*, 15 A. B. R. 793; *Hutting Mfg. Co. v. Edwards*, 160 Fed. 619, 20 A. B. R. 349.

35—*Ogden v. Reddish*, 200 Fed. 977, 29 A. B. R. 531.

36—*Stevenson v. Milliken-Tomlinson*, 99 Me. 320, 13 A. B. R. 201.

37—*Ogden v. Reddish*, 200 Fed. 977, 29 A. B. R. 531; and see *Shelton v. First Nat. Bank of Mannsville*, 31 Okla. 217, 27 A. B. R. 587; *In re Pfaffinger*, 154 Fed. 523, 18 A. B. R. 807; *In re Alden*, 15 Ohio Fed. Dec. 120, 16 A. B. R. 362; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 A. B. R. 781.

38—*Kimmerle v. Farr*, 189 Fed. 295, 26 A. B. R. 818; *Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897; *In re First Nat. Bank of Louisville*, 155 Fed. 100, 18 A. B. R. 766; *contra*, *In re Andrews*, 135 Fed. 599, 14 A. B. R. 247.

The creditor must have notice not only of the insolvency of the bankrupt, but of his intent to prefer but in the absence of qualifying circumstances, notice of the

is mere knowledge that a debtor is unable to meet his obligations as they become due<sup>39</sup> or that most of his indebtedness is past due<sup>40</sup> or that his notes have gone to protest frequently,<sup>41</sup> sufficient to put the creditor upon inquiry. The knowledge that bankrupt was a little short of money and desired the creditor to substitute one security for another, is not sufficient to show the creditor had reasonable cause to believe the debtor insolvent;<sup>42</sup> nor is the giving of a mortgage, as it is only *prima facie* fraudulent and may be explained.<sup>43</sup>

Knowledge that the bankrupt had borrowed money on a forged certificate of stock has been held to constitute reasonable cause to believe that he was insolvent.<sup>44</sup>

### § 972. — Knowledge of agent or attorney.

The act expressly provides that it is sufficient if the agent, which would include the attorney, acting in the transaction, has reasonable cause to believe. This is merely an affirmance of the general rule that the principal is charged with the knowledge acquired, or possessed, by his agent within the scope of his employment;<sup>45</sup> but, if the knowledge of the agent has been acquired in such a way as to make it improper for him to communicate it to his principal, as if acquired in confidence as the attorney of another,<sup>46</sup> or if acquired while the agent is acting

insolvency, at the time of payment, will carry with it notice of the intent to prefer. *In re Varley & Bauman Clothing Co.*, 191 Fed. 459, 26 A. B. R. 840.

39—*Upson v. Mount Morris Bank*, 103 App. Div. (N. Y.) 367, 14 A. B. R. 6; *First Nat. Bank of Philadelphia v. Abbott*, 165 Fed. 852, 21 A. B. R. 436; but see *In re Varley & Bauman Clothing Co.*, 191 Fed. 459, 26 A. B. R. 840.

40—*In re Goodhile*, 130 Fed. 471, 12 A. B. R. 380.

41—*In re Thomas Deutschle & Co.*, 182 Fed. 435, 25 A. B. R. 348.

42—*Collins v. Bell*, 3 N. B. R. 146, Fed. Cas. No. 3010.

43—*Steadman v. Bank of Monroe*, 117 Fed. 237, 9 A. B. R. 4; *Moore v. Young*, 4 Biss. 128, Fed. Cas. No. 9782.

44—*Collett v. Bronx Nat. Bank*, 205

Fed. 370, 30 A. B. R. 598, aff'g 200 Fed. 111, 29 A. B. R. 454.

45—*In re Dunavant*, 1 N. B. N. 542, 96 Fed. 542, 3 A. B. R. 41; *Babbitt v. Kelly*, 9 A. B. R. 335; *Rogers v. Palmer*, 19 N. B. R. 471, 102 U. S. (12 Otto) 263, 26 L. ed. 164; *Sage v. Wynkoop*, 16 N. B. R. 363, Fed. Cas. No. 12215; *Vogle v. Lathrop*, 4 N. B. R. 146, Fed. Cas. No. 16985; *Mayer v. Hermann*, 10 Blatch. 256, Fed. Cas. No. 9344; *Graham v. Stark*, 3 N. B. R. 93, 3 Ben. 520, Fed. Cas. No. 5676; *Wight v. Muxlow*, 8 Ben. 52, Fed. Cas. No. 17629; *In re Graham*, 110 Fed. 133, 6 A. B. R. 750; *Plummer v. Myers*, 137 Fed. 660, 14 A. B. R. 805; *Off v. Hakes*, 142 Fed. 364, 15 A. B. R. 696; *In re Nassau*, 15 A. B. R. 793.

46—*In re Egbert*, 1 A. B. R. 340; see *Crooks v. Bank*, 34 Misc. (N. Y.) 450, 5 A. B. R. 754.

for himself and not for his principal, or fraudulently,<sup>47</sup> the reason of the rule ceases and it does not apply, though, it is held, that the fact that the insolvent and the agent have confidential relations or that the agent has self-interests antagonistic to a disclosure to his principal, does not make his knowledge any less that of his principal.<sup>48</sup> Notice to an agent will be imputed to his principal, though at the time of the alleged preference, the agency through which the notice was derived, has terminated and the agent is acting in another capacity.<sup>49</sup>

The same rules apply to a corporation, and where it is governed by a board of managers or directors, the knowledge of the officer will be imputed to the corporation,<sup>50</sup> even though such officer be the bankrupt himself.<sup>51</sup> So, where the bankrupt is the agent of the creditor receiving the transfer, the latter will be held to have had reasonable cause to believe.<sup>52</sup>

Knowledge of a cashier is knowledge of the bank.<sup>53</sup> A bank which undertakes to collect a note for another bank is the agent of the latter bank and not of its customer who turned the note over for collection, and knowledge of the collecting bank is not knowledge of the creditor.<sup>54</sup>

The fact that the bankrupt prior to the recording of a mortgage spoke to the mortgagee's attorney about the possibility of making an assignment has been held sufficient,<sup>55</sup> and where a creditor placed his claim in the hands of a collection agent who forwarded it to a firm who, knowing of the debtor's insolvency, induced him to confess judgment for the debt, and collected and forwarded it to the collection agent, the amount was held recoverable on suit of the trustee.<sup>56</sup>

47—*Rogers v. American Halibut Co.*, 31 A. B. R. 576; *Benner v. Blumauer-Frank Drug Co.*, 198 Fed. 362, 28 A. B. R. 798.

48—*Campbell v. Balcomb*, 183 Fed. 766, 25 A. B. R. 538.

49—*Constam v. Haley*, 206 Fed. 260, 30 A. B. R. 650.

50—*Crooks v. Bank*, 34 Misc. (N. Y.) 450, 5 A. B. R. 754; *In re Gillette*, 104 Fed. 769, 5 A. B. R. 119.

51—Knowledge of bankrupt who was manager of a corporation to which he was indebted held knowledge of corpora-

tion. *Rogers v. American Halibut Co.*, 31 A. B. R. 576.

52—*Allen v. Gray*, 63 Misc. (N. Y.) 219, 21 A. B. R. 828.

53—*Collett v. Bronx Nat. Bank*, 205 Fed. 370, 30 A. B. R. 598, aff'g 200 Fed. 111, 29 A. B. R. 454.

54—*Balcomb v. Old Nat. Bank*, 201 Fed. 679, 29 A. B. R. 329.

55—*Ogden v. Reddish*, 200 Fed. 977, 29 A. B. R. 531.

56—*Hoover v. Wise*, 14 N. B. R. 264, 91 U. S. (1 Otto) 308, 23 L. ed. 392; see *In re Flick*, 3 N. B. N. R. 71.

Knowledge of the trustee of a township of the insolvency of the debtor is imputable to the township, but the trustee's participation in a fraudulent transfer to another creditor by means of which the bankrupt pays his indebtedness to the township will not be imputed to the township, without formal direction of the board of trustees.<sup>57</sup>

### § 973. — Transactions out of the usual course.

Transactions not in the usual course of trade or of the accustomed dealings between the parties is notice of probable wrong, and the creditor is thereby put on inquiry and is chargeable with all such inquiry would have produced. Such a transaction is *prima facie* evidence of fraud,<sup>58</sup> and the presumption must be overcome by proof of proper inquiry into the seller's pecuniary condition.<sup>59</sup> In determining if it was unusual, regard must be had to the character of the business.<sup>60</sup> Thus it is unusual for a chair manufacturer to sell legs used in his business;<sup>61</sup> so is a sale of the entire stock in trade;<sup>62</sup> or a sale at night, without invoice, for cash;<sup>63</sup> or a mortgage of the entire stock in trade for a pre-existing debt;<sup>64</sup> or a confession of judgment enabling the creditor to seize the stock and close out the business,<sup>65</sup> or a conveyance of the debtor's entire estate<sup>66</sup> or a conveyance of his residence.<sup>67</sup>

57—*Painter v. Township of Napoleon*, 190 Fed. 637, 26 A. B. R. 324.

58—*In re Hunt*, 2 N. B. R. 166, Fed. Cas. No. 6881; *In re Krum*, 7 Ben. 5, Fed. Cas. No. 7943.

59—*Walbrun v. Babbitt*, 9 N. B. R. 1, 16 Wall. 577, 21 L. ed. 489; *Brooks v. Davis*, Fed. Cas. No. 1950.

60—*Judson v. Kelty*, 6 N. B. R. 165, 5 Ben. 348, Fed. Cas. No. 7567.

61—*Schrenkeisen v. Miller*, 9 Ben. 55, Fed. Cas. No. 12480.

62—*In re The Leader*, 190 Fed. 624, 26 A. B. R. 668; *Thomas v. Adelman*, 136 Fed. 973, 14 A. B. R. 510; *Allen v. McMannes*, 156 Fed. 615, 19 A. B. R. 276; *McElvain v. Hardesty*, 169 Fed. 31, 22 A. B. R. 320; *Main v. Glen*, 7 Biss. 86, Fed. Cas. No. 8973; *North v. House*, 6 N. B.

R. 365, Fed. Cas. No. 10310; *In re Kahley*, 4 N. B. R. 124, Fed. Cas. No. 7593, 2 Biss. 383.

63—*Davis v. Armstrong*, 3 N. B. R. 7, Fed. Cas. No. 3624.

64—*Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 A. B. R. 781; *Rison v. Knapp*, 4 N. B. R. 114, 1 Dill. 187, Fed. Cas. No. 11861; *Graham v. Stark*, 3 N. B. R. 93, 3 Ben. 520, Fed. Cas. No. 5676; *Hurley v. Smith*, 1 Hask. 308, Fed. Cas. No. 6920.

65—*Webb v. Sachs*, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. No. 17325.

66—*In re McDonald & Sons*, 178 Fed. 487, 24 A. B. R. 446.

67—*Brewster v. Goff*, 164 Fed. 127, 21 A. B. R. 239.

### § 974. — Absconding of debtor.

The mere fact that the debtor has absconded, and was absent from the state when attachment proceedings were begun is not sufficient to establish reasonable cause to believe that he intended to give the creditor a preference.<sup>68</sup>

### § 975. — Payment under compromise.

A creditor who accepts a payment made in accordance with an offer of compromise is justified in believing that the offer is made in good faith to all creditors, unless something occurs to put him on inquiry, and need not ascertain if the debtor can pay the amount offered and intends to pay it to all creditors alike.<sup>69</sup>

### § 976. — Questions of fact.

What constitutes "reasonable cause to believe" is a question of fact, and each case depends upon its own peculiar circumstances, and no rigid rule can be established applicable to every case.<sup>70</sup> Positive proof of collusion between debtor and creditor, by which one may be preferred, is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as a means of ascertaining the truth, and the rule is well settled that circumstances inconclusive if separately considered may by their joint operation, especially when corroborated by moral circumstances, be sufficient.<sup>71</sup>

The test of sufficiency of the evidence to warrant a submission of the question to the jury does not rest upon the assertions made by either party of his intent or belief in the transaction, but on the inferences thereof which may fairly arise from the facts in evidence.<sup>72</sup> Where there is evidence justifying submission, the finding of the jury will not be disturbed upon appeal or writ of error.<sup>73</sup>

68—Johnson v. Anderson, 70 Neb. 233, 11 A. B. R. 294.

69—Smith v. Hewlett Robin Co., 178 Fed. 271, 24 A. B. R. 153.

70—Crittenden v. Barton, 59 App. Div. (N. Y.) 555, 5 A. B. R. 775; Gering v. Leyda, 186 Fed. 110, 26 A. B. R. 137; Whitwell v. Wright, 136 App. Div. (N. Y.) 246, 23 A. B. R. 747; Stern v. Paper, 183 Fed. 228, 25 A. B. R. 451, aff'd 198 Fed. 642, 28 A. B. R. 592; Utah Ass'n of Credit Men v. Boyle Furn. Co., 39

Utah 518, 26 A. B. R. 867; Suffel v. McCartney Nat. Bank, 127 Wis. 208, 16 A. B. R. 259; Butler Paper Co. v. Goembel, 143 Fed. 295, 16 A. B. R. 26; Turner v. Fisher, 133 Fed. 82, 13 A. B. R. 243.

71—In re McDonald & Sons, 178 Fed. 487, 24 A. B. R. 446.

72—Hamilton Nat. Bank of Chicago v. Balcomb, 177 Fed. 155, 24 A. B. R. 338.

73—Ridge Avenue Bank v. Sundheim, 145 Fed. 798, 16 A. B. R. 863.

## § 977. — Evidence.

The court will take judicial notice of business customs and methods as criteria for valuing facts as imposing the duty of inquiry as to a debtor's solvency,<sup>74</sup> but the degree of intelligence or the business experience of the preferred party is not to be considered.<sup>75</sup> Overdrafts are in themselves no evidence of insolvency.<sup>76</sup>

The adjudication is no evidence that a creditor receiving a preference had reasonable cause to believe a preference was intended.<sup>77</sup>

The taking of a chattel mortgage by a creditor to secure an overdue debt shortly before the institution of the bankruptcy proceedings is a fact to be considered. But peculiar facts may attend the giving thereof, and these should always be carefully considered, with a view of ascertaining what actually inspired the giving of the mortgage.<sup>78</sup> The fact that the creditor trusted the bankrupt by accepting him as surety for a substantial sum is entitled to considerable weight.<sup>79</sup>

## § 978. Effect of preference.

## § 979. — In general.

A preference voidable under subdivision "b" disqualifies the creditor receiving it from having his claim allowed unless and until he surrenders what he has received as a preference;<sup>80</sup> or from taking part in the management and administration of the estate.<sup>81</sup>

Where a trust mortgage is set aside as preferential, all liens founded upon it fall as well,<sup>82</sup> and a wife's release of her dower contained in a preferential mortgage executed by her and the bankrupt for his benefit, is rendered ineffective upon the setting aside of the mortgage as preferential.<sup>83</sup>

74—*McGirr v. Humphreys Groc. Co.*, 192 Fed. 55, 26 A. B. R. 518.

75—*Wright v. Sampter*, 152 Fed. 196, 18 A. B. R. 355.

76—*Crim v. Woodford*, 136 Fed. 34, 14 A. B. R. 302.

77—*Hussey v. Richardson Roberts Dry Goods Co.*, 148 Fed. 598, 17 A. B. R. 511; *Laundy v. First Nat. Bank of Junction City*, 66 Kan. 759, 11 A. B. R. 223.

78—*Hussey v. Richardson Roberts Dry Goods Co.*, 148 Fed. 598, 17 A. B. R. 511.

79—*Getts v. Janesville Wholesale Grocery Co.*, 163 Fed. 417, 21 A. B. R. 5.

80—*Ante*, § 618.

81—*In re Walker*, 1 N. B. N. 510, 96 Fed. 550, 3 A. B. R. 35.

82—*Rouse v. Ottenwess & Huxoll*, 31 A. B. R. 115.

83—*In re Lingafelter*, 181 Fed. 24, 32 L. R. A. (N. S.) 103, 24 A. B. R. 656.

### § 980. — Fraudulent preferences voidable, not void.

Fraudulent preferences, that is, any transaction which constitutes a preference as hereinbefore described, given or received<sup>84</sup> within four months before the filing of a petition, or after the filing of the petition and before the adjudication, if the creditor had reasonable cause to believe a preference was intended, are voidable, not void.<sup>85</sup> This makes the English doctrine that a suit in the nature of trover cannot be brought by the trustee unless he alleges and proves a demand for restoration and a refusal to restore the property transferred applicable here.<sup>86</sup> While such a transfer is fraudulent and voidable, it is not so because morally wrong, but because the act says it is.<sup>87</sup>

A voidable preference is not a mere preference in fact, but the creditor must have reasonable cause to believe that he was obtaining the statutory preference, that is, a preference in law, the gist of which is the debtor's insolvency. If the creditor had reason to believe when property was transferred to him within four months of the filing of the petition that a preference was intended, it is immaterial whether it was taken as payment or as security, in either case it is voidable; but, in the absence of such knowledge it is not,<sup>88</sup> and the same is true of a payment in money.<sup>89</sup>

### § 981. — Bona fide purchasers.

One to whom a preferential mortgage is assigned after bankruptcy for less than its face value is not a bona fide purchaser.<sup>90</sup>

### § 981½. Injunction against transferee.

Creditors who have received preference with reasonable cause to believe a preference was intended should be enjoined from

84—In re Conhaim, 2 N. B. N. R. 148, 97 Fed. 923, 3 A. B. R. 249.

85—In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 434, 99 Fed. 400, 3 A. B. R. 634; In re McLam, 1 N. B. N. 402, 97 Fed. 922, 3 A. B. R. 245; Stern v. Louisville Trust Co., Newborg v. Same, 112 Fed. 501, 7 A. B. R. 305.

86—In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396.

87—In re Cobb, 1 N. B. N. 557, 96 Fed. 821, 3 A. B. R. 129.

88—In re Eggert, 2 N. B. N. R. 185, 390, 98 Fed. 834, 3 A. B. R. 541, 102 Fed. 735, 4 A. B. R. 449; In re Baker, 2 N. B. N. R. 195.

89—In re Wise, 2 N. B. N. R. 151; Blakey v. Bk., 1 N. B. N. 411, 95 Fed. 267, 2 A. B. R. 460.

90—Butcher v. Werksman, 204 Fed. 330, 30 A. B. R. 332.



disposing of the property transferred pending the adjudication in bankruptcy and the appointment of a trustee;<sup>91</sup> and it is immaterial that the debt which is preferred was contracted in good faith before the passage of the bankrupt law, or that the preferred creditor claims to have disposed of the property when it is found such disposition was merely simulated;<sup>91a</sup> or in any way proceeding to carry such preference into effect, as by collecting accounts transferred by bankrupt.<sup>91b</sup>

### § 982. Set-offs against preferential transfers.

Section 60c of the act provides that: "If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

It is not necessary to entitle a creditor to the set-off provided for in this section that the property or money transferred to the bankrupt was transferred to the trustee. All that is required is that the creditor parted with his money or property in good faith, and without security, and that the same passed into the bankrupt's possession. Further credits extended to a person who thereafter becomes a bankrupt, may be set off as against antecedent preferential payments, and not against such as may have been made after the extension of the new credits.<sup>94</sup>

Where a bank induces the bankrupt to pay it the amount sought to be recovered for the express purpose and with the intent to apply the same upon the bankrupt's indebtedness to it, it has no right of set-off on the theory that the money was deposited in the ordinary course of business.<sup>95</sup>

The recovery of what has been given as a preference is not for

91—*In re Rockwood*, 1 N. B. N. 134, 91 Fed. 363, 1 A. B. R. 272; *Sedgwick v. Menck*, 1 N. B. R. 108, Fed. Cas. No. 12167; see *In re Brown*, 91 Fed. 358, 1 A. B. R. 107.

91a—*In re Nathan*, 1 N. B. N. 326, 563, 92 Fed. 590.

91b—*In re Kerski*, 1 N. B. N. 328, 2 A. B. R. 79.

94—*Kaufman v. Tredway*, 195 U. S. 271, 49 L. ed. 190, 12 A. B. R. 682; but see *Bank of Wayne v. Gold*, 146 App. Div. (N. Y.) 296, 26 A. B. R. 722; *Price v. Derbyshire Coffee Co.*, 128 App. Div. (N. Y.) 472, 21 A. B. R. 280.

95—*Schmidt v. Bank of Commerce*, 15 N. M. 470, 25 A. B. R. 904.

the bankrupt's benefit but for that of his creditors, and this provision treats it as a debt due as opposed to the debt owing on account of the new credit and the rule as to mutual debts is applied. The receipt by a creditor of payments upon an account current in the usual course of business, followed by new credits, does not constitute a preference under the law.<sup>96</sup>

This subdivision does not restrict the creditors to whom it applies to such as received preferences with reasonable cause to believe a preference was intended and the use of the term "good faith" seems to imply that an innocent preference was in the legislators' minds as much as the opposite.<sup>97</sup> In spite of the use of the word "recoverable," this subdivision is not limited in its application to cases where the trustee sues to recover the preferences.<sup>98</sup> Under the act the surrender cannot be said to be voluntary since it is required if the creditor would participate in the dividends;<sup>99</sup> though the contrary is held by the greater number of cases.<sup>1</sup> A creditor may under this provision set off his new credits although he did not have reasonable cause to believe a preference intended and though the property is not recoverable by the trustee,<sup>2</sup> but any excess of payments over the new credits must be surrendered before proof of the claim can be allowed.<sup>3</sup>

A creditor seeking to obtain the set-off of a credit must plead the essential facts entitling him thereto in the same manner as if he sought to maintain a separate action on such claim.<sup>4</sup> If a

96—See *ante*, § 959.

97—In *re* Thompson, 112 Fed. 651, 7 A. B. R. 214.

98—Section 60b, Act of 1898; In *re* Ryan, 105 Fed. 760, 5 A. B. R. 396, 2 N. B. N. R. 693; *Peterson v. Nash Bros.*, 112 Fed. 311, 7 A. B. R. 181; *McKey v. Lee*, 105 Fed. 923, 5 A. B. R. 267; In *re* Bothwell, 8 A. B. R. 213, and cases cited; *Kahn v. Cone Export & Commission Co.*, 115 Fed. 290, 8 A. B. R. 157; In *re* Seckler, 106 Fed. 484, 5 A. B. R. 579; In *re* Southern Overalls Mfg. Co., 111 Fed. 518, 6 A. B. R. 633; In *re* Soldosky, 111 Fed. 511, 7 A. B. R. 123; contra, In *re* Keller, 109 Fed. 118, 6 A. B. R. 334; In *re* Abraham Steers Lumber Co., 110 Fed. 738, 6 A. B. R. 315, 112 Fed. 406, 7 A. B. R. 332.

99—In *re* Beswick, 2 N. B. N. R. 808; In *re* Hoffman, 2 N. B. N. R. 554; *McKee v. Lee*, 3 N. B. N. R. 262, 105 Fed. 923, 5 A. B. R. 267.

1—In *re* Christensen, 101 Fed. 802, 4 A. B. R. 202, aff'g 2 N. B. N. R. 695; In *re* Thompson, 2 N. B. N. R. 1016; and see In *re* Ryan, 107 Fed. 760, 5 A. B. R. 396, 2 N. B. N. R. 693.

2—*Morey Mercantile Co. v. Scheffer*, 114 Fed. 447, 7 A. B. R. 670.

3—*Gans v. Ellison*, 114 Fed. 734, 8 A. B. R. 153; In *re* Thompson's Sons, 7 A. B. R. 214.

4—In *re* Oliver, 109 Fed. 784, 6 A. B. R. 626.

debtor give in payment a check which becomes protested, and afterwards more goods are ordered and a payment made on account, such payment cannot be applied to the check so as to make the date of the check the date of the preference and entitle the creditor to set off the new credit.<sup>5</sup> When an account is paid in full more than four months prior to bankruptcy, although the debtor is insolvent, and later another debt is contracted, the payment cannot be treated as a set-off against the debt sought to be proved.<sup>6</sup>

### § 983. Payments to attorney in contemplation of bankruptcy.

By section 60d of the act, it is provided, that "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The services of an attorney are necessary in case of involuntary bankruptcy to enable a debtor to prepare the necessary papers, procure the adjudication and reference, bring the debtor before the referee, conduct examinations and otherwise perform the duties imposed upon the bankrupt in involuntary proceedings as well as to oppose the latter when improperly brought. This provision recognizes this fact and approves the payment by bankrupt to such attorney of reasonable compensation. The reasonableness of it may be inquired into by the court upon the petition of the trustee or any creditor. This proceeding is administrative in character, in which the jurisdiction of the court is not dependent on the service of process but is expressly given by statute and a notice of hearing therein may be given by mail or otherwise as the court may direct.<sup>7</sup>

The bankruptcy court alone in the first instance has jurisdic-

5—In re Bartey, 110 Fed. 928, 7 A. B. R. 26.

6—In re Abraham Steers Lumber Co., 112 Fed. 406, 7 A. B. R. 332.

7—In re Wood & Henderson, 210 U. S.

246, 52 L. ed. 1046, 20 A. B. R. 1; In re Lewin, 103 Fed. 850, 4 A. B. R. 632; see Haffenberg v. Chicago Title & Trust Co., 192 Fed. 874, 27 A. B. R. 708.

tion to determine the reasonableness of the attorney's fee<sup>8</sup> and it can proceed only when the matter is presented in such a manner as to fully advise the attorney of the investigation.<sup>9</sup>

In a proceeding by the trustee against an attorney for a recovery of the latter's fee, prosecuted under section 60d of the act, the question in limine is whether the debtor in making the transfer to the attorney was acting in contemplation of the filing of a bankruptcy petition by or against him.<sup>10</sup> If the contract with the attorney was not made by the bankrupt in contemplation of bankruptcy the case is not within the subdivision and there is no jurisdiction to proceed summarily.<sup>11</sup> If made in contemplation of bankruptcy, the court is authorized to proceed summarily, but upon due notice, to determine the extent the fee is excessive or indeed allowable at all.<sup>12</sup>

The words "in contemplation of the filing of a petition by or against him" do not mean simply the consciousness of the debtor of a financial condition enabling him to file, or subjecting him to, such a petition, but such must have been of influence in the transfer to the attorney. There must be some relation of cause and effect, between the knowledge of insolvency and the transaction with the attorney.<sup>13</sup>

Whether in making the transfer to the attorney, a purpose germane to the question of bankruptcy proceedings existed is to be ascertained either by direct testimony as to what the bankrupt said in making the transfer, or by circumstances surrounding the transfer.<sup>14</sup>

If the case turns on the character of the services contracted

8—In re Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046, 20 A. B. R. 1; Haffenberg v. Chicago Title & Trust Co., 192 Fed. 874, 27 A. B. R. 708.

The reasonableness of a fee paid to an attorney for services to be rendered in bankruptcy proceedings cannot be determined in a plenary suit. Haffenberg v. Chicago Title & Trust Co., 192 Fed. 874, 27 A. B. R. 708.

9—Haffenberg v. Chicago Title & Trust Co., 192 Fed. 874, 27 A. B. R. 708.

10—Tripp v. Mitschrich, 211 Fed. 424, 31 A. B. R. 662.

11—Tripp v. Mitschrich, 211 Fed. 424, 31 A. B. R. 662.

Where the referee finds that the payment was for services rendered prior to bankruptcy but not in contemplation of bankruptcy the referee cannot proceed further and determine the validity of the payment as a preference or fraudulent transfer but must dismiss the trustee's petition. In re Stolp, 199 Fed. 488, 29 A. B. R. 32.

12—Tripp v. Mitschrich, 211 Fed. 424, 31 A. B. R. 662.

13—Tripp v. Mitschrich, 211 Fed. 424, 31 A. B. R. 662.

14—Tripp v. Mitschrich, 211 Fed. 424, 31 A. B. R. 662.

for, the services must have been of a kind relevant to the matter of bankruptcy, not one which would be necessary and proper in the ordinary course of business, whether bankruptcy was to intervene or not.<sup>15</sup>

The word "counselor" as here used is practically synonymous with the word "attorney," but is used doubtless to indicate that the services intended to be provided for are not limited to those of an attorney as such. The allowances for counsel's services should be confined to such as are rendered in aid of the purpose sought to be accomplished by the Bankruptcy Act, excluding previous consultations or advice, as also all unnecessary attendance as counsel in the course of the proceedings and excluding especially all claims for services in aiding the bankrupt to conceal, justify or extenuate questionable acts or transactions;<sup>16</sup> services in resisting the distribution of his property under the law,<sup>17</sup> or services in negotiating for a settlement with creditors without resort to the bankruptcy court,<sup>18</sup> or services performed on behalf of the bankrupt in defending him from criminal prosecutions.<sup>19</sup>

While services referred to in section 60d are such as are expected to be performed by the attorney in the future, subsequent to the time of payment, and not past services though in contemplation of bankruptcy,<sup>20</sup> yet a transfer, in contemplation of bankruptcy, in payment of future legal services to be performed, not beneficial to the estate and which does not inure to the benefit of creditors is voidable.<sup>21</sup>

It is immaterial whether the payment or transfer to the attorney is made at the time the professional engagement is entered into or thereafter.<sup>22</sup>

It has been held that section 60d applies to services rendered before bankruptcy and that the payment or transfer referred to in 60d cannot apply to services rendered as specified in 64b,

15—Tripp v. Mitschrich, 211 Fed. 424, 31 A. B. R. 662.

Section 60d applies only to services to be rendered which are germane to the purposes of the act. In re Stolp, 199 Fed. 488, 29 A. B. R. 32.

16—In re Kross, 1 N. B. N. 566, 96 Fed. 816, 3 A. B. R. 187.

17—Goodrich v. Wilson, 14 N. B. R. 555.

18—In re Habegger, 139 Fed. 623, 15 A. B. R. 198.

19—In re Habegger, 139 Fed. 623, 15 A. B. R. 198.

20—In re Stolp, 199 Fed. 488, 29 A. B. R. 32.

21—In re Habegger, 139 Fed. 623, 15 A. B. R. 198.

22—In re Cummins, 196 Fed. 224, 28 A. B. R. 385.

relating to priority of payment,<sup>23</sup> but this seems doubtful. Among the debts given priority under section 64b, is one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed, and to the bankrupt in voluntary cases, as the court may allow.<sup>24</sup> This limits the fee to services actually rendered, but not as to time of payment. The two provisions are to be construed together and their purpose is the same, that the attorney who serves a bankrupt client shall, even after the latter's estate has passed from his hands, be paid. Though contemplating bankruptcy, in fact, as a preparation therefor, a debtor may pay his attorney a reasonable fee for the work involved, but it must be confined to necessary work connected therewith.<sup>25</sup> If such fee is not paid in advance the attorney can ask for it out of the estate, or the bankrupt may himself pay it, as by an order for money due as wages though not yet payable;<sup>26</sup> or by the transfer of property, but any excess over what the court deems reasonable must be returned to the trustee.<sup>27</sup>

An agreement by an insolvent, made after the filing of a petition in involuntary bankruptcy against him and in contemplation of the filing of a voluntary petition, that his attorney should take certain goods in payment for his services, where there was no actual delivery or change of possession until after the adjudication upon the voluntary petition, does not constitute a transfer of the property, within the meaning of this section, and the goods, having been removed after such adjudication and while they were in custodia legis, must be restored to the trustee.<sup>28</sup> The payment of attorney's fees for services previously rendered and to be rendered does not constitute a preference, even as to the services to be rendered, if the amount is reasonable;<sup>29</sup> but a mortgage given after the commencement of proceedings, to secure payment for the services of the mort-

23—In re Stolp, 199 Fed. 488, 29 A. B. R. 32.

24—Section 64b (3), Act of 1898.

25—In re Goodwin, 2 N. B. N. R. 445.

26—In re Lewin, 103 Fed. 852, 4 A. B. R. 632.

27—In re Tollett, 2 N. B. N. R. 1096, 1099.

28—In re Corbett, 104 Fed. 872, 5 A. B. R. 224.

29—In re Sidle, 2 N. B. R. 77, Fed. Cas. No. 12844.

gagee in resisting the petition may be summarily set aside and a bill in equity is not necessary.<sup>30</sup>

An attorney to whom a transfer was made in payment for services to be rendered in bankruptcy proceedings, will not be ordered to pay the expenses of proceedings by the trustee to determine the validity of the transfer.<sup>31</sup>

**§ 984. Actions affecting preferences.**

See post, chapter XXVI.

30—In re Sims, 16 N. B. R. 251, Fed. Cas. No. 12888.

31—In re Cummins, 196 Fed. 224, 28 A. B. R. 385.

## CHAPTER XXIV

### EXEMPTIONS

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- § 1037. Fraudulent transfers of exempt property.
- § 1038. Taxes on exempt property.

### § 985. Jurisdiction over exempt property.

Subdivision 11 of section 2 of the act expressly confers upon courts of bankruptcy jurisdiction to "determine all claims of bankrupts to their exemptions," and this jurisdiction is exclusive, as to questions concerning the right of the bankrupt to his exemptions.<sup>1</sup> Until the exemptions are claimed and specific property set off, the court has full power to consider and dispose of whatever is involved. It may deny the bankrupt his exemptions where he has waived or forfeited them, or for any reason they cannot be rightfully claimed.<sup>2</sup> Jurisdiction is, however, limited to setting aside the property claimed as exempt, and after hearing any question raised as to the right of exemption to either refuse or affirm the exemption, and have it turned over to the bankrupt, leaving it to the state courts to work out and enforce conflicting claims with regard to it. The distinction would seem to be that while the bankruptcy court has no jurisdiction over the property claimed as exempt once the right to it has been established, it may, preliminary to that, determine whether for any reason the right cannot be asserted.<sup>3</sup>

<sup>1</sup>—In re McCrary Bros., 169 Fed. 485, 22 A. B. R. 161; *Lucius v. Cawthon-Coleman Co.*, 196 U. S. 149, 49 L. ed. 425, 13 A. B. R. 696; *McGahan v. Anderson*, 113 Fed. 115, 7 A. B. R. 641; In re Mayer, 108 Fed. 599, 6 A. B. R. 117; In re Overstreet, 1 N. B. N. 408, 2 A. B. R. 486; In re Bragg, 2 N. B. N. R. 82; but see In re Rhodes, 109 Fed. 117, 6 A. B. R. 173; In re Eash, 157 Fed. 996, 19 A. B. R. 738, holding that the bankruptcy court has no jurisdiction to review an order of the state court allowing or denying his claim to exemptions.

<sup>2</sup>—In re Baughman, 183 Fed. 668, 25 A. B. R. 167.

<sup>3</sup>—*Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061, 10 A. B. R. 107; In re Rising, 27 A. B. R. 519; In re Castleberry, 143 Fed. 1018, 16 A. B. R. 159; *Ingram v. Wilson*, 125 Fed. 913, 11 A. B. R. 192; In re MacKissic, 171 Fed. 259, 22 A. B. R. 817; In re Highfield, 163 Fed. 924, 21 A. B. R. 92; *Newberry Shoe Co. v. Collier*, 111 Va. 288, 25 A. B. R. 130.

So the action of the trustee in allotting property as exempt may be excepted to, and the propriety of his action is open to final determination by the bankruptcy courts; but after the property is set apart as exempt neither the trustee nor the bankruptcy court has any jurisdiction over it.<sup>4</sup>

If creditors claim a right to exempt property under a waiver, or if, as to them, it is not exempt for other reasons from their debts, they must resort to a state court to enforce payment of their debts from such property.<sup>5</sup>

The extent of the jurisdiction of the bankruptcy courts, in determining claims of creditors against the exempt property, where there is a waiver, is discussed elsewhere.<sup>6</sup>

The bankruptcy court will not undertake to enforce debts or liens which are claimed to be good against the homestead or exemption,<sup>7</sup> though its jurisdiction has been held to extend to a case where it is sought to correct an error in the description of bankrupt's homestead, as a result of which it was sold in bankruptcy proceedings.<sup>8</sup>

Where the exemption claimed is in money in the hands of the trustee, the bankruptcy court will hold and protect the fund until proper proceedings can be instituted and the money sequestered by a court of competent jurisdiction, for the benefit of the parties in interest.<sup>9</sup>

The bankruptcy court is without jurisdiction to set apart a homestead exemption in lands situated in another state,<sup>10</sup> or to order a personal property exemption to any one but bankrupt.<sup>11</sup>

The informality of objecting to the claim of exemption prior to the appointment of a trustee, will not prevent the adjudication

4—In *re* Cheatham, 210 Fed. 370, 31 A. B. R. 520.

5—In *re* Remmerde, 206 Fed. 822, 30 A. B. R. 701.

6—See *post* § 1013.

7—In *re* Cheatham, 210 Fed. 370, 31 A. B. R. 520; In *re* Castleberry, 143 Fed. 1018, 16 A. B. R. 159; In *re* Everett, 9 N. B. R. 90, Fed. Cas. No. 4579; In *re* Preston, 6 N. B. R. 545; *Darling v. Berry*, 13 Fed. 659; In *re* Betts, 15 N. B. R. 536, 4 Dill. 93, Fed. Cas. No. 1371;

*Newberry Shoe Co. v. Collier*, 111 Va. 288, 25 A. B. R. 130; see also *post* § 1013.

8—*Steele v. Moody*, 16 N. B. R. 558.

9—In *re* Castleberry, 143 Fed. 1018, 16 A. B. R. 159.

10—In *re* Owings, 140 Fed. 739, 15 A. B. R. 472.

11—In *re* Blanchard & Howard, 161 Fed. 797, 20 A. B. R. 422; but see *Lumpkin v. Eason*, 10 N. B. R. 549.

of the question where it appears that there are no assets and hence no reason for the appointment of the trustee.<sup>12</sup>

Property which is only partially exempt may be administered.<sup>13</sup>

### § 986. Title to exempt property.

The title to property of the bankrupt exempt by the law of his domicile at the date of the filing of the petition,<sup>14</sup> does not pass to the trustee,<sup>15</sup> regardless of whether the property is separable and segregated from other property, or is commingled and undivided or indivisible from such other property,<sup>16</sup> but remains in the bankrupt, who has the same rights as others before a state tribunal, where his exempt property has been wrongfully seized on execution.<sup>17</sup>

While the title to exempt property does not vest in the trustee and such property cannot be administered by him for the benefit of creditors, yet it can pass to the trustee as a part of the estate, to be segregated, identified, appraised and set apart to the bankrupt. The property is not automatically exempted, but must first be set aside to the bankrupt after a hearing.<sup>18</sup> The trustee is entitled to possession until he has ascertained that the property is exempt,<sup>19</sup> but beyond setting it aside, he has no connection with it.<sup>20</sup> The bankrupt may convey, mortgage, or make

12—In re Allen & Co., 134 Fed. 620, 13 A. B. R. 518.

13—First Nat. Bank v. Lanz, 202 Fed. 117, 29 A. B. R. 247.

14—See *post* § 988.

15—In re Orear, 189 Fed. 888, 26 A. B. R. 521; section 70a, Act of 1898; In re Seabolt, 113 Fed. 766, 8 A. B. R. 57; In re Wells, 105 Fed. 762, 5 A. B. R. 308; In re Orear, 189 Fed. 888, 26 A. B. R. 521; The Gregory Co. v. Bristol, 191 Fed. 31, 26 A. B. R. 938; In re Wishniefsky, 181 Fed. 896, 24 A. B. R. 798; First Nat. Bank of Sayre v. Bartlett, 35 Pa. Super. Ct. 593, 21 A. B. R. 88; In re Edwards, 156 Fed. 794, 19 A. B. R. 632; In re Hastings, 181 Fed. 33, 30 L. R. A. (N. S.), 982, 24 A. B. R. 360; Snyder v. Guthrie (Pa. Ct. Com. Pl.), 24 A. B. R. 58; Bowen & Thomas v. Keller, 130 Ga. 31, 22 A. B. R. 727; In re Nye, 133 Fed. 33,

13 A. B. R. 142; Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 10 A. B. R. 107; In re Rising, 27 A. B. R. 519.

16—Bank of Nez Perce v. Pindel, 193 Fed. 917, 28 A. B. R. 69.

17—In re Everett, 9 N. B. R. 90, Fed. Cas. No. 4579.

18—Chicago, B. & Q. R. R. Co. v. Hall, 229 U. S. 511, 57 L. ed. 1306, 30 A. B. R. 619, aff'g 88 Neb. 20, 25 A. B. R. 53.

19—In re Soper, 173 Fed. 116, 22 A. B. R. 868; In re McClintock, 15 Ohio Fed. Dec. 58, 13 A. B. R. 606.

20—In re Cheatham, 210 Fed. 370, 31 A. B. R. 520; In re Soper, 173 Fed. 116, 22 A. B. R. 868; In re Hill, 2 A. B. R. 798, 96 Fed. 185; In re Bass, 15 N. B. R. 453, 3 Woods, 382, Fed. Cas. No. 1091; Durant v. Ins. Co., 16 N. B. R. 324, Fed. Cas. No. 4188; In re Baker, 1 N. B. N.

such disposition of it as he sees fit; he may maintain and defend suits with reference thereto,<sup>21</sup> dispose of or rent it,<sup>22</sup> and upon his death, it descends to his heirs.<sup>23</sup> After it has been designated and set apart by the trustee, it has passed out of the possession and control of the bankruptcy court, and neither it nor the trustee has any further interest in it,<sup>24</sup> and the court of bankruptcy will not, on the petition of a chattel mortgagee of such property, order the bankrupt to restore such property to the trustee to be sold by him for such mortgagee's benefit.<sup>25</sup> As the trustee has title to the assets of the bankrupt estate only in a representative capacity, he cannot transfer title to the bankrupt by setting aside to him property which the statute does not make exempt, as such an act would be void and he would be held accountable;<sup>26</sup> nor make an allowance from the general fund for articles sold under distress for rent, which would have been exempt.<sup>27</sup>

There is, however, a class of property which is closely akin to exempt property to which the trustee takes title for the benefit of creditors. Such is the reversionary interest in land allotted to bankrupt as a homestead after the termination of the exempt estate or interest.<sup>28</sup> So the trustee has a claim for the excess upon a piece of bankrupt's real estate which exceeds in value the exemption allowed by law, and to that extent the bankrupt's title to such real estate is qualified.<sup>29</sup>

212, 1 A. B. R. 526; *In re Grimes*, 96 Fed. 529, 1 N. B. N. 516, 2 A. B. R. 730; *In re Hester*, 5 N. B. R. 285; *In re Lambert*, 2 N. B. R. 426; *In re Everett*, 9 N. B. R. 90; *In re Hunt*, 5 N. B. R. 493; *Henly v. Lanier*, 15 N. B. R. 280.

21—*Henly v. Lanier*, 15 N. B. R. 280; *In re Hunt*, 5 N. B. R. 493, Fed. Cas. No. 6883.

22—*In re Oleson*, 110 Fed. 796, 7 A. B. R. 22.

23—*In re Hester*, 5 N. B. R. 285, Fed. Cas. No. 6437; *Farmer v. Taylor*, 15 N. B. R. 515; *In re Seabolt*, 113 Fed. 766.

24—*In re Grimes*, 96 Fed. 528, 1 N. B. N. 516, 2 A. B. R. 730.

25—*In re Hatch*, 102 Fed. 280, 4 A. B. R. 349.

26—*In re Gainey*, 2 N. B. R. 163, Fed. Cas. No. 5181; *In re Farish*, 2 N. B. R. 168, Fed. Cas. No. 4647; *In re Jackson & Pearce*, 2 N. B. R. 158, Fed. Cas. No. 7127; *In re Perdue*, 2 N. B. R. 67, Fed. Cas. No. 10975.

27—*In re Lawson*, 2 N. B. R. 19, Fed. Cas. No. 8149.

28—*In re Woodard*, 1 N. B. N. 385, 2 A. B. R. 339, 95 Fed. 260; *In re Watson*, 2 N. B. R. 174, Fed. Cas. No. 17271; *Rix v. Bank*, 2 Dill. 367; *In re Sale*, 143 Fed. 310, 16 A. B. R. 235.

29—*In re Parks*, 9 N. B. R. 270, Fed. Cas. No. 10765; *Johnson v. May*, 16 N. B. R. 425, Fed. Cas. No. 7397.

### § 987. Right determined as of date of petition.

The right to the exemption must exist at the date of the institution of proceedings in the bankruptcy court.<sup>30</sup> Hence, no right to exemptions can be created by the marriage of the bankrupt subsequent to the filing of the petition, though prior to the qualification of the trustee.<sup>31</sup> Where a debtor receives his exemptions and shortly thereafter bankruptcy proceedings are instituted, he cannot claim further exemptions.<sup>32</sup>

### § 988. State law governs.

Section 6 of the law<sup>33</sup> establishes the rule governing exemptions which pervades the entire act and must be read into every

30—*Mullinix v. Simon*, 196 Fed. 775, 28 A. B. R. 1; *In re Duerson*, 13 N. B. 183, Fed. Cas. No. 4117; *In re Fletcher*, 15 Ohio Fed. Dec. 210, 16 A. B. R. 491; *In re Neal*, 15 Ohio Fed. Dec. 113, 14 A. B. R. 550; but see *In re Donahey*, 176 Fed. 458, 23 A. B. R. 796; *In re O'Hara*, 162 Fed. 325, 20 A. B. R. 714; see also *In re Youngstrom*, 153 Fed. 98, 18 A. B. R. 572.

31—*In re Fletcher*, 15 Ohio Fed. Dec. 210, 16 A. B. R. 491; and see *In re Rainwater*, 191 Fed. 738, 25 A. B. R. 419.

32—*In re Miller*, 1 N. B. N. 263, 1 A. B. R. 647; *In re Buckingham*, 2 N. B. N. R. 617.

33—"This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Analogous provisions of Act of 1867. Section 14. . . . That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt,

and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four: *Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court. As this act does not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws, the exemption laws of all the states and territories are set forth at length under Title IV.

other section thereof when not clearly in conflict.<sup>34</sup> The laws of the state in which bankrupt has had his domicile for six months or the greater portion thereof immediately preceding the filing of his petition, fix the nature and extent of the exemptions as well as of the right to them<sup>35</sup> but the time and manner of claiming, awarding, selecting and setting apart such exemptions is governed by the bankruptcy law.<sup>36</sup>

It has been held, that the question whether the bankrupt was a resident of a state and hence entitled to exemptions under its laws must be determined as of the date when the exemption is claimed.<sup>37</sup>

The rule that the time within which exemptions are to be claimed and the manner of claiming the same are controlled by the bankruptcy act applies equally where the claim to exemption is made by bankrupt's wife.<sup>38</sup>

The bankruptcy law adopts the exemptions allowed by the state statutes, and the federal court, in allowing exemptions thereunder, is governed by the interpretation of the highest court of the state,<sup>39</sup> so far as such statutes have been construed, and

34—Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 14 A. B. R. 94, rev'g 113 Fed. 141, 7 A. B. R. 615; Steele v. Buel, 104 Fed. 968, 5 A. B. R. 165.

35—In re Andrews & Simonds, 193 Fed. 776, 27 A. B. R. 116; In re Nye, 133 Fed. 33, 13 A. B. R. 142; McCarty v. Coffin, 150 Fed. 307, 18 A. B. R. 148; Duncan v. Ferguson-McKinney Dry-Goods Co., 150 Fed. 269, 18 A. B. R. 155; In re Kane, 127 Fed. 552, 11 A. B. R. 533; Bank of Nez Perce v. Pindel, 193 Fed. 917, 28 A. B. R. 69; In re Lynch, 101 Fed. 579, 4 A. B. R. 262; In re Friederich, 100 Fed. 284, 3 A. B. R. 801; In re Hammond, 198 Fed. 574, 28 A. B. R. 811.

Claims for exemption are to be allowed and administered under the state laws and in accordance with the decisions of the state courts. In re Exum, 209 Fed. 716, 31 A. B. R. 691.

36—Smalley v. Laugenour, 196 U. S. 93, 49 L. ed. 400, 13 A. B. R. 692; In re Andrews & Simonds, 193 Fed. 776, 27 A. B. R. 116; In re McClintock, 15 Ohio

Fed. Dec. 58, 13 A. B. R. 606; In re Gerber, 186 Fed. 693, 26 A. B. R. 608; In re Sharp, 15 A. B. R. 491. But see In re Wunder, 133 Fed. 821, 13 A. B. R. 701.

37—In re Donahey, 176 Fed. 458, 23 A. B. R. 796; In re Ohara, 162 Fed. 325, 20 A. B. R. 714.

38—In re Burnham, 202 Fed. 762, 30 A. B. R. 270.

39—In re Exum, 209 Fed. 716, 31 A. B. R. 691; In re Hastings, 181 Fed. 33, 30 L. R. A. (N. S.) 982, 24 A. B. R. 360; In re McCrary Bros., 169 Fed. 485, 22 A. B. R. 161; In re Cochran, 185 Fed. 913, 26 A. B. R. 459; In re Thedford, 28 A. B. R. 191; Southern Irrigation Co. v. Wharton Nat. Bank, 144 S. W. 701, 28 A. B. R. 941; In re Sullivan, 148 Fed. 815, 17 A. B. R. 578, aff'g 142 Fed. 620, 16 A. B. R. 87; In re Downing, 148 Fed. 120, 15 A. B. R. 423; In re Jones, 2 N. B. N. R. 296, 97 Fed. 773, 3 A. B. R. 259; Richardson v. Woodward, 104 Fed. 873, 5 A. B. R. 94; In re Eggert, 2 N. B. N. R. 44; In re Beauchamp, 101

beyond that will apply to them the general established rules of construction.<sup>40</sup>

The construction placed upon a statute by the highest court of the state becomes a part of the statute, and no court can add to exemptions by a mere change of its decisions, since the effect would be to impair the obligation of existing contracts.<sup>41</sup>

Where the decisions of the state court are in conflict and point to no definite rule respecting the construction of the state statute, the federal court may place its own construction upon the statute, but if there is a rule which is reasonably clear the federal court must follow it rather than to undertake to determine upon its own interpretation whether the state court may not change the rule in the future.<sup>42</sup>

### § 989. Statutes liberally construed.

The state exemption laws as well as the provisions of the bankruptcy act should be liberally construed in favor of the bankrupt.<sup>43</sup> It should not be forgotten, however, that courts have not power to legislate, and can no more add an exemption not fairly within the statute than they can take from the statute.<sup>44</sup>

### § 990. Constitutionality and effect of exemption laws.

Upon the enactment of the federal bankruptcy law, all state statutes on the subject so far as they were in conflict, except exemption laws, were superseded, or suspended.<sup>45</sup> With the power to pass a uniform bankruptcy law is linked authority to define what and how much of a debtor's property shall be exempt,<sup>46</sup> and in the exercise of this power congress may even pass exemption laws impairing the obligation of contracts.<sup>47</sup>

Fed. 106, 4 A. B. R. 151; In re Morris, 2 N. B. N. R. 260; In re Lentz, 2 N. B. N. R. 190, 97 Fed. 486; In re Stevenson, 1 N. B. N. 531, 93 Fed. 789, 2 A. B. R. 230; In re Camp, 1 N. B. N. 142, 91 Fed. 745, 1 A. B. R. 165; In re Stone, 116 Fed. 35, 8 A. B. R. 416.

40—Richardson v. Woodward, 104 Fed. 873, 5 A. B. R. 94.

41—In re Scheirer, 188 Fed. 744, 26 A. B. R. 739.

42—In re Baker, 182 Fed. 392, 24 A. B. R. 411.

43—In re Jackson, 18 A. B. R. 216; In re Evans & Co., 158 Fed. 153, 19 A. B. R. 752; In re Andrews & Simonds, 193 Fed. 776, 27 A. B. R. 116; In re Thedford, 28 A. B. R. 191.

44—In re Gerber, 186 Fed. 693, 26 A. B. R. 608.

45—Richard, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506.

46—In re Reiman, 13 N. B. R. 128, 12 Blatchf. 562, Fed. Cas. No. 11675.

47—In re Owens, 12 N. B. R. 518, 6 Biss. 432.

But laws exempting reasonable portions of the debtor's property relate to the remedy, and are, therefore, not liable to a constitutional objection.<sup>48</sup> So long, therefore, as the trustee takes in each state whatever would have been available to the creditors if the bankrupt law had not been passed, the system is uniform in the constitutional sense.<sup>49</sup>

In enacting a uniform bankruptcy law, congress may properly provide that the exemptions given by the several state statutes shall be allowed to the bankrupt, and this is true without respect to the validity or invalidity of the state law,<sup>50</sup> that question being left for the highest court of the state to determine,<sup>51</sup> though the bankruptcy court may look to the state constitution, and if the exemption statute is unconstitutional, it will refuse to allow the exemption.<sup>52</sup> When the state exemption laws are adopted as a part of a federal bankruptcy system, they must be taken as they are found upon the statute books of the states, as interpreted by the highest courts of such states;<sup>53</sup> but the incorporation of these statutes into the bankruptcy law will not make valid provisions in them which, under the state constitutions are invalid.<sup>54</sup> The adoption of the different statutes of exemptions is not in contravention of the constitutional requirement that the law must be "uniform," since that provision contemplates only uniformity of administration,<sup>55</sup> and upon this ground of supposed lack of uniformity the act of 1867 was frequently unsuccessfully attacked.<sup>56</sup> This word "uniform" is only a limitation upon the power of congress in enacting bankruptcy

48—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; *In re Beckerford*, 1 Dill. 45; *In re Owens*, 12 N. B. R. 518, 6 Biss. 432, Fed. Cas. No. 10632.

49—*Hanover Nat. Bank v. Moyses*, *supra*; *In re Deckert*, 2 Hughes 183.

50—*In re Smith*, 14 N. B. R. 295, 2 Woods 458, Fed. Cas. No. 12996; *In re Smith*, 8 N. B. R. 401, Fed. Cas. No. 12986; *In re Kean*, 8 N. B. R. 367, Fed. Cas. No. 7630.

51—*Bush v. Lester*, 15 N. B. R. 36; but see *In re Petrim*, 1 N. B. R. 264.

52—*In re Buelow*, 2 N. B. R. 26, on appeal, id. 230, 98 Fed. 86, 3 A. B. R. 389.

53—*In re Scheier*, 188 Fed. 744, 26 A. B. R. 739; *In re Manning*, 112 Fed. 948, 7 A. B. R. 571; *In re Staunton*, 117 Fed. 507; *In re Duerson*, 13 N. B. R. 183, Fed. Cas. No. 4117. See *ante* § 988.

54—*In re Deckert*, 10 N. B. R. 1; *In re Dillard*, 9 N. B. R. 8.

55—*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; see also *In re Rahrer*, 140 U. S. 545, 560, 35 L. ed. 572; *In re Jordan*, 8 N. B. R. 180, Fed. Cas. No. 7514.

56—*In re Beckerford*, 1 Dill. 45, 4 N. B. R. 203; *In re Smith*, 8 N. B. R. 401; *Kean v. White*, 8 N. B. R. 367; *In re Deckert*, *supra*.



legislation,<sup>57</sup> and means uniformity among the states, and, so far as the distribution of the assets are concerned, the law is uniform.<sup>58</sup>

### § 991. Bankrupt should claim exemptions.

### § 992. — In general.

The bankrupt should file in triplicate, with the schedule of his property, a claim for such exemptions as he may be entitled to, one copy to be for the clerk, one for the referee, and one for the trustee;<sup>59</sup> and if he does not, there appears no reason why the title thereto would not vest in the trustee.<sup>60</sup>

Though the only suggestion that the bankrupt must specify the articles he wishes to claim as exempt is found in the caption of the official form of schedule B (5), and though the law expressly makes it the duty of the trustee to select and set apart the exemptions,<sup>61</sup> it would nevertheless seem to follow that a claim to exemptions must be specific and not general, and that the same must be itemized, especially where the state law so requires.<sup>62</sup> An objection to an order of sale does not amount to a claim for specific property.<sup>63</sup>

The assent of the creditors cannot dispense with the necessity of designating exemptions.<sup>64</sup> It has been held that the bank-

57—In re Smith, 8 N. B. R. 401; citing *Evans v. Eaton*, Peters, C. C. R. 323; *Bloomer v. Statly*, 5 McLean, 158; *Satterlee v. Matthewson*, 2 Pet. 330; *Hepburn v. Griswold*, 8 Wall. 603, 19 L. ed. 513; In re Everett, 9 N. B. R. 90; In re Smith, 14 N. B. R. 295; In re Vogler, 8 N. B. R. 132; In re Jordan, 8 N. B. R. 180; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287.

58—In re Beckerford, 4 N. B. R. 59, 1 Dill. 45; *Hanover Nat. Bank v. Moyses*, *supra*.

59—Section 7 (8), Act of 1898; In re Jackson, 2 N. B. R. 158, Fed. Cas. No. 7127; In re Friederich, 100 Fed. 284, 3 A. B. R. 801; In re Rodenhagen, 2 N. B. R. 674; In re Duffy, 118 Fed. 926, 9 A. B. R. 358.

60—In re Exum, 209 Fed. 716, 31 A. B. R. 691; In re Harrington, 200 Fed.

1010, 29 A. B. R. 666; In re Wunder, 133 Fed. 821, 13 A. B. R. 701; In re Moran, 105 Fed. 901, 5 A. B. R. 472, *aff'd* in *Moraw v. King*, 111 Fed. 730, 7 A. B. R. 176; In re Gerber, 186 Fed. 693, 26 A. B. R. 608; In re Sharp, 15 A. B. R. 491.

61—See 47a (11) Act of 1898.

62—In re Exum, 209 Fed. 716, 31 A. B. R. 691; In re McClintock, 15 Ohio Fed. Dec. 58, 13 A. B. R. 606; In re Wunder, 133 Fed. 821, 13 A. B. R. 701; In re Groves, 6 A. B. R. 728; In re Baughman, 183 Fed. 668, 25 A. B. R. 167; In re Mathews, 20 A. B. R. 369; *contra*, In re Kelly, 199 Fed. 984, 28 A. B. R. 730; *Burke v. Guarantee Title & Trust Co.*, 134 Fed. 235, 14 A. B. R. 31.

63—In re Wunder, 133 Fed. 821, 13 A. B. R. 701.

64—In re Prince & Walter, 131 Fed. 546, 12 A. B. R. 675.

rupt does not, however, lose his right to an exemption by making a claim under the wrong section of the state statutes,<sup>65</sup> or by making a claim in the alternative.<sup>66</sup>

The claim of an exemption need not be made prior to the adjudication<sup>67</sup> and several courts have even held that the bankrupt may assert his exemption at any time before the sale of the property by the trustee.<sup>68</sup> An extension of time allowed to the bankrupt within which to file his schedules, operates as an extension of time within which to claim his exemptions.<sup>69</sup>

The bankrupt may select exempt property in conformance to the state statute,<sup>70</sup> and it is then the duty of the court to see that it is secured to him,<sup>71</sup> but a severance of exempted articles or property from the rest of his estate is not to be made by the debtor.<sup>72</sup>

The exemptions are personal to the debtor, not for the benefit of creditors, and can only be demanded and selected by him.<sup>73</sup>

### § 993. — Amendment of schedules.

The fact that bankrupt fails to make claim in his schedules will not necessarily bar him from making a subsequent claim therefor in an amended schedule, provided that rights have not intervened or injury will not be worked by the allowance,<sup>74</sup>

65—*Bank of Nez Perce v. Pindel*, 193 Fed. 917, 28 A. B. R. 69.

66—*In re Kelly*, 199 Fed. 984, 28 A. B. R. 730.

67—*In re Fisher*, 142 Fed. 205, 15 A. B. R. 652.

68—*In re Exum*, 209 Fed. 716, 31 A. B. R. 691; *In re Solomon*, 10 N. B. R. 9, Fed. Cas. No. 13166.

69—*In re O'Hara*, 162 Fed. 325, 20 A. B. R. 714.

70—*In re Grimes*, 1 N. B. N. 516, 96 Fed. 529, 2 A. B. R. 730; *In re Solomon*, 10 N. B. R. 9, Fed. Cas. No. 13166; *In re Smith*, 8 N. B. R. 401, Fed. Cas. No. 12986; *In re Tobias*, 103 Fed. 68, 3 N. B. N. R. 23, 4 A. B. R. 555; *In re Wilson*, 108 Fed. 197, 6 A. B. R. 287; *In re Garner*, 115 Fed. 200.

71—*In re Stevens*, 5 N. B. R. 298, 2 Biss. 373, Fed. Cas. No. 13392.

72—*In re Friederich*, 100 Fed. 284, 3 A. B. R. 801.

73—*In re Blanchard & Howard*, 161 Fed. 797, 20 A. B. R. 422; *Mitchell v. Mitchell*, 147 Fed. 280, 17 A. B. R. 382; but see, *Lumpkin v. Eason*, 10 N. B. R. 549; contra, *In re Hastings*, 181 Fed. 33, 30 L. E. A. (N. S.) 982, 24 A. B. R. 360.

74—*In re Burnham*, 202 Fed. 762, 30 A. B. R. 270; *In re Maxson*, 170 Fed. 356, 22 A. B. R. 424; *In re Goodman*, 174 Fed. 644, 23 A. B. R. 504; *In re White*, 123 Fed. 513, 11 A. B. R. 556; *In re Williams*, 2 N. B. N. R. 419; *In re Harrington*, 1 N. B. N. 513; *In re Osborn*, 104 Fed. 780; *Bartholomew v. West*, 8 N. B. R. 12, Fed. Cas. No. 1071; *In re Moran*, 105 Fed. 901, 5 A. B. R. 472; *In re Kaufmann*, 142 Fed. 898, 16 A. B. R. 118; *In re Von Kerm*, 135 Fed. 447, 14 A. B. R. 403; *In re Baughman*, 183 Fed. 668, 25 A. B. R. 167; *In re Fisher*, 142 Fed. 205, 15 A. B. R. 652; *In re Berman*, 15 Ohio Fed. Dec. 110, 15 A. B. R. 463.

and that the amendment is for his benefit and not solely for the benefit of creditors.<sup>75</sup> Where it appears that the claim for exemptions was fraudulently omitted from the schedules they cannot be amended for the purpose of claiming them.<sup>76</sup> The application for amendment must be made within a reasonable time after discovering the facts which will justify the amendment,<sup>77</sup> and before the discharge,<sup>78</sup> or before the property has been disposed of by sale or otherwise.<sup>79</sup>

### § 994. Setting apart and appraisement.

Goods claimed as exempt should be set aside by the receiver where property is directed to be sold before the appointment of a trustee.<sup>80</sup>

After the bankrupt in his schedule has selected his exemptions, the trustee, if appointed, must set them aside and in this he has no discretion, the law being mandatory.<sup>81</sup> It is solely his duty, and any agreement on his part or the creditor's that they shall be allotted in any other manner than that prescribed by the bankruptcy law, or through other agencies than that of the trustee of the bankrupt, is a nullity.<sup>82</sup> Where appraisers set apart or value the exemptions pursuant to an agreement to that effect, exceptions to such allotments may be filed by bankrupt or any creditor within 20 days after the same has been made and filed with the clerk or referee, when such allotment will be set aside. Where, however, the assets are in excess of the exemptions, the property must be appraised by three appraisers

75—In re Merry, 201 Fed. 369, 29 A. B. R. 829.

Trustee held to take title to exempt horse not claimed as exempt under original schedules where the only effect of amending schedules and allowing the exemptions would be to benefit a particular creditor who retained title thereto under an unrecorded conditional sale. *Id.*

76—In re Nunn, 1 N. B. N. 427, 2 A. B. R. 664; In re Garden, 93 Fed. 423, 1 N. B. N. 189, 1 A. B. R. 582; Steele v. Moody, 16 N. B. R. 558.

77—In re Burnham, 202 Fed. 762, 30 A. B. R. 270; In re Jennings & Co., 166 Fed. 639, 22 A. B. R. 160, In re Irwin, 174 Fed. 642, 23 A. B. R. 487.

78—In re Irwin, 174 Fed. 642, 23 A.

B. R. 487; In re Kean, 8 N. B. R. 367, Fed. Cas. No. 7630.

79—In re Von Kerm, 135 Fed. 447, 14 A. B. R. 403; In re Wunder, 133 Fed. 821, 13 A. B. R. 701; In re Donahey, 176 Fed. 458, 23 A. B. R. 796.

80—In re Joyce, 128 Fed. 985, 11 A. B. R. 716; In re Shaffer & Son, 128 Fed. 986, 11 A. B. R. 717.

81—In re Finklestein, 192 Fed. 738, 27 A. B. R. 229; In re Andrews & Simonds, 193 Fed. 776, 27 A. B. R. 116; but see In re Ansley Bros., 153 Fed. 983, 18 A. B. R. 457, holding that exemptions need not be allotted to bankrupt until he accounts for all of his property.

82—In re Prince & Walter, 131 Fed. 546, 12 A. B. R. 675.

when their inventory may aid the trustee in making his allotment, but he is in no wise concluded by it nor has he any right to adopt it as his own,<sup>83</sup> even where another method is prescribed by the state law.<sup>84</sup>

The bankrupt law allows to debtors the exemptions provided by the state statutes, but the manner in which they are to be claimed, set apart and awarded is regulated by the bankruptcy law.<sup>85</sup> Where exempt property is not readily divisible from the mass of the estate without the necessary inquiry to determine the fact of segregation and the specific property which is really exempt, the court may regulate the time and manner in which the exemption shall be claimed and set apart to the ultimate use and benefit of the bankrupt.<sup>86</sup>

The court cannot refuse to set aside the bankrupt's exemption because under the state law it cannot be claimed against a certain class of creditors one of whom opposes the allowance in the bankruptcy court,<sup>87</sup> though it has recently been held that property held by the trustee in bankruptcy, which in case of an execution levy, could not be selected as exempt, is not subject to such selection in bankruptcy proceedings, and that any act of the trustee in allowing the selection of such property is void.<sup>88</sup>

With the single exception of setting aside the exemptions, the trustee bears no relation thereto, and he must promptly deliver possession thereof to the bankrupt.<sup>89</sup> He cannot impose conditions upon his allowance nor demand indemnity from the bankrupt before surrendering the exemptions;<sup>90</sup> nor divest himself of any part of the estate except for full consideration when

83—In re Grimes, 1 N. B. N. 516, 96 Fed. 529, 2 A. B. R. 730; In re Smith, 1 N. B. N. 532, 93 Fed. 791, 2 A. B. R. 190; contra, In re McCutchen, 2 N. B. N. R. 636, 100 Fed. 779, 4 A. B. R. 81; see In re Wilson, 101 Fed. 571, 4 A. B. R. 260; In re Peabody, 16 N. B. R. 243, Fed. 10866.

84—In re Camp, 1 N. B. N. 142, 91 Fed. 745, 1 A. B. R. 165; In re Bass, 15 N. B. R. 453, 3 Woods, 382, Fed. Cas. No. 1091; In re Stevens, 5 N. B. R. 298, 2 Biss. 373, Fed. Cas. No. 13392; In re Preston, 6 N. B. R. 545, Fed. Cas. No. 11394; In re Richard, 1 N. B. N. 487, 2 A. B. R. 506, 94 Fed. 635.

85—In re Friederich, 100 Fed. 284, 2 A. B. R. 801; see *ante* § 988.

86—Bank of Nez Perce v. Pindel, 193 Fed. 917, 28 A. B. R. 69.

87—In re Brumbaugh, 128 Fed. 971, 12 A. B. R. 204.

88—In re Nunemaker, 208 Fed. 491, 30 A. B. R. 697, In re Stern, 208 Fed. 488, 30 A. B. R. 694.

89—In re Soper, 173 Fed. 116, 22 A. B. R. 868; Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111.

90—In re Brown, 100 Fed. 441, 1 N. B. N. 511, 4 A. B. R. 46; but see In re Ansley, 153 Fed. 983, 18 A. B. R. 457.

the exemptions are not properly claimed, nor will the action of a state court adjudging property to be exempt, confer any authority on the trustee to transfer the title to such property.<sup>91</sup>

As to what constitutes the setting aside of the exemption, it seems clear that some affirmative act to that end is required of the trustee. A mere report by him that the bankrupt has claimed his exemptions will not amount to a setting aside,<sup>92</sup> but there must be a specification of the items with an appraisal of the property set apart.<sup>93</sup>

While it is the duty of the trustee to set apart the bankrupt's exemption, his action is not final, but the court of bankruptcy is expressly empowered to determine all claims to exemptions.<sup>94</sup> It has been held that where exemptions had been set apart or denied by a state court and bankruptcy proceedings were shortly thereafter instituted that the order of the state court cannot be reviewed or set aside by the bankruptcy court,<sup>95</sup> but this seems questionable.

Within 20 days after receiving notice of his appointment, the trustee must make report to the court of the articles set off to the bankrupt with the estimated value of each article, unless they do not come into his possession and his right to them is contested, in which case the time should be computed from the final decision thereon;<sup>96</sup> and exceptions to the determinations of the trustee may be taken within 20 days after the filing of the report by any creditor.<sup>97</sup>

Where the twentieth day falls on Sunday, the time is extended to include the following Monday.<sup>98</sup> The bankrupt himself may petition the court in relation to his claim to exemptions at any time while the property is still unadministered.<sup>99</sup>

A creditor, desiring to object to the trustee's report setting apart the bankrupt's exemptions, should file all of his objections within the time fixed by law, and cannot come in after the

91—In re Nunn, 1 N. B. N. 427, 2 A. B. R. 664.

92—In re Harber, 2 N. B. N. R. 449; Darsey v. Mumford, 17 N. B. R. 181.

93—In re Manning, 112 Fed. 948, 7 A. B. R. 571.

94—Act of 1898, § 2, subd. 11.

95—In re Rhodes, 109 Fed. 117, 6 A. B. R. 173; In re Eash, 157 Fed. 996, 19 A. B. R. 738.

96—G. O. XVII; In re McClintock, 15 Ohio Fed. Dec. 58, 13 A. B. R. 606; In re Shields, 1 N. B. R. 170, Fed. Cas. No. 12785.

97—G. O., XVII.

98—In re Amos, 19 A. B. R. 804.

99—In re White, 3 N. B. N. R. 27, 103 Fed. 774, 4 A. B. R. 613.

expiration of that time and add new and additional grounds to his objections already on file. It is otherwise as to the enlargements or amplifications of grounds originally taken.<sup>1</sup> The referee may require the exceptions to be argued before him and at the request of either party must certify them to the court for final determination,<sup>2</sup> and an objection made at the first meeting will preserve the right to object at a subsequent stage of the proceedings.<sup>3</sup> The bankrupt is not entitled to a trial by jury of the issues raised by exceptions to the report of the trustee setting apart exemptions.<sup>4</sup>

### § 995. Property exempt in general.

The word "exemptions" as used in the bankruptcy act is not limited to real estate and chattels. It includes all classes of property and would cover a trust-income,<sup>5</sup> and property of any kind which is covered by the local statutes,<sup>6</sup> though it would not cover allowances which are clearly a part of a state insolvency law, the operation of which is suspended by the bankruptcy act.<sup>7</sup>

### § 996. Exemptions granted by federal laws.

The bankrupt is entitled to exemptions granted by federal as well as state laws.<sup>8</sup>

A party cannot be a resident of one state within the meaning of the federal homestead law, and a resident of another state within the meaning of the exemption laws of that state.<sup>9</sup>

Pensions and Indian Allotments as exempt property, see post, sections 1006, 1011.

### § 997. Exemptions as head of family.

As bearing upon the right of a bankrupt to a homestead, or other exemption, it is of importance to determine whether under

1—In re Cotton & Preston, 183 Fed. 190, 25 A. B. R. 532; Id. 23 A. B. R. 586; In re Reese, 115 Fed. 993, 8 A. B. R. 411.

2—G. O. XVII; In re Smith, 1 N. B. N. 532, 93 Fed. 791, 2 A. B. R. 190.

3—In re Harber, 2 N. B. N. R. 449.

4—In re Thedford, 27 A. B. R. 354.

5—In re Baudouine, 1 N. B. N. 506, 96 Fed. 536; 3 A. B. R. 55; In re McKay, 143 Fed. 671, 16 A. B. R. 238; see also,

In re Tiffany, 133 Fed. 799, 13 A. B. R. 310.

6—In re Erben, 2 N. B. R. 66, Fed. Cas. No. 1315.

7—In re Anderson, 110 Fed. 141, 6 A. B. R. 555.

8—In re Cohn, 171 Fed. 568, 22 A. B. R. 761.

9—In re Bassett, 189 Fed. 410, 26 A. B. R. 800.

the law he is the head of a family or is a person having care or support of a dependent female. This, however, is a question that is generally well settled by the state courts construing the various exemption statutes, and reference should be had to them.<sup>10</sup>

The head of the family is, ordinarily, one who controls, supervises, and manages a house, and has living with him and is supporting, some person whom it is either his moral or legal duty to support, and is not necessarily the father,<sup>11</sup> but mere contribution to the support of a sister who did not reside with him does not entitle the bankrupt to exemptions.<sup>12</sup> A husband living apart from his wife by mutual consent is not entitled to an exemption as the head of a family.<sup>13</sup> A married woman living with her husband, who is a wage-earner, is not the head of a family and, under the laws of some states, is therefore not entitled to

10—In *re Mussey*, 179 Fed. 1007, 25 A. B. R. 91; *Whitmer v. Field*, 53 Vt. 556; *Rice v. Rudd*, 57 Id. 6; *Woodbury v. Warren*, 67 Id. 261; *Thorp v. Thorp*, 70 Id. 49; In *re Dawley*, 1 N. B. N. 528, Id. 528, 94 Fed. 795, 2 A. B. R. 496; In *re McCutchen*, 100 Fed. 779, 4 A. B. R. 81, 2 N. B. N. R. 636.

11—In *re McGowan*, 170 Fed. 493, 22 A. B. R. 469

A man living with and caring for his mother held entitled to a homestead exemption, even though she may not have been dependent upon him in a financial sense. In *re Glisson*, 182 Fed. 287, 25 A. B. R. 911.

An unmarried bankrupt whose domestic affairs are in charge of a sister, who receives no pay for her services and pays no board, but considers her brother's home her home, has been held to be the head of a family, and entitled as such to a homestead exemption. *Bailey v. Comings*, 16 N. B. R. 382, Fed. Cas. No. 733. So has an unmarried man who supports his widowed mother and minor brothers; In *re Morrison*, 110 Fed. 734, 6 A. B. R. 488. Owing to peculiar provisions of a state law, an unmarried man who had a household under his supervision, with

minor children awarded him as apprentices by orphans' court, was held not to be the head of a family (In *re Summers*, 3 N. B. R. 21, Fed. Cas. No. 13604), and the same was true of a husband, his minor children living with his divorced wife, and he contributed nothing to their support. (In *re Tillman*, 2 N. B. N. R. 611), while in another case an unmarried man residing in a house of which he was proprietor, and which had no other inmates than hired servants or persons living on his bounty, was held to be the head of a family, and, as such, entitled to a homestead exemption, but not to additional allowances for inmates for whose maintenance he was legally bound; In *re Taylor*, 3 N. B. R. 38, Fed. Cas. No. 13775. In Virginia a married woman holding title to property, although living with her husband, is entitled to the exemption where she traded as a feme sole, and is held to be the head of a family, either alone or jointly with her husband for homestead purposes. *Richardson v. Woodward*, 104 Fed. 873, 5 A. B. R. 94.

12—In *re Rainwater*, 191 Fed. 738, 25 A. B. R. 419.

13—In *re Finklea*, 153 Fed. 492, 18 A. B. R. 738.

exemptions in the stock in trade of a business carried on in her own name.<sup>14</sup>

In Ohio, a divorced woman who has the care of her own minor children, is entitled to an exemption in real estate in lieu of a homestead.<sup>15</sup> In Georgia, an unmarried female having the care and support of an aged and infirm female is entitled to a homestead exemption though not the head of a family.<sup>16</sup>

### § 998. Burial lots.

A statute exempting lots used for burial purposes does not authorize a debtor to hold any number of lots for speculative purposes, but under such statute only such lots will be held exempt which are intended for the personal use of the debtor.<sup>17</sup>

### § 999. Growing crops.

An essential feature of the exemption of property is that it shall be permanently exempt in the hands of the debtor, and a statute which merely postpones a creditor's right to levy on a growing crop until after its maturity does not make such crop exempt or prevent its passing to the trustee.<sup>18</sup>

In the absence of an express provision of law the general rule is that growing crops do not constitute a part of the homestead, but are a part of the assets of the estate;<sup>19</sup> this, however, is a matter governed entirely by the state law.<sup>20</sup> In Minnesota, the proceeds derived from a sale of crops raised on the homestead are not exempt.<sup>21</sup>

### § 1000. Homestead exemptions.

#### § 1001. — Nature and extent of right.

The right to a homestead exemption is not given by the bankrupt act, but exists by virtue of some state laws, if at all, and

14—In re Herbold, 14 A. B. R. 116.

15—In re Giles, 158 Fed. 596, 19 A. B. R. 306.

16—In re Jackson, 18 A. B. R. 216.

17—Burdette v. Jackson, 179 Fed. 229, 24 A. B. R. 127.

18—Spencer v. Lowe, 198 Fed. 961, 29 A. B. R. 877.

19—In re Sullivan, 148 Fed. 815, 17 A. B. R. 578, aff'g 142 Fed. 620, 16 A. B. R.

87; In re Coffman, 1 N. B. N. 402, 93 Fed. 422, 1 A. B. R. 530; In re Daubner, 1 N. B. N. 520, 96 Fed. 805, 3 A. B. R. 368; In re Hoag, 97 Fed. 543, 3 A. B. R. 290; contra, In re Eastman, 2 N. B. N. R. 86.

20—In re Hoag, 97 Fed. 543, 3 A. B. R. 290.

21—In re Friedrich, 199 Fed. 193, 28 A. B. R. 656.



therefore if the latter makes provision for an exempt homestead, it will be allowed by the bankruptcy courts, otherwise not,<sup>22</sup> but in order to obtain the same the debtor must comply with the provisions of the state law under which he makes claim.<sup>23</sup>

The age, infirmities and necessities of the bankrupt should not be considered in determining his right of a homestead exemption.<sup>24</sup> The chief essential to the debtor's right to a homestead is, as a rule, actual selection of the property and its occupancy as such,<sup>25</sup> at the time he makes claim,<sup>26</sup> a mere present intention to make it his homestead being usually held insufficient,<sup>27</sup> as will any selection or occupancy that is not bona fide.<sup>28</sup>

The right to a homestead cannot exist in property in which the debtor has not a present legal right of possession or occupancy. So where his interest is only that of a remainderman or reversioner, no right of homestead cannot exist in his favor,<sup>29</sup> though the premises are occupied jointly by himself and wife who is the tenant for life.<sup>30</sup>

It has been held, however, that, in a state where a husband entitled to curtesy becomes vested with a life estate in his wife's property, he is entitled to a homestead exemption out of the estate he holds in the property occupied by him and his family as a homestead, without regard to the value of the fee where his interest is less.<sup>31</sup> It has been held further that after the death of the father and mother, the homestead character of property continues with the children.<sup>32</sup>

Personal property may be set aside as homestead,<sup>33</sup> but in the

22—In re Kerr, 9 N. B. R. 566, Fed. Cas. No. 7729.

23—In re Farish, 2 N. B. R. 168, Fed. Cas. No. 4647.

24—In re O'Brien, 203 Fed. 1012, 30 A. B. R. 151.

25—In re Carlon, 189 Fed. 815, 27 A. B. R. 18; In re Dawley, 1 N. B. N. 528, and cases cited; In re Gibbs, 103 Fed. 782, 4 A. B. R. 619; Cowan v. Burchfield, 180 Fed. 614, 25 A. B. R. 293; but see In re Malloy, 188 Fed. 788, 26 A. B. R. 31.

26—In re Buelow, 2 N. B. N. R. 26, on appeal 230, 98 Fed. 86, 3 A. B. R. 389.

27—In re Hatch, 1 N. B. N. 293, 2 A. B. R. 36. But see Cowan v. Burchfield, 180 Fed. 614, 25 A. B. R. 293,

28—In re Wright, 8 N. B. R. 430, Fed. Cas. No. 1806.

29—In re Fitzsimmons, 2 N. B. N. R. 453; In re Woodard, 1 N. B. N. 385, 95 Fed. 260, 2 A. B. R. 339; In re Watson, 2 N. B. R. 570 [174], Fed. Cas. No. 17271; Rix v. Bank, 2 Dill. 367.

30—In re Sale, 143 Fed. 310, 16 A. B. R. 235.

31—In re Marquette, 103 Fed. 777, 4 A. B. R. 623; In re Kaufmann, 142 Fed. 898, 16 A. B. R. 118.

32—In re Rafferty, 112 Fed. 512, 7 A. B. R. 415.

33—In re Reinhart, 129 Fed. 510, 12 A. B. R. 78.

absence of a statutory provision to that effect, there can be no homestead exemption in unimproved property;<sup>34</sup> nor where one reserves a room in a building in which he stored some articles, while he boarded at a restaurant and lodged elsewhere;<sup>35</sup> nor where the premises are permanently rented and not occupied by the owner.<sup>36</sup>

Where it appears that the bankrupt used the property as much for homestead as for business purposes, and not incidentally only as a homestead, it should be considered as his homestead.<sup>37</sup> The homestead right attaches to property, when occupied as a home, held under a contract for the purchase or lease thereof.<sup>38</sup>

The purchase of a homestead with non-exempt funds on the eve of bankruptcy is not a fraud upon creditors and will not work a forfeiture of the right to the homestead exemption.<sup>39</sup> Nor is the homestead right affected by the fact that an incumbrance thereon was paid off within four months prior to bankruptcy with non-exempt funds,<sup>40</sup> nor by the fact that it was purchased with the proceeds of another homestead shortly before bankruptcy, where such transaction was in good faith.<sup>41</sup> It is held, that the bankrupt may perfect his homestead exemption even after the trustee in bankruptcy qualifies, provided in his schedules he claims a designated piece of realty as a homestead, and proceeds, under the state law, without delay.<sup>42</sup>

In some states the extent of the homestead is determined by the fact whether the property claimed as such is situated in a city, town or village. This question does not necessarily depend on the fact of incorporation. The land may be within the corporate limits of a town without losing its character as a rural

34—In re Duerson, 13 N. B. R. 183, Fed. Cas. No. 4117; In re Baker, 182 Fed. 392, 24 A. B. R. 411.

35—In re Dawley, 1 N. B. N. 528, 94 Fed. 795, 2 A. B. R. 496.

36—In re Vincent, 115 Fed. 236.

37—In re McCrary Bros., 169 Fed. 485, 22 A. B. R. 161; Cowan v. Burchfield, 180 Fed. 614, 25 A. B. R. 293.

38—In re Maxson, 170 Fed. 356, 22 A. B. R. 424.

39—In re Wood, 147 Fed. 877, 17 A. B. R. 93; In re Letson, 157 Fed. 78, 19 A. B. R. 506.

40—Southern Irrigation Co. v. Wharton Nat. Bank, 28 A. B. R. 941. Contra, In re Boston, 2 N. B. N. R. 19, 98 Fed. 587, 3 A. B. R. 388.

41—In re Baker, 182 Fed. 392, 24 A. B. R. 411; Hunergardt v. Dry Goods Co., 116 Fed. 31, 8 A. B. R. 341; In re Stone, 116 Fed. 35, 8 A. B. R. 416. Contra, In re Wright, 8 N. B. R. 430, Fed. Cas. No. 18067; In re Lammer, 14 N. B. R. 460, 7 Biss. 289, Fed. Cas. No. 8031.

42—In re Colwell, 165 Fed. 828, 21 A. B. R. 614. But see In re Youngstrom, 153 Fed. 98, 18 A. B. R. 572.

homestead, or it may be located in a town or village, and thus have the character of an urban homestead, although the town or village is not incorporated.<sup>43</sup>

Where the property claimed by the bankrupt as a homestead appears to be worth more than the homestead exemption, the same may be appraised and assigned as a homestead on payment of the excess over the exemption;<sup>44</sup> or, if the bankrupt makes no application to retain it and pay such excess and it is indivisible, the referee may order a sale,<sup>45</sup> and the validity of such sale does not depend on the filing of the proceedings with the clerk of the bankruptcy court; and the bankrupt, not having objected to such order of sale, cannot thereafter attack its validity nor object to the deduction of the value of other assets from his share of the proceeds, which, though not exempt, he received without objection from the trustee.<sup>46</sup>

### § 1002. — Abandonment.

Homestead rights may be lost by abandonment, but mere physical absence without the intent to abandon will not generally destroy the right,<sup>47</sup> nor the use of part of the premises for another purpose, or the renting of part.<sup>48</sup> A temporary removal, even for a long time, or the renting of the property will not suffice to work an abandonment, if the animus revertendi remains,<sup>49</sup> and this is true, although bankrupt, by his attorney's direction, closed and locked his business homestead on filing his petition, intending, however, to resume business, the building

43—*Burow v. Grand Lodge*, 133 Fed. 708, 13 A. B. R. 542; *In re Nicholson*, 27 A. B. R. 908.

44—*Bank of Nez Perce v. Pindel*, 193 Fed. 917, 28 A. B. R. 69; *In re Anderson*, 103 Fed. 854, 4 A. B. R. 640; *In re Carmichael*, 108 Fed. 789, 5 A. B. R. 551.

45—*Bank of Nez Perce v. Pindel*, 193 Fed. 917, 28 A. B. R. 69.

46—*In re Oderkirk*, 103 Fed. 779, 4 A. B. R. 617.

47—*In re Malloy*, 188 Fed. 788, 26 A. B. R. 31; *In re Presnall*, 167 Fed. 406, 21 A. B. R. 905; *In re Pope*, 2 N. B. R. 427, 98 Fed. 722, 3 A. B. R. 525; *In re Thompson*, 140 Fed. 257, 15 A. B. R.

283; *In re Schulz*, 135 Fed. 228, 14 A. B. R. 317.

48—*In re McCrary Bros.*, 169 Fed. 485, 22 A. B. R. 161; *Cowan v. Burchfield*, 180 Fed. 614, 25 A. B. R. 293; *Duncan v. Ferguson-McKinney Dry-Goods Co.*, 150 Fed. 269, 18 A. B. R. 155; *In re Presnall*, 167 Fed. 406, 21 A. B. R. 905; *In re Parker*, 1 N. B. N. 262, 1 A. B. R. 708; *In re Mayer*, 108 Fed. 599, 6 A. B. R. 117.

49—*In re Thedford*, 28 A. B. R. 191; *In re Lynch*, 1 N. B. N. 182, 1 A. B. R. 245; *In re Ross*, 2 N. B. N. R. 218; *Duddy v. Willis*, 99 Mo. 132; *Leach v. King*, 85 Mo. 413; *Bailey Ass'n v. Comings*, 16 N. B. R. 382, Fed. Cas. No. 733.

and contents passing into the trustee's possession.<sup>50</sup> There can be no intention to return to a state without a former or actual bona fide residence within it.<sup>51</sup>

In Texas, the owner of a lot in a town or city occupied by him as a homestead may abandon a part thereof by devoting it to a purpose inconsistent with its use as a part of a homestead.<sup>52</sup>

### § 1003. — In property mortgaged or transferred.

Questions frequently arise as to the right of the bankrupt to have a homestead exemption where he has transferred or mortgaged the property out of which he would be entitled. Under the act of 1867 the rule was that where a conveyance fraudulent as to creditors was set aside by a bankrupt court, at the instance of the assignee, the parties were restored to the status occupied prior to such conveyance, and a homestead exemption was allowed,<sup>53</sup> and a similar doctrine under the present law was announced under the laws of Tennessee, where a bankrupt husband fraudulently conveyed property to his wife,<sup>54</sup> though, if the wife joined in the fraudulent conveyance, it would not be so.<sup>55</sup>

The fact that the homestead is mortgaged to certain creditors does not make it an asset to be administered in bankruptcy,<sup>56</sup> and, it has been held that a bankrupt who mortgaged the only real estate he possessed, might nevertheless claim a homestead exemption out of it,<sup>57</sup> though he would not be entitled thereto out of lands subject to purchase money mortgage,<sup>58</sup> although without such mortgage, a discharge may be pleaded in bar in an action for the purchase money.<sup>59</sup> So, the cestui que trust under

50—In re Harrington, 1 N. B. N. 513, 99 Fed. 390, 3 A. B. R. 639.

51—In re Dinglehoef, 109 Fed. 866, 6 A. B. R. 242.

52—In re O'Brien, 203 Fed. 1012, 30 A. B. R. 151.

53—In re Detert, 11 N. B. R. 293, Fed. Cas. No. 3829; Cox v. Wilder, 7 N. B. R. 241, 2 Dill. 45, Fed. Cas. No. 3308; Penny v. Taylor, 10 N. B. R. 200, Fed. Cas. No. 10957; McFarland v. Goodman, 11 N. B. R. 134, 6 Biss. 111, Fed. Cas. No. 8789; Bartholomew v. West, 8 N. B. R. 12, Fed. Cas. No. 1071; Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, Fed. Cas. No. 13071; con-

tra, Keating v. Keefer, 5 N. B. R. 133; In re Dillard, 9 N. B. R. 8; In re Graham, 2 Biss. 449; In re Everett, 9 N. B. R. 90.

54—In re Griffith, 1 N. B. N. 546.

55—In re Tollett, 2 N. B. N. R. 1096, 105 Fed. 425, 5 A. B. R. 305.

56—In re Bailey, 176 Fed. 990, 24 A. B. R. 201.

57—In re Brown, 3 N. B. R. 60, Fed. Cas. No. 1980.

58—In re Whitehead, 2 N. B. R. 180, Fed. Cas. No. 17562.

59—Hoskins v. Wall, 17 N. B. R. 314,

a trust to secure present loans and future advances will be protected against the borrower, who declared the land a homestead, and subsequently obtained such advances, fraudulently concealing his declaration of homestead.<sup>60</sup>

Effect of fraudulent or preferential transfer, see also, post, section 1017.

#### § 1004. — Wife's right.

Where a husband abandoned his wife, and she obtained a divorce, she has a right to have the premises set apart to her as a homestead, especially when she holds and has held the title in her own right, and continuous actual occupancy is not necessary;<sup>61</sup> and it has been held that she is entitled to a homestead out of lands fraudulently conveyed to her by her husband, a bankrupt, although the conveyance was made to hinder creditors.<sup>62</sup> In Virginia a married woman who holds the title to the property, although living with her husband, is entitled to claim the exemption, as against her own creditors, where she had been trading as a feme sole. She is the head of a family, either alone or jointly with her husband, for homestead purposes.<sup>63</sup> The bankrupt's wife having a separate estate cannot affect his right to a homestead, unless he occupies her property instead of his own.<sup>64</sup>

#### § 1005. — Re-allotment.

Where the homestead set apart in a state court some years prior to the bankruptcy has enhanced in value beyond the amounts prescribed by the statute, bankrupt should only be allowed the statutory value,<sup>65</sup> although it was held under the act of 1867 that where there was no irregularity a re-assessment would not be ordered for mere excess of value.<sup>66</sup> The latter view, however, would probably only hold good in case of recent allotments.<sup>67</sup>

60—In re Haake, 7 N. B. R. 61, 2 Sawy. 231, Fed. Cas. No. 5883.

61—In re Pope, 2 N. B. N. R. 427, 98 Fed. 722, 3 A. B. R. 525.

62—Roughs v. Hooke, 3 Lea. 302; In re Griffith, 1 N. B. N. 546.

63—Richardson v. Woodward, 104 Fed. 873, 5 A. B. R. 94.

64—In re Tonne, 13 N. B. R. 170, Fed. Cas. No. 14095.

65—In re McBride, 2 N. B. N. R. 345, 99 Fed. 686, 3 A. B. R. 729.

66—In re Hall, 9 N. B. R. 366, 2 Hughes, 411, Fed. Cas. No. 5921.

67—In re Rhodes, 109 Fed. 117, 6 A. B. R. 173.

**§ 1006. Indian allotments.**

The various treaties with the Indian tribes setting apart portions of the public domain for their use, as a rule contain restrictions either prohibitive or only after a long period of years, upon the alienation of lands allotted in severalty or otherwise. The bankruptcy law recognizes all exemptions whether state or federal, and also vests the trustee with title only of such property which, prior to the filing of the petition, bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Accordingly, since neither of these provisions applies to allotments to Indians, such lands as here indicated would not form a part of the assets of an Indian adjudicated bankrupt.<sup>68</sup>

**§ 1007. Insurance policies.**

Insurance policies exempt under the local laws must be regarded as exempt under the bankruptcy act, and do not pass to the trustee.<sup>69</sup> Where the state law provides that the proceeds of certain insurance policies shall inure to the wife it is not necessary that a claim thereto be made personally by the wife to prevent the trustee obtaining title to the policy.<sup>70</sup>

For a full discussion and citation of authorities, see ante, section 815 et seq.

**§ 1008. Exemptions in partnership property.****§ 1009. — Firm exemptions.**

There can be no exemption to a co-partnership as such, since it is a personal privilege, in addition to which the adjudication works an absolute dissolution of the firm, and its existence is terminated, so that there is no firm to claim or receive exemptions.<sup>71</sup>

68—In re Russie, 96 Fed. 609, 3 A. B. R. 6; In re Rennie, 2 A. B. R. 182, 1 N. B. N. 335.

69—Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 14 A. B. R. 94, rev'g 113 Fed. 141, 7 A. B. R. 615; In re Pfaffinger, 164 Fed. 526, 21 A. B. R. 255.

The Wisconsin statute making policies payable to married women exempt held to apply only to such policies as by their terms secure to a married woman the

intended benefits upon the death of her husband, and not to limited policies which accrue to her only in the event of his death within a period specified, at the expiration of or beyond which proceeds belong to husband. In re Churchill, 198 Fed. 711, 29 A. B. R. 153.

70—In re Orear, 189 Fed. 888, 26 A. B. R. 521.

71—In re Vickerman & Co., 199 Fed. 589, 29 A. B. R. 298; In re Novak, 150

### § 1010. — Individual exemptions out of firm property.

Upon this question the authorities are irreconcilable. The most logical conclusion, however, and that which is supported by the weight of authority, is that the individual members of a firm are not entitled to have any portion of the firm property set apart as exempt, though the other members consent, unless there should remain a surplus of such property after the payment of all firm debts;<sup>72</sup> this conclusion being based upon the theory that the partnership assets are a trust fund for the payment of firm creditors, the interest of the partners being an interest in the surplus only.

The authorities taking the opposite view generally agree, however, that to entitle the individual partner to an allowance out of firm assets he must show that he has no personal property exemption independent of the firm property,<sup>73</sup> and the other partners must consent thereto and the claim must be seasonably and properly asserted, the signing of the petition by all the partners being *prima facie* evidence of such consent.<sup>74</sup>

Fed. 602, 18 A. B. R. 236; *In re Lentz*, 2 N. B. R. 190, 97 Fed. 486; *In re Friederich*, 100 Fed. 284, 3 A. B. R. 801; *In re Blodgett*, 10 N. B. R. 145, Fed. Cas. No. 1555.

72—*In re Vickerman & Co.*, 199 Fed. 589, 29 A. B. R. 298; *In re Scheier*, 188 Fed. 744, 26 A. B. R. 739; *In re Prince & Walter*, 131 Fed. 546, 12 A. B. R. 675; *Jennings v. Stannus & Son*, 191 Fed. 347, 27 A. B. R. 384; *In re Blanchard*, 161 Fed. 793, 20 A. B. R. 417; *In re Golden Rule Mercantile Co.*, 21 A. B. R. 397; *In re Rushmore*, 24 A. B. R. 55; *In re Beauchamp*, 101 Fed. 106; *In re Lentz*, 2 N. B. R. 190, 97 Fed. 486; *In re Hafer*, 1 N. B. R. 147, Fed. Cas. No. 5896; *In re Handlin*, 12 N. B. R. 49, 3 Dill. 290, Fed. Cas. No. 6018; *In re Tonne*, 13 N. B. R. 170, Fed. Cas. No. 14095; *In re Boothroyd*, 14 N. B. R. 223, Fed. Cas. No. 1652; *In re Hughes*, 16 N. B. R. 464, 8 Biss. 107, Fed. Cas. No. 6842; *In re Croft Brothers*, 17 N. B. R. 324, 8 Biss. 188, Fed. Cas. No. 3404; *In re Stewart*, 13 N. B. R. 295, Fed. Cas. No. 13420; *In re Blodgett*, 10 N. B. R. 145, Fed. Cas. 1555; *In re Demarest*, 110 Fed. 638, 6 A. B. R.

232; *In re Meriweather*, 107 Fed. 102, 5 A. B. R. 435; *In re Mosier*, 112 Fed. 138, 7 A. B. R. 268. *Contra*, *In re Wilson*, 101 Fed. 571, 4 A. B. R. 260; *In re Friederich*, 95 Fed. 282, *aff'd* 100 Fed. 284, 3 A. B. R. 801; *In re Young*, 3 N. B. R. 111, Fed. Cas. No. 18148; *In re Rupp*, 4 N. B. R. 25, Fed. Cas. No. 12141; *In re Richardson*, 11 N. B. R. 114 Fed. Cas. No. 11776; *Radeliff v. Woods*, 25 Barb. 52; *In re Camp*, 1 N. B. N. 142, 91 Fed. 745, 1 A. B. R. 165; *In re Steed*, 107 Fed. 682, 6 A. B. R. 73, but in this case it was held that exemptions should not be allowed out of the firm assets unless there are no individual assets. It has been held that where a business is conducted as a partnership but in fact is not, the sole owner is entitled to exemptions. (*In re Carpenter*, 109 Fed. 558, 6 A. B. R. 465.)

73—*In re Monroe & Co.*, 156 Fed. 216, 19 A. B. R. 255.

74—*In re Monroe & Co.*, 156 Fed. 216, 19 A. B. R. 255; *In re Wilson*, 101 Fed. 571, 4 A. B. R. 260; *In re Friedrich*, 100 Fed. 284, 3 A. B. R. 801; *In re Stevenson*, 1 N. B. N. 531, 93 Fed. 789, 2 A. B.

Where partners purchased lots, taking the title in the firm name, and erected buildings thereon with the understanding that each should own in severalty the lot on which he built, it was held that the interest of each was sufficient to entitle him to a homestead.<sup>75</sup> And where one partner buys out the other members of his firm, he has been held to be entitled to have his exemption set apart, since the firm has been dissolved and he is in the same position as if no firm had ever existed,<sup>76</sup> but where the partners while insolvent agree to dissolve exemptions should not be allowed.<sup>77</sup>

A former partner who has retired from the firm will not be allowed a personal property exemption out of the assets of the firm.<sup>78</sup>

A partner who in proceedings against himself and his firm, successfully challenges the jurisdiction of the court against him by reason of his minority, thereby terminates his individual relation to the proceedings and cannot thereafter claim exemptions out of the partnership property.<sup>79</sup>

One member of a firm cannot estop himself as between himself and the firm's creditors, by any dealings with a partner, from any duty that he owes such creditors, or deprive such creditors of any rights or remedies;<sup>80</sup> as by transferring his interest in the firm to the other partner to enable the latter to claim exemptions out of the firm's assets. And, where one partner abandons his interest to his partner just before the latter files a petition, no consideration being given, no exemption should be allowed;<sup>81</sup> but where the partnership assets were transformed into individual assets of one of the partners by a dissolution of the firm in good faith shortly before bankruptcy,

R. 230; *In re Nelson*, 2 A. B. R. 556; *In re Grimes*, 1 N. B. N. 339, 94 Fed. 800, 2 A. B. R. 160; *In re Seabolt*, 113 Fed. 766, 8 A. B. R. 57. See also *In re McCrary Bros.*, 169 Fed. 485, 22 A. B. R. 161.

75—*Bartholomew v. West*, 8 N. B. R. 12, Fed. Cas. No. 1071.

76—*In re Bjournstad*, 18 N. B. R. 282.

77—*In re Head*, 114 Fed. 489, 7 A. B. R. 556.

78—*In re Fowler & Co.*, 145 Fed. 270, 16 A. B. R. 580.

79—*In re Ellenbecker*, 205 Fed. 396, 30 A. B. R. 537.

80—*In re Polidori*, 2 N. B. N. R. 945; *In re Gorman*, 18 N. B. R. 419, 9 Biss. 23, Fed. Cas. No. 5624.

81—*In re Rosenbaum*, 1 N. B. N. 541; *In re Bergman*, 2 N. B. N. R. 806; but see *In re Rudnick*, 2 N. B. N. R. 975, 102 Fed. 750, 4 A. B. R. 531, rev'g 2 N. B. N. R. 769; *In re Lockerby*, 3 N. B. N. R. 7.



it has been held that the bankrupt would not be denied his exemptions out of what formerly was firm property.<sup>82</sup> A minor who contributed to the firm capital but who assented to being ignored in all firm transactions has been held not entitled to an exemption out of the firm assets.<sup>83</sup>

An application by a partner for a homestead exemption out of partnership property should be strictly construed as against such application.<sup>84</sup>

Where there is a surplus after paying all partnership claims, exemptions may properly be allowed to the individual partners, since such surplus would then become a part of their personal estate,<sup>85</sup> but such exemption cannot exceed his interest in the partnership.<sup>86</sup>

### § 1011. Pension money.

All money due or to become due to any person as pension is exempt from attachment, levy or seizure, and is to inure wholly to his benefit,<sup>87</sup> and will be set apart to him in bankruptcy proceedings, provided it is in his hands at the time of filing the petition as it was received, and not loaned, invested or changed in its nature so as to become intermingled with other property interests, thus rendering the pension funds incapable of identification.<sup>88</sup> While such money need not be turned over to the trustee, it should be scheduled by the bankrupt as money on hand with the statement of the exemption.<sup>89</sup>

### § 1012. Personal property.

Since the exemption laws are peculiar to the various states and in their interpretation the federal courts consider themselves controlled by the decisions of the highest state courts, recourse must necessarily be had to such decisions interpreting the state statutes as to what personal property is exempt.

82—*In re Kolber*, 193 Fed. 281, 27 A. B. R. 414; *In re Lockerby*, 3 N. B. N. R. 7.

83—*In re Floyd*, 154 Fed. 757, 18 A. B. R. 827.

84—*In re Jennings & Co.*, 166 Fed. 639, 22 A. B. R. 160.

85—*In re Beauchamp*, 101 Fed. 106, 4 A. B. R. 151; *In re Tonne*, 13 N. B. R. 170; *In re Stewart*, 13 N. B. R. 295; *In re Price*, 6 N. B. R. 400, Fed. Cas. No. 11410.

86—*In re Rutland Groc. Co.*, 189 Fed. 765, 26 A. B. R. 942.

87—U. S. R. S., § 4747.

88—*In re Ellithorpe*, 111 Fed. 163, 7 A. B. R. 18, *aff'g* 5 A. B. R. 681; *In re Stout*, 109 Fed. 794, 6 A. B. R. 505; *Martin v. Bank*, 14 Atl. 649; *Bank v. Carpenter*, 119 N. Y. 550. *Contra: In re Jones*, 166 Fed. 337, 21 A. B. R. 536.

89—*In re Bean*, 100 Fed. 262, 4 A. B. R. 53.

# Cases determining the right to exemptions in wearing apparel and personal ornaments,<sup>90</sup> tools and implements of trade,<sup>91</sup>

90—"Wearing Apparel" as generally used in exemption laws includes all the articles of dress usually worn by persons in the calling and condition of life and in the locality of the residence of the persons claiming the exemption. *Sellers v. Bell*, 94 Fed. 801, 2 A. B. R. 529.

The value or amount of the articles in any given case is wholly immaterial except in so far as such value or amount may be indicative of *mala fides* on the part of the debtor or an intent to defraud creditors. (*In re Evans & Co.*, 158 Fed. 153, 19 A. B. R. 752.)

Articles intended and adopted to be worn on the person and necessary to or promotive of protection of the person against the elements, or personal comfort or decency, or serving to ornament the person, may be wearing apparel. (*In re Evans & Co.*, 158 Fed. 153, 19 A. B. R. 752.)

Masonic regalia for occasional wear has been held exempt; *Frazier v. Barnum*, 19 N. J. Eq. 316; *contra*, *In re Everleth*, 129 Fed. 620, 12 A. B. R. 236. A match safe has been held not exempt; *In re Evans & Co.*, 158 Fed. 153, 19 A. B. R. 752. Whether jewelry is exempt as wearing apparel depends upon whether it was acquired and used as ornamental apparel or acquired and kept as an investment, as a matter of business. *In re Leech*, 171 Fed. 622, 22 A. B. R. 599. Accordingly there has been set aside as exempt a gold watch and chain; *Sellers v. Bell*, *supra*; *In re Freeman*, 2 N. B. N. R. 569; *In re Jones*, 2 N. B. N. R. 296; 97 Fed. 773, 3 A. B. R. 259; *In re Headley*, 2 N. B. N. R. 684; *In re Steele*, 2 Flip, 324, Fed. Cas. No. 13346; *Stewart v. McClung*, 12 Ore. 431; *In re Henry*, 14 Ohio Fed. Dec. 353, 14 A. B. R. 362; *In re Evans & Co.*, 158 Fed. 153, 19 A. B. R. 752; *contra*, *In re Turnbull*, 106 Fed. 667, 5 A. B. R. 549; *In re Graham*, 2 Biss. 449; *In re Eveleth*, 129 Fed. 620, 12 A. B. R. 236; a ring, *In re Evans & Co.*, 158 Fed. 153, 19 A. B. R. 752; *con-*

*tra*, *In re Henry*, 14 Ohio Fed. Dec. 353, 14 A. B. R. 362; a scarf pin, *In re Evans & Co.*, 158 Fed. 153, 19 A. B. R. 752; a diamond stud worth \$250 habitually worn to fasten bankrupt's shirt, in the absence of circumstances connected with its acquisition or use tending to show fraud or bad faith toward his creditors, *In re Smith*, 96 Fed. 832, 3 A. B. R. 140.

91—"Tools and implements of trade" have been set apart for a baker, *In re Petersen*, 1 N. B. N. 430, 95 Fed. 417, 2 A. B. R. 630; *In re Osborn*, 104 Fed. 780, 5 A. B. R. 111; a carpenter and embalmer, *In re Harrington*, 1 N. B. N. 513; an undertaker, *Steiner v. Marshall*, 140 Fed. 710, 15 A. B. R. 486; a dealer in farm produce, *In re Conley*, 162 Fed. 806, 19 A. B. R. 200; but they have been refused in case of a merchant, *In re Peabody*, 16 N. B. R. 243, Fed. Cas. No. 10866; *In re Schwartz*, 4 N. B. R. 189, Fed. Cas. No. 12503; a retail druggist, *In re Lynde*, 17 A. B. R. 906.

A watch may be set aside when necessary for a man's business. *In re Collier*, 111 Fed. 503, 7 A. B. R. 131; *contra*, *In re Turnbull*, 106 Fed. 667, 5 A. B. R. 549.

A cream separator is a tool or instrument of a farmer, *In re Hemstreet*, 139 Fed. 958, 14 A. B. R. 823; candy stove and marble top stove have been held exempt as tools of a candy maker, *In re Trombly*, 16 A. B. R. 598; and a guide for hunters and fishermen has been held entitled to hold a canoe, but not his rifle as exempt, *In re Mullen*, 140 Fed. 206, 15 A. B. R. 275.

An electric motor and a lathe held implements under the Idaho statute, *In re Robinson*, 206 Fed. 176, 30 A. B. R. 686.

The fact that articles specifically exempted by statute, such as horses, wagons, etc., may have been used by the bankrupt in the conduct of a business, does not warrant treating them as "tools or implements" if they are not ordinarily and fairly to be treated as such. The bankrupt in such case cannot be compelled to

domestic animals,<sup>92</sup> government awards,<sup>93</sup> necessities,<sup>94</sup> and the like, as well as the right to exemptions in the proceeds of property,<sup>95</sup> or upon a change of occupation,<sup>96</sup> will be found in the notes.

include in his selection of "tools and implements" articles exempt under other provisions of the statute. In *re* Zimmermann, 202 Fed. 812, 30 A. B. R. 361.

All the tools and implements necessary to carry on the bankrupt's trade may be exempt though they relate ordinarily to various trades and are in common use in several callings. In *re* Robinson, 206 Fed. 176, 30 A. B. R. 686.

A statute exempting tools and instruments used for carrying on one's trade does not limit exemptions to mechanical tools, but, under it, horses, wagons, furniture, etc., may be set apart as exempt. The bankrupt, however, is not entitled to all tools and instruments that might add convenience. In *re* Conley, 162 Fed. 806, 19 A. B. R. 200.

92—"Domestic animals" when necessary, as two horses used for team work, have been set apart as exempt (Rowell v. Powell, 53 Vt. 302; Steel v. Lyford, 59 Vt. 230); but they must be capable of such use (Sullivan v. Davis, 50 Vt. 648); an unbroken colt intended for such work (In *re* Alfred, 1 N. B. N. 136, 1 A. B. R. 243), but not a race horse, though he has been occasionally used for work (In *re* Libby, 103 Fed. 776, 4 A. B. R. 615), and working animals generally (In *re* Peabody, 16 N. B. R. 243, Fed. Cas. No. 10866, but see In *re* Grady, 14 A. B. R. 738); but unless a bankrupt personally follows some trade, occupation or profession which necessitates the ownership of a wagon and team, and earns his living by such trade, etc., he is not entitled to such property as exempt under the law (In *re* Parker, 18 N. B. R. 43, Fed. Cas. No. 10724); as a whitewasher, kalsominer, paperhanger and repairer of plastering (In *re* Hindman, 104 Fed. 331). The fact that the bankrupt has part of the meat of a swine does not prevent his having his best remaining swine as exempt

under a statute exempting his best swine or meat of a swine (In *re* Libby, 103 Fed. 776, 4 A. B. R. 615). Money claimed in lieu of domestic animals, but which were never owned, cannot be allowed (In *re* Williams, 2 N. B. N. R. 419).

93—A government reward has been held not exempt. In *re* Ghazal, 169 Fed. 147, 22 A. B. R. 119.

94—"Necessaries" have been set apart in the way of provisions and fuel (In *re* Bulow, 2 N. B. N. R. 230, 98 Fed. 86, 3 A. B. R. 389), but real estate will not be set aside to cover a deficiency in the value of articles and necessities (In *re* Thornton, 2 N. B. R. 68, Fed. Cas. No. 13994), nor money as an exemption, except when it is the proceeds of articles which ought to be set aside under the head of "other articles and necessities" (In *re* Welch, 5 N. B. R. 248, 5 Ben. 230, Fed. Cas. No. 17366).

Where a bankrupt executed a mortgage two days before adjudication, he was permitted to retain sufficient for the support of himself and family (In *re* Thompson, 13 N. B. R. 300, 4 Fed. Cas. No. 13938). Whether the circumstances of the bankrupt require the setting apart of necessities is a question for the trustees to determine, subject to the approval of the court (In *re* Hay, 7 N. B. R. 344, 2 Lowell, 180, Fed. Cas. No. 6253).

95—In Pennsylvania a bankrupt may select a portion of his exemptions from personal property and the balance from the proceeds of the sale of real estate (In *re* Harber, 2 N. B. N. R. 449), and must be claimed in specie and not as cash out of proceeds (In *re* Sternberg, 3 N. B. N. R. 79; see In *re* Sunseri, 3 id. 65), but a liquor license not being subject to execution, he has no claim to exemption out of the proceeds of its sale (In *re* Myers, 102 Fed. 869, 2 N. B. N. R. 860, 1049,

96—It has been held that where one

An alien,<sup>97</sup> or non-resident,<sup>98</sup> is not entitled to personal property exemptions in some states.

### § 1013. Waiver of exemptions.

Prior to the decision of the supreme court in *Lockwood v. Exchange Bank*,<sup>1</sup> there was much diversity of opinion with reference to the power of the court of bankruptcy in cases where there was a waiver of the exemptions either generally as to all creditors or specially as to a particular creditor. Most courts took the position that since the title to exempt property does not pass to or vest in the trustee, the federal court has absolutely no control or jurisdiction over the same other than to set it apart leaving the person holding such waiver to resort to the state court to enforce this right, if any he has.<sup>2</sup> This is the view adopted by the supreme court and has been followed universally.<sup>3</sup> The objection that if the property has once been set apart as exempt, before the party holding such waiver can enforce his claim, the bankrupt will have received his discharge and the same may be pleaded in bar to an action thereon, is overcome by the holding that the discharge may be postponed a reasonable time to enable a creditor holding a waiver of exemptions to assert his rights in a state court.<sup>4</sup> In deciding whether a discharge should be withheld the district court cannot finally

merely temporarily changes his pursuit, he is entitled to the exemptions allowed in his former occupation, provided there was no intention of making a permanent change. (*In re Fly*, 110 Fed. 141, 6 A. B. R. 550.)

97—*Mississippi*: *In re Kaplan*, 186 Fed. 242, 24 A. B. R. 376.

98—*In re Donahey*, 176 Fed. 458, 23 A. B. R. 796; *In re O'Hara*, 162 Fed. 325, 20 A. B. R. 714.

1—190 U. S. 294, 47 L. ed. 1061, 10 A. B. R. 107.

2—*In re Camp*, 1 N. B. N. 142, 91 Fed. 745, 1 A. B. R. 365; *In re Jackson*, 116 Fed. 46, 8 A. B. R. 594; *In re Hill*, 96 Fed. 185, 2 A. B. R. 798; *In re Bass*, 3 Woods 382, Fed. Cas. No. 1064; *In re Stevens*, 5 N. B. R. 298; *In re Preston*, 6 N. B. R. 545; *In re Little*, 110 Fed. 621, 6 A. B. R. 681; *In re Wells*, 105 Fed. 762,

5 A. B. R. 308; *Woodruff v. Cheeves*, 105 Fed. 601, 5 A. B. R. 296, rev'g 96 Fed. 317, 2 A. B. R. 679.

3—*Roden Grocery Co. v. Bacon*, 133 Fed. 515, 13 A. B. R. 251; *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 12 A. B. R. 159; *Northern Shoe Co. v. Cecka*, 22 N. D. 631, 28 A. B. R. 935; *In re Batten*, 170 Fed. 688, 22 A. B. R. 270; *In re Edwards*, 156 Fed. 794, 19 A. B. R. 632; *McKenney v. Cheney*, 118 Ga. 387, 11 A. B. R. 54; *In re Paramore*, 156 Fed. 211, 19 A. B. R. 130.

4—*Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061, 10 A. B. R. 107; *In re Allen & Co.*, 134 Fed. 620, 13 A. B. R. 518; *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 12 A. B. R. 159; *H. S. Meinhard & Bro. v. Pincus*, 200 Fed. 736, 29 A. B. R. 619.

pass on the validity of the waiver of exemptions, but should merely decide whether a *prima facie* waiver exists.<sup>5</sup> The petition of a creditor holding a waiver to be allowed to prosecute his claim in the state courts will be disallowed where the bankrupt's exemptions have not yet been set apart.<sup>6</sup>

The right to have property set apart as exempt is a personal privilege, which a bankrupt may claim or waive,<sup>7</sup> and which cannot be assigned.<sup>8</sup> An assignment of the right to exemptions is a waiver thereof,<sup>9</sup> as is a failure to file exceptions to an order of the referee denying the right to exemptions.<sup>10</sup> In Georgia, the bankrupt has a choice between constitutional and statutory exemption, but he cannot have both. The selection of the one exemption is a waiver of his right to the other.<sup>11</sup>

A waiver of the right to the homestead in the property scheduled by the bankrupt does not defeat the right of his or her spouse to have the homestead set apart to her or him.<sup>12</sup>

A judgment creditor of the bankrupt who holds a waiver by him of his exemptions, may levy upon and sell the exempt property at any time before his final discharge.<sup>13</sup> The waiver of the homestead exemption in a mortgage is, however, in favor of the mortgage creditor alone, and does not inure to the benefit of others. If in other respects the mortgage is valid, the exemption as against the mortgage creditor is restricted to the equity of redemption, and the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance.<sup>14</sup> While a creditor holding a note or an

5—*Meinhard & Bro. v. Pineus*, 200 Fed. 736, 29 A. B. R. 619.

6—*In re Richardson*, 11 A. B. R. 379.

7—*In re Exum*, 209 Fed. 716, 31 A. B. R. 691; *In re Harrington*, 200 Fed. 1010, 29 A. B. R. 666; *In re Pfeiffer*, 155 Fed. 892, 19 A. B. R. 230; *In re Hastings*, 181 Fed. 33, 30 L. R. A. (N. S.) 982, 24 A. B. R. 360.

Waiver of exemptions by failure to claim, see *ante*, § 991.

In Georgia the head of family cannot waive the statutory homestead; the right of waiver relates exclusively to the constitutional homestead. *In re Reinhart*, 129 Fed. 510, 12 A. B. R. 78.

8—*In re Pfeiffer*, 155 Fed. 892, 19 A. B. R. 230; *In re Blanchard & Howard*,

161 Fed. 797, 20 A. B. R. 422; *Mitchell v. Mitchell*, 147 Fed. 280, 17 A. B. R. 382. *Contra*: *In re Hastings*, 181 Fed. 33, 30 L. R. A. (N. S.) 982, 24 A. B. R. 360.

9—*In re Sloan*, 135 Fed. 873, 14 A. B. R. 435.

10—*In re Cohn*, 171 Fed. 568, 22 A. B. R. 761.

11—*In re Jeffers*, 17 A. B. R. 368. But see *In re Reinhart*, 129 Fed. 510, 12 A. B. R. 78.

12—*In re Maxson*, 170 Fed. 356, 22 A. B. R. 424.

13—*Zumpfe v. Schultz*, 35 Pa. Super. Ct. 106, 20 A. B. R. 916.

14—*In re Nye*, 133 Fed. 33, 13 A. B. R. 142.

obligation containing a waiver of exemption does not have a specific lien on the exempt property it does create an incumbrance upon it.<sup>15</sup> Thus, in passing upon a note under the act of 1867, containing a waiver of exemption, Chief Justice Waite said<sup>16</sup> that the owner of a homestead has the absolute control over it and may deal with it in such manner as he sees fit, and has the right to sell or incumber it as suits his convenience, and adds: "If he sells or incumbers before he selects, his power of selection as against such sale or incumbrance is gone. No particular form of incumbrance is specified; that is left to the discretion of the legislature. Now, a waiver of the right to sell is, in effect, an incumbrance on the property which may be selected." Hence, while there is no lien on the property designated, it comes into the bankruptcy court incumbered by a waiver of the right of the bankrupt to claim the property as exempt.

Accordingly, it is held that where a bankrupt claims his exemption in property surrendered and debts are proved as to which the benefit of the exemption has been waived, it is the duty of the trustee to sell the property claimed as a homestead, or so much thereof as may be necessary, to pay the debts proved as to which the benefit of the exemption has been waived, since the claim of such creditor must be paid out of the fund as to which he can alone resort. The residue of the exempt property, if any, or the proceeds of the sale thereof, should then be allowed the bankrupt under his claim.<sup>17</sup>

### § 1014. Successive exemptions.

While successive allowances will not be made within short periods of time or out of the same property, the debtor may use the exemption allowed him by statute to acquire other property out of which he would be entitled to the same amount of allow-

15—*Roden Grocery Co. v. Bacon*, 133 Fed. 515, 13 A. B. R. 251.

16—*In re Solomon*, 2 Hughes, 164, Fed. Cas. No. 13166.

17—*In re Sisler*, 1 N. B. N. 472, 96 Fed. 402, 2 A. B. R. 760; *In re Graves*, 2 N. B. N. R. 469; *Reed v. Union Bk.*, 29 Gratt. 719; *Linkenbroker v. Detrick*, 81 Va. 44; *In re Solomon*, 2 Hughes, 164; *In re Harber*, 2 N. B. N. R. 449; *In re*

*Nunn*, 1 N. B. N. 427, 2 A. B. R. 664.

See *In re Bragg*, 2 N. B. N. R. 82; *In re Harber*, 2 N. B. N. R. 449; *In re Becker*, 2 N. B. N. R. 202; *In re Ross*, 2 N. B. N. R. 218; *In re Garden*, 1 N. B. N. 189, 93 Fed. 423, 1 A. B. R. 582; *In re Hoover*, 113 Fed. 136, 7 A. B. R. 330; *In re Garner*, 115 Fed. 200, 8 A. B. R. 263; *In re Hopkins*, 1 A. B. R. 209.

ance exempt from levy and sale, for it is not contemplated that a debtor having once received his exemptions can never receive them again.<sup>18</sup> It has been held, however, that where the bankrupt has been allowed his homestead exemption in a former proceeding, he is not entitled to a second allowance in a subsequent proceeding.<sup>19</sup>

### § 1015. Denial of right of exemption.

### § 1016. — Assignment for creditors.

Upon the filing of a petition in bankruptcy within four months of a general assignment for the benefit of creditors, the latter is void and the trustee in bankruptcy takes the property as though such assignment had never been made and may, by proper proceedings, recover the same if not voluntarily surrendered to him. While the making of such an assignment is not actually fraudulent but only fraudulent in law, and, since the exemption laws are given for the protection of the family and not the benefit of the individual and are to be liberally construed,<sup>20</sup> the assignor in such assignment is entitled to his exemptions out of the assigned property in case of subsequent bankruptcy proceedings,<sup>21</sup> or out of the proceeds if the same has been sold.<sup>22</sup>

### § 1017. — Concealment and fraudulent transfer of property.

The authorities are not in harmony upon the right of a bankrupt to exemptions where he has failed to account for all his assets, or has fraudulently transferred or concealed his property, many courts holding that exemptions should be allowed since a remedy is afforded by which they may be recovered,<sup>23</sup>

18—In re Buckingham, 2 N. B. N. R. 617.

19—In re Jeffers, 17 A. B. R. 368.

20—In re Tilden, 1 N. B. N. 134, 91 Fed. 500, 1 A. B. R. 300; In re Buckingham, 2 N. B. N. R. 617; Sears v. Hanks, 14 O. S. 298, 301.

21—In re Noell, 2 N. B. N. R. 789; In re Talbott, 116 Fed. 417, 8 A. B. R. 427; Rex v. Capitol Bk., 2 Dill. 367; Fed. Cas. No. 11869; In re Poleman, 9 N. B. R. 376, 5 Biss. 526, Fed. Cas. No. 11247; In re Griffin, 2 N. B. R. 85, Fed. Cas. No. 5813; In re Stevens, 2 Biss. 373, Fed.

Cas. No. 13392; Bashinski v. Talbott, 119 Fed. 337.

22—In re Noell, *supra*; In re Jones, 2 Dill. 343, Fed. Cas. No. 7445; In re Welch, 5 N. B. R. 348, 5 Ben. 230, Fed. Cas. No. 17366; In re Ellis, 1 N. B. R. 154, Fed. Cas. No. 4400; Vaughan v. Thompson, 17 Ill. 78; Berry v. Hanks, 28 Ill. App. 57.

23—In re Allen & Co., 134 Fed. 620, 13 A. B. R. 518; In re Thompson, 140 Fed. 257, 15 A. B. R. 283; In re Denson, 195 Fed. 857, 28 A. B. R. 162; In re Neal, 15 Ohio Fed. Dec. 113, 14 A. B. R. 550;

but the better rule would seem to be opposed to such doctrine,<sup>24</sup> and certainly in those states where the exemption law requires the bankrupt to come into court with clean hands, there can be no question that such acts will operate as a bar to the right to have property set aside as exempt.<sup>25</sup>

The concealment must be established by clear and unequivocal evidence,<sup>26</sup> but the evidence need not make out a case of fraudulent concealment in every detail as indicated and defined by the statute.<sup>27</sup>

The transfer of real estate by the bankrupt to his wife more than four months prior to the filing of the petition will not deprive him of his exemptions,<sup>28</sup> and the mere failure of the bankrupt to include in his schedule, property in the possession of his wife is not conclusive of concealment or an attempt to conceal.<sup>29</sup>

It has been held that property or the proceeds thereof constituting a preference which is surrendered to the trustee by the

In re Noell, 2 N. B. N. R. 789; In re Park, 2 N. B. N. R. 981, 102 Fed. 602, 4 A. B. R. 432; In re Detert, 11 N. B. R. 293, Fed. Cas. No. 3829; Cox v. Wilder, 7 N. B. R. 241, 2 Dill. 45, Fed. Cas. No. 3308; Penny v. Taylor, 10 N. B. R. 200, Fed. Cas. No. 10957; McFarland v. Goodman, 11 N. B. R. 134, 6 Biss. 111, Fed. Cas. No. 8789; Bartholomew v. West, 8 N. B. R. 12, Fed. Cas. No. 1071; Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, Fed. Cas. No. 13071; In re Peterson, 1 N. B. N. 215, 1 A. B. R. 254; Comstock v. Bechtel, 63 Wis. 656; Wilcox v. Hawley, 31 N. Y. 648; In re Talbott, 116 Fed. 417, 8 A. B. R. 427; In re Falconer, 110 Fed. 111, 6 A. B. R. 557.

24—In re Sussman, 183 Fed. 331, 24 A. B. R. 909; Kinder v. Trotti, 130 La. 360, 28 A. B. R. 939; Cowan v. Burchfield, 180 Fed. 614, 25 A. B. R. 293; In re Leverton, 155 Fed. 925, 19 A. B. R. 426; In re Long, 116 Fed. 113, 8 A. B. R. 591; In re White, 109 Fed. 635, 6 A. B. R. 451; In re Duffy, 118 Fed. 926, 9 A. B. R. 358; In re Yost, 117 Fed. 792, 9 A. B. R. 153; In re Evans, 116 Fed. 909, 8 A. B. R. 730.

25—In re Simon v. Sternberg, 151 Fed. 507, 18 A. B. R. 204; In re Shaefer, 151 Fed. 505, 18 A. B. R. 361; In re Alex, 141 Fed. 483, 15 A. B. R. 450; In re Cochran, 185 Fed. 913, 26 A. B. R. 459; In re Dobbs, 172 Fed. 682, 22 A. B. R. 801; In re Magata, 2 N. B. R. 456; McNally v. Mulherin, 79 Ga. 614; In re Waxelbaum, 101 Fed. 228, 4 A. B. R. 120; In re Tollett, 2 N. B. N. R. 1096, 105 Fed. 425, 5 A. B. R. 305; reversed on ground that conveyance was only constructively fraudulent, in 106 Fed. 866, 54 L. R. A. 222, 5 A. B. R. 404; In re Williamson, 114 Fed. 190, 8 A. B. R. 42, 114 Fed. 192, 8 A. B. R. 53; In re Taylor, 114 Fed. 607, 7 A. B. R. 410; In re Boorstin, 114 Fed. 696, 8 A. B. R. 89; In re West, 116 Fed. 767, 8 A. B. R. 564.

26—In re Cotton & Preston, 183 Fed. 190, 25 A. B. R. 532.

27—In re Morris, 2 N. B. N. R. 260.

28—In re Cotton & Preston, 183 Fed. 190, 25 A. B. R. 532.

29—In re Diamond, 158 Fed. 370, 19 A. B. R. 811.



preferred creditor, can be applied in the setting off of exemptions.<sup>30</sup>

Homestead exemptions in property mortgaged or transferred, see also, ante, section 1003.

### § 1018. — Engaging in illegal business.

A debtor engaged in the illegal sale of liquor is not entitled to exemptions in some states.<sup>31</sup>

### § 1019. — Failure to give security.

The bankrupt has been held not entitled to exemptions in property for which he agreed but failed to give security, since no title passed.<sup>32</sup>

### § 1020. — Fraud.

While exemptions cannot ordinarily be claimed in property obtained by fraud,<sup>33</sup> it is only where the fraud inheres in the very transaction itself by its intended effect preventing the collection of the debt that the fraudulent debtor can claim no right to exemption. The mere fact that the debtor was dealing under an assumed name will not work a forfeiture of his right to exemptions.<sup>34</sup> In some states, no exemption can be claimed in property obtained shortly before bankruptcy by means of a false or erroneous report to a mercantile agency,<sup>35</sup> while in others it is held that the making of false statements in writing to his creditors to obtain credit will not deprive the bankrupt of his right to his homestead exemption.<sup>36</sup>

The trustee, as well as the creditors, may except to the allowance of the exemption on the ground of fraud.<sup>37</sup>

### § 1021. — Purchase of property with non-exempt funds.

Courts of bankruptcy proceed upon equitable principles, and should no more sustain a positive fraud than would a court of

30—In re Soper, 173 Fed. 116, 22 A. B. R. 868; In re Talbott, 116 Fed. 417, 8 A. B. R. 427; In re Falconer, 110 Fed. 111, 6 A. B. R. 557; contra, In re Long, 116 Fed. 113, 8 A. B. R. 591; In re Wishniefsky, 181 Fed. 896, 24 A. B. R. 798; In re Coddington, 126 Fed. 891, 11 A. B. R. 122; In re Neal, 15 Ohio Fed. Dec. 113, 14 A. B. R. 550; In re Geo. M. Sharr, 15 A. B. R. 491.

31—In re Lynde, 17 A. B. R. 906.

32—In re Hennis, 17 A. B. R. 889.

33—In re Wolcott, 140 Fed. 460, 15 A. B. R. 386.

34—In re McUlla, 189 Fed. 250, 26 A. B. R. 480.

35—In re Peacock, 203 Fed. 191, 30 A. B. R. 179.

36—In re Cotton & Preston, 183 Fed. 190, 25 A. B. R. 532.

37—In re Rice, 164 Fed. 589, 21 A. B. R. 202.

equity, and it would seem that exemptions should not be allowed in property purchased by the bankrupt for the express purpose of claiming an exemption, with funds that would otherwise have gone to the creditors.<sup>38</sup>

The bankruptcy court is, however, bound by the state laws as construed by the highest courts of the state, and it seems to be generally held that the bankrupt is entitled to exemptions in property though the same was purchased with non-exempt property in contemplation of bankruptcy.<sup>39</sup>

### § 1022. — Purchase money borrowed from wife.

That the goods claimed as exempt were paid for out of moneys borrowed from the wife, is no bar to the exemption.<sup>40</sup>

### § 1023. — Purchase of property with embezzled funds.

The good faith required by the Georgia statute to entitle a debtor to a homestead exemption is merely the making of a full and fair disclosure of his personal property, and his exemptions will not be denied him by the bankruptcy court on the ground that the property was purchased with the money of the county of which he was treasurer.<sup>41</sup>

### § 1024. — Purchase price not paid.

By statute in many states it is specifically provided that property or the proceeds thereof when sold, cannot be set apart as exempt where the purchase price has not been paid.<sup>42</sup> Even

38—In re Gerber, 186 Fed. 693, 26 A. B. R. 608. And see In re Boston, 98 Fed. 587, 2 N. B. N. R. 19, 3 A. B. R. 388.

39—In re Hammond, 198 Fed. 574, 28 A. B. R. 811; In re Wood, 147 Fed. 877, 17 A. B. R. 93; In re Litson, 157 Fed. 78, 19 A. B. R. 506.

40—In re Bailes, 176 Fed. 460, 23 A. B. R. 789.

41—In re Castleberry, 143 Fed. 1018, 16 A. B. R. 159.

42—In re O'Connor, 16 A. B. R. 784; In re Anderson, 103 Fed. 854, 4 A. B. R. 640; McGahan v. Anderson, 113 Fed. 115, 7 A. B. R. 641; In re Durham, 104 Fed. 231, 4 A. B. R. 760; In re Seydel, 118 Fed. 207; In re Wells, 105 Fed. 762, 5

A. B. R. 308; Mullinix v. Simon, 196 Fed. 775, 28 A. B. R. 1.

In *Ohio*: In re Stern, 208 Fed. 488, 30 A. B. R. 694; In re Nunemaker, 208 Fed. 491, 30 A. B. R. 697.

In *Arkansas* there is no exemption against a judgment or other process for the purchase price while the property remains in the vendee's possession, the possession of which the trustee holds (Fellheimer v. Durham, 3 N. B. N. R. 30).

In *Washington*: In re Phillips, 209 Fed. 490, 31 A. B. R. 597. A bankrupt's claim for exemptions out of a stock of merchandise, some of which had been paid for in full, and all of which had been paid for in part, was allowed, notwithstanding the provision of the statute

in the absence of a statute to hold to the contrary would be unconscionable and operate as a great hardship.

Some courts, however, hold that the fact that the bankrupt obtained property with an intention not to pay for the same cannot defeat his right to exemptions therein, on the theory that any right to rescind the purchase is personal to the vendor and cannot be asserted by other creditors or the trustee.<sup>43</sup>

So, it is held, that the objection that the purchase price has not been paid cannot be urged in the bankruptcy court, but must be urged in the state court.<sup>44</sup>

### § 1025. — As against claims for wages.

In some states the right of exemption can be asserted against a claim for salary or wages.<sup>45</sup>

Compensation earned by a trustee is not salary or wages within the meaning of such statute.<sup>46</sup>

### § 1026. Deductions.

#### § 1027. — In general.

The amount of the proceeds from sales used by the bankrupt since the commencement of the bankruptcy proceedings may be deducted from his allotment,<sup>47</sup> and, under the laws of some states, property shown to have been in the bankrupt's possession at the time of the filing of the petition and not disclosed in his inventory nor surrendered to the trustee may be deducted from his exemptions.<sup>48</sup> In such case an established discrepancy of a large amount, together with proven concealment of some of his assets establish a *prima facie* case for the trustee entitling him,

that no property should be exempt against a claim for the purchase price. (In re Petrini, 1 N. B. N. 264.)

In Virginia it was held that where the goods surrendered by a bankrupt were honestly acquired in the regular course of business, he is entitled to a homestead exemption in same, although they were paid for out of the proceeds of goods not paid for. (In re Tobias, 103 Fed. 68, 3 N. B. N. R. 23, 4 A. B. R. 555.)

<sup>43</sup>—In re Hammond, 198 Fed. 574, 28 A. B. R. 811.

<sup>44</sup>—In re Maynard & Co., 183 Fed. 823, 25 A. B. R. 732.

<sup>45</sup>—In re Phillips, 209 Fed. 490, 31 A. B. R. 597.

<sup>46</sup>—In re Pears, 205 Fed. 255, 30 A. B. R. 563.

<sup>47</sup>—In re Ansley Bros., 153 Fed. 983, 18 A. B. R. 457.

<sup>48</sup>—In re Denson, 195 Fed. 857, 28 A. B. R. 162.

in the absence of explanation by the bankrupt, to charge the bankrupt's exemptions.<sup>49</sup>

### § 1028. — Costs and expenses of proceedings.

Property set aside to a bankrupt under his claim to exemption forms no part of the bankrupt estate and the expenses and commissions of the referee or trustee, or counsel fees to the attorneys of the bankrupt or the trustee cannot be allowed from the proceeds thereof,<sup>50</sup> when exempt property is sold. It is held, however, that the exemptions allowed by the law do not excuse the payment from them of the fees of the bankruptcy court, so as to permit the suit to proceed on an affidavit of inability to advance the costs, as required.<sup>51</sup>

The bankrupt's right to his exemption out of the proceeds of exempt property cannot be subjected to the costs and expenses of the sale<sup>52</sup> even though the property is of a perishable nature.<sup>53</sup> Rent for the time the trustee is compelled to occupy premises after adjudication, has been held a proper charge against the estate which must be paid before bankrupt's exemption can be set apart.<sup>54</sup>

### § 1029. Liens on exempt property.

### § 1030. — How created.

Homestead waiver notes held by creditors of a bankrupt do not of themselves constitute liens on the property surrendered by him,<sup>55</sup> though they are in the nature of an incumbrance. A state law giving the vendor of property otherwise exempt, the right to subject it to the payment of his debt due for the purchase money, gives no lien thereon.<sup>56</sup>

49—In re Denson, 195 Fed. 857, 28 A. B. R. 162.

50—In re Yeager, 182 Fed. 951, 25 A. B. R. 51.

51—In re Herbold, 14 A. B. R. 116; In re Hines, 117 Fed. 790, 9 A. B. R. 27; In re Collier, 93 Fed. 191, 1 N. B. N. 257, 1 A. B. R. 182; In re Bean, 100 Fed. 262, 4 A. B. R. 53; contra, Sellers v. Bell, 94 Fed. 801, 2 A. B. R. 529.

52—In re Hopkins, 103 Fed. 781, 4 A. B. R. 619.

53—In re LeVay, 125 Fed. 990, 11 A. B. R. 114.

54—In re Grimes, 1 N. B. N. 516, 96 Fed. 529, 2 A. B. R. 730.

55—Bowen & Thomas v. Keller, 130 Ga. 31, 22 A. B. R. 727; In re Schuller, 108 Fed. 591, 6 A. B. R. 278; In re Moran, 105 Fed. 801, 5 A. B. R. 472.

56—In re Wilkes, 112 Fed. 975, 7 A. B. R. 574.

### § 1031. — Acquisition within four months.

Liens acquired against exempt property by means of legal proceedings within four months of the filing of the petition are rendered void under section 67f of the act.<sup>57</sup> Any other interpretation of the act would defeat its purpose which is to discharge the bankrupt from its liabilities and start him afresh with property set apart to him as exempt.<sup>58</sup>

Section 67f, however, applies only to liens obtained by legal proceedings within four months and does not defeat rights in exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed.<sup>59</sup>

A lien acquired before the bankrupt files his homestead declaration but within four months of the filing of the petition in bankruptcy will not be enforced.<sup>60</sup>

### § 1032. — Acquisition after bankruptcy.

A judgment obtained after the filing of the petition in bankruptcy but before the granting of the discharge may become a lien upon property which was exempt at the time of the filing of the petition but which was not exempt at the time of the creation of the debt, the homestead exemption having in the interim been enlarged by statute.<sup>61</sup>

Execution sales of the homestead of the bankrupt, upon judgments docketed after bankruptcy based upon claims for material sold to the bankrupt for the repair of the homestead, will be stayed where it appears that under the state law no lien attaches against the homestead until the filing of an acknowledgment or the docketing of a judgment.<sup>62</sup>

57—Chicago, B. & Q. R. R. Co. v. Hall, 229 U. S. 511, 57 L. ed. 1306, 30 A. B. R. 619, aff'g 88 Neb. 20, 25 A. B. R. 53.

58—Contra, Jewett Bros. v. Huffman, 14 N. D. 110, 13 A. B. R. 738; McKenney v. Cheney, 118 Ga. 387, 11 A. B. R. 54; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 7 A. B. R. 506; In re Little, 110 Fed. 621, 6 A. B. R. 681. See also, Northern Shoe Co. v. Cecka, 22 N. D. 631, 28 A. B. R. 935.

59—Chicago, B. & Q. R. R. Co. v. Hall, 229 U. S. 511, 57 L. ed. 1306, 30 A. B. R. 619, aff'g 88 Neb. 20, 25 A. B. R. 53.

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Trustee is not entitled to the bankrupt's exemption as against a creditor levying on the same within four months prior to bankruptcy on a judgment waiving exemption. Sharp v. Woolslare, 25 Pa. Super. Ct. 251, 12 A. B. R. 396.

60—In re Forbes, 186 Fed. 79, 26 A. B. R. 355.

61—Gregory Co. v. Cale, 115 Minn. 508, 27 A. B. R. 131.

62—In re Hassler, 204 Fed. 139, 29 A. B. R. 502.

### § 1033. — On exempt and non-exempt property.

A mortgage constituting an unlawful preference, where it includes both exempt and non-exempt property, is only voidable as to the non-exempt property.<sup>63</sup> If property has value in excess of the amount of the statutory exemption, the lien will hold upon the excess.<sup>64</sup>

Where it is conceded that part and possibly all of certain attached property is exempt, the property may be held under an attachment until it has been determined in the bankruptcy proceedings what part, if any, of the attached property is non-exempt and passes to the trustee,<sup>65</sup> and where a mortgage is partly on exempt property and the entire property is sold, the trustee should hold the amount of the exemption to await the outcome of a suit in a state court to determine the right to exemption as between the bankrupt and the mortgagee.<sup>66</sup>

### § 1034. — Lien not waived by proof of claim.

A creditor may assert whatever peculiar right he may have against the homestead exemption notwithstanding he has proven his claim as unsecured,<sup>67</sup> and the fact that a creditor, after the adjudication in bankruptcy, abandoned attachment proceedings instituted by him within four months prior thereto and filed his claim as a general creditor does not constitute a waiver of his right to attach, or estop him from subsequently attaching, property which has been set aside by the bankruptcy court as exempt.<sup>68</sup>

### § 1035. — Remedies of lien-holders.

Setting aside the property as exempt does not affect the rights of one holding a lien thereon, nor does it prevent a creditor whose claim is not avoided by the discharge, from proceeding against the property in the hands of the bankrupt.<sup>69</sup> The trustee, in allotting exemptions, is not obliged to designate articles

63—In re Bailey, 176 Fed. 990, 24 A. B. R. 201. See, also, *ante*, § 957.

64—Haworth v. Travis, 13 N. B. R. 145.

65—Jewett Bros. v. Huffman, 14 N. D. 110, 13 A. B. R. 738.

66—First Nat. Bank v. Lanz, 202 Fed. 117, 29 A. B. R. 247.

67—In re Loden, 184 Fed. 965, 25 A. B. R. 917.

68—Northern Shoe Co. v. Cecka, 22 N. D. 631, 28 A. B. R. 935.

69—In re Hartsell & Son, 140 Fed. 30, 15 A. B. R. 177.

free from liens,<sup>70</sup> while such action, when taken, in no wise impairs the right of lien holders whose liens were valid against the property before it was set apart.<sup>71</sup> They need not come into the bankruptcy court for relief, but may proceed without regard to the bankruptcy proceedings, and in case they hold waivers of exemptions, the discharge may be withheld a reasonable time to enable them to proceed in the state court.<sup>72</sup> A creditor may enforce a lien superior to the exemption under the state law if such lien be fastened on the exempt property prior to the final discharge in bankruptcy, but if a debtor succeeds in obtaining his discharge and pleads it prior to the fastening of a specific lien on his exempt property, the effect is to release the debtor from the payment of the debt and the creditor's right of action is destroyed.<sup>73</sup>

The court of bankruptcy has no power to partition property, on a portion of which there is valid mortgage executed by the bankrupt and his wife, so as to set off a homestead free from liens, or otherwise impair the security, or discharge any part of the property until the debt is paid or to substitute other security for the mortgage.<sup>74</sup>

A creditor with an enforceable lien or claim against exempt property can collect only the deficiency from the general assets,<sup>75</sup> and a creditor having a mortgage on the bankrupt's homestead may be required to exhaust that remedy before he can enforce his other remedies against the bankrupt's estate.<sup>76</sup>

Where the homestead premises have been mortgaged and exceed in value the homestead exemption, the bankrupt is entitled to have the property not exempt first subjected to the mortgage debt,<sup>77</sup> or, if all the property is required to be sold, he

70—In re Preston, 6 N. B. R. 545, Fed. Cas. No. 1394; In re Thomas, 1 N. B. R. 551, 96 Fed. 828, 3 A. B. R. 78.

71—Haworth v. Travis, 13 N. B. R. 145; Robinson v. Wilson, 14 N. B. R. 565; In re Haake, 7 N. B. R. 61, 2 Sawy. 231, Fed. Cas. No. 5883; In re Preston, 6 N. B. R. 545, Fed. Cas. No. 1394; In re Lambert, 2 N. B. R. 426; In re Garrett, 11 N. B. R. 493; In re Dillard, 9 N. B. R. 8; In re Hutton, 3 N. B. R. 787; In re Whitehead, 2 N. B. R. 599; In re Deckert, 10 N. B. R. 1; In re Bass, 15

N. B. R. 453; In re Broome, 3 N. B. R. 343, 3 Ben. 488.

72—See *ante*, § 1013.

73—Bowen & Thomas v. Keller, 130 Ga. 31, 22 A. B. R. 727.

74—In re Thomas, 1 N. B. R. 551, 96 Fed. 828, 3 A. B. R. 99.

75—In re Cale, 182 Fed. 439, 25 A. B. R. 367.

76—In re Sautoff, 14 N. B. R. 364, 7 Biss. 167, Fed. Cas. No. 12379.

77—In re Barrett, 140 Fed. 569, 16 A. B. R. 46.

is entitled out of the proceeds over and above the mortgage, the amount of his exemption, free from the claims of other creditors.<sup>78</sup>

In Pennsylvania, an execution attachment will not lie to reach personal chattels in the hands of the trustee in bankruptcy, which are claimed by the bankrupt as his exemption.<sup>79</sup>

### § 1036. Sales of exempt property.

The supreme court, in *Lockwood v. Exchange Bank*,<sup>80</sup> expressly holds that a court of bankruptcy has no jurisdiction over exempt property except to set it apart, from which it would seem to follow that the court is without jurisdiction to order a sale of the bankrupt's exempt property,<sup>81</sup> and, since consent cannot confer jurisdiction not authorized by law, it would seem that the consent of the bankrupt or his creditors is immaterial.<sup>82</sup> It follows that the court will not, upon the petition of a creditor claiming a lien upon exempt property, order the bankrupt to restore the same after it has been delivered to him by the trustee, in order that it may be sold for the benefit of creditors.<sup>83</sup> The trustee in bankruptcy has no equity in the homestead exemption that can be made the subject of a sale by him, nor can the homestead be sold by the bankruptcy court subject only to the life estate of the bankrupt.<sup>84</sup>

It is held in numerous cases, however, that it is not improper to permit the bankrupt to claim the proceeds of the sale of exempt property if such property has been sold by order of the court before the time for filing schedules has expired,<sup>85</sup> unless

78—*In re Barrett*, 140 Fed. 569, 16 A. B. R. 46.

79—*Hyde v. Holland*, (Pa. Ct. Com. Pl.) 31 A. B. R. 785.

80—190 U. S. 294, 47 L. ed. 1061, 10 A. B. R. 107.

81—*Ingram v. Wilson*, 125 Fed. 913, 11 A. B. R. 192; *In re Griffin*, 2 N. B. R. 85, Fed. Cas. No. 5813.

A referee cannot direct the sale of exempt property. *In re Remmerde*, 206 Fed. 822, 30 A. B. R. 701. But see *In re Paramore*, 156 Fed. 208, 19 A. B. R. 126, holding that where the homestead is covered by a mortgage containing a waiver of the exemption, the court may

direct a sale of the same, in which case the bankrupt should be allowed his exemption from the proceeds of the sale.

82—*In re Rising*, 27 A. B. R. 519.

83—*In re Bender*, 15 Ohio Fed. Dec. 253, 17 A. B. R. 895.

84—*Sullivan v. Mussey*, 184 Fed. 60, 25 A. B. R. 781, aff'g 179 Fed. 1007, 25 A. B. R. 91.

85—*In re Kane*, 127 Fed. 552, 11 A. B. R. 533; *Lipman v. Stein*, 134 Fed. 235, 14 A. B. R. 30, aff'g 130 Fed. 629, 12 A. B. R. 384; *In re Sloan*, 135 Fed. 873, 14 A. B. R. 435; *In re Renda*, 149 Fed. 614, 17 A. B. R. 521; *In re Luby*, 155 Fed. 659, 18 A. B. R. 801; *In re Andrews*



the exemption has been waived,<sup>86</sup> and, it is held that if he fails to select his exemptions, before the estate is sold, he loses his right thereto.<sup>87</sup>

A creditor is not prevented from pursuing his remedy in the state courts, and a sale by order of a state court, or under the terms of a mortgage or pledge, is not invalid. A mortgagee may enforce his lien in a state court against property that has been set aside as exempt in the bankruptcy court,<sup>88</sup> and a vendor's lien against land may be enforced by sale.<sup>89</sup>

In some states it is held that exemptions claimed out of personal property, must be claimed in specie and not out of the proceeds of the sale,<sup>90</sup> but it is held that such rule will not prevent the bankrupt from claiming his exemption out of the proceeds of perishable property under order of the court.<sup>91</sup> Where, after an exemption is set apart from a stock of goods which has been inventoried and a part of the stock is sold, the bankrupt is not entitled to the whole of his exemption out of the proceeds of the sale, but merely that portion of the proceeds which the amount of his exemption bears to the inventory value.<sup>92</sup> A creditor acquiescing in a sale is estopped to deny the right of the bankrupt to have exemptions allowed out of the proceeds.<sup>93</sup> It frequently happens that the bankrupt is entitled to a homestead exemption of a specified amount and the property

& Simonds, 193 Fed. 776, 27 A. B. R. 116; In re Finklestein, 192 Fed. 738, 27 A. B. R. 229; In re Zack, 196 Fed. 909, 28 A. B. R. 138; In re Clark, 102 Fed. 602; In re Rodenhagen, 2 N. B. N. R. 674; In re Buckingham, 2 N. B. N. R. 617; In re Beckerford, 4 N. B. R. 59, Fed. Cas. No. 1209; In re Bolinger, 108 Fed. 374, 6 A. B. R. 171; In re Wilson, 108 Fed. 197, 6 A. B. R. 287. In some states this rule does not hold good. See In re Haskin, 109 Fed. 789, 6 A. B. R. 485; In re Manning, 112 Fed. 948, 7 A. B. R. 571.

86—Matter of Hargraves, 19 A. B. R. 238; In re Highfield, 163 Fed. 924, 21 A. B. R. 92; Citizens' Bank of Douglas v. Hargraves, 164 Fed. 613, 21 A. B. R. 323, rev'g 160 Fed. 758, 20 A. B. R. 186.

87—In re Solomon, 10 N. B. R. 9, Fed. Cas. No. 13166.

88—Cumming v. Clegg, 14 N. B. R.

49; Bush v. Lester, 15 N. B. R. 36; In re Bass, 15 N. B. R. 453; In re Everett, 9 N. B. R. 90; In re Hunt, 5 N. B. R. 493; Hatcher v. Jones, 14 N. B. R. 387, 53 Geo. 208.

89—In re Perdue, 2 N. B. R. 67, Fed. Cas. No. 10975; see also In re Martin, 13 N. B. R. 397, 2 Hughes, 418, Fed. Cas. No. 9152; In re Owens, 12 N. B. R. 518, 6 Biss. 432, Fed. Cas. No. 10632; In re Ellis, 1 N. B. R. 154, Fed. Cas. No. 4400.

90—In re Donahey, 176 Fed. 458, 23 A. B. R. 796; In re Sunseri, 3 N. B. N. R. 65; see In re Sternberg, 3 id. 79; In re Pfeiffer, 155 Fed. 892, 19 A. B. R. 230.

91—In re LeVay, 125 Fed. 990, 11 A. B. R. 114.

92—In re Arnold, 169 Fed. 1000, 22 A. B. R. 392.

93—Dunlap Hardware Co. v. Huddleston, 167 Fed. 433, 21 A. B. R. 731.

occupied by him is of greater value and incapable of partition. In such case it is held the property will be sold and the amount of the exemption paid from the proceeds;<sup>94</sup> also where the property is incapable of division without injury and where the interest of the estate and all the parties will be best subserved by its sale as a whole;<sup>95</sup> or where the estate in question is only an estate for years;<sup>96</sup> or out of the equity of redemption, where property is sold under a mortgage by the bankruptcy court;<sup>97</sup> or where the bankrupt consents to the sale upon condition of receiving a share of the proceeds,<sup>98</sup> and where the trustee has, without just cause, refused to set his exemptions aside upon due claim, he may receive his exemptions from the proceeds.<sup>99</sup> Of a different nature from these sales is the case where articles which would have been exempt are seized and sold under distress for rent; under such circumstances, the bankrupt could not be allowed their value from the general fund, for the proceeds of the sale did not go to swell such fund.<sup>1</sup>

Where the goods are sold and the proceeds are in the hands of an officer of the court, the court may determine conflicting claims to the fund,<sup>2</sup> but the distribution of the money will be regulated by the state laws.<sup>3</sup> Where exempt property is sold by consent of the bankrupt, it is held that the costs and expenses of the bankruptcy proceedings may be paid out of the proceeds of the sale, in preference to the claim of one holding an equitable lien upon the property.<sup>4</sup> The bankrupt as well as the assignee of his exemption have the right to contest any claim on the

94—In re Lynch, 2 N. B. R. 374, 101 Fed. 579.

95—In re Edwards, 2 N. B. R. 109; In re Brown, 3 N. B. R. 250; In re Poleman, Fed. Cas. No. 11247; In re Grimes Bros., 1 N. B. N. 426, 2 A. B. R. 610; In re Richard, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506; In re Diller, 100 Fed. 931; In re Ansley Bros., 153 Fed. 983, 18 A. B. R. 457.

96—In re Beckerford, 4 N. B. R. 59, Fed. Cas. No. 1209.

97—In re Beede, 19 N. B. R. 68, Fed. Cas. No. 1226.

98—In re Woodard, 1 N. B. N. 430, 95 Fed. 955, 2 A. B. R. 692.

99—In re Brown, 1 N. B. N. 511.

1—In re Lawson, 2 N. B. R. 19, Fed. Cas. No. 8149. And see In re Sloan, 135 Fed. 873, 14 A. B. R. 435.

2—In re Renda, 149 Fed. 614, 17 A. B. R. 521.

3—In re Park, 2 N. B. N. R. 981, 102 Fed. 602, 4 A. B. R. 432; In re Buckingham, 2 N. B. N. R. 617; In re Staunton, 117 Fed. 507, 9 A. B. R. 79.

Landlord held entitled to the payment of rent as a priority out of the proceeds of a sale of exempt property, the lease containing a waiver of exemptions. In re Sloan, 135 Fed. 873, 14 A. B. R. 435.

4—In re Castleberry, 143 Fed. 1021, 16 A. B. R. 430.

proceeds and should not be deprived of a hearing.<sup>5</sup> Where the trustee pays the assignee of the bankrupt the full amount of the bankrupt's exemption out of the proceeds of a sale of the bankrupt's entire stock, he will be reimbursed for the amount paid, although the sale nets the estate but a portion of the appraised value of the stock.<sup>6</sup>

A sale of the homestead for an amount less than the amount to which the bankrupt is entitled in lieu of the homestead will not be effective.<sup>7</sup>

### § 1037. Fraudulent transfers of exempt property.

Exempt property cannot be the subject of a fraudulent transfer.<sup>8</sup> A debtor may convey existing exemptions as well as exempt property to be acquired in the future.<sup>9</sup>

### § 1038. Taxes on exempt property.

By section 64 of the law the trustee is required to pay from the general assets "all taxes legally due and owing by the bankrupt," even though they are assessed against property which is set off to the bankrupt as exempt, or are a lien upon and enforceable against such property. This is true, although the effect of such payment is to exhaust the fund which would otherwise be distributed among the general creditors.<sup>10</sup> While such an interpretation of the law may work an injustice to the creditors the doctrine is doubtless founded upon that liberality of construction of exemption laws which is necessary for the protection of the family in the vicissitudes of financial distress.

5—*In re Sloan*, 135 Fed. 873, 14 A. B. R. 435.

6—*In re Hutchinson*, 197 Fed. 1021, 28 A. B. R. 405.

7—*In re Nye*, 133 Fed. 33, 13 A. B. R. 142.

8—*First Nat. Bank v. Lanz*, 202 Fed. 117, 29 A. B. R. 247; *McCarty v. Coffin*,

150 Fed. 307, 18 A. B. R. 148. See, also, *ante*, § 799.

9—*In re Hastings*, 181 Fed. 33, 30 L. R. A. (N. S.) 982, 24 A. B. R. 360.

10—*In re Tilden*, 1 N. B. N. 134, 91 Fed. 500, 1 A. B. R. 300; *In re Baker*, 1 N. B. N. 212, 1 A. B. R. 526.

## CHAPTER XXV

### SUITS BY AND AGAINST BANKRUPT

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- § 1090. Trustee to prosecute suits.
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### § 1039. Jurisdiction over applications to stay proceedings.

#### § 1040. — In general.

Application for injunction to stay proceedings in a state court should be made to the court of bankruptcy,<sup>1</sup> which may hear and decide the question, though it may refer such application, or any specified issue arising thereon, to the referee to ascertain and report the facts.<sup>2</sup> The jurisdiction of the bankruptcy court to determine, for the purpose of such application, whether the claim on which the proceedings in the state court are founded is one from which a discharge would be a release, is exclusive and its determination conclusive until revised,<sup>3</sup> and its power to enjoin proceedings in a state court on a dischargeable debt is plenary but its exercise is discretionary. An injunction will usually issue (1) if the bankrupt is threatened with arrest or needless annoyance, (2) if the suit is not yet in judgment, and (3) even after judgment if (a) the rights of general creditors, not parties to such proceedings, will be jeopardized, or (b) the judgment is based on an act of bankruptcy or a fraud on creditors or the law; but in the absence of (a) and (b) it should never issue after execution sale provided the state court has or can be given jurisdiction of all the interested parties.<sup>4</sup> Thus it will

1—In re Bolinger, 1 N. B. N. 254; In re Klein, 1 N. B. N. 486, 97 Fed. 31; contra, In re Geister, 2 N. B. N. R. 297, 97 Fed. 322, 3 A. B. R. 228.

Action of state court in denying a stay is not final. New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 21 A. B. R. 474.

2—G. O. XII.

3—Wagner v. U. S., 2 N. B. N. R. 1116, 104 Fed. 133, 4 A. B. R. 596.

4—In re Southern L. & T. Co. v. Benbow, 1 N. B. N. 499, 96 Fed. 514, 3 A. B. R. 9; Globe Cycle Wks., 1 N. B. N. 421, 2 A. B. R. 447, in which the cases are collated and distinguished; In re Sabine, 1 N. B. N. 45, 1 A. B. R. 315; In re Northrop, 1 A. B. R. 427; Bear v. Chase,

restrain a third person from selling or encumbering property of the bankrupt;<sup>5</sup> or restrain action against the trustee, if the continuance of the action will embarrass the administration of the estate.<sup>6</sup> The jurisdiction to issue an injunction in certain cases exists notwithstanding the fact that a discharge has been granted.<sup>7</sup> The court of bankruptcy has no authority to withdraw from the state court suits pending therein between the bankrupt and other parties and compel their trial in the district court.<sup>8</sup>

An application by the bankrupt for relief from a fine for civil contempt imposed by a state court subsequent to the adjudication should be made to the state court.<sup>9</sup>

### § 1041. — Jurisdiction of referees.

Wherever the court has jurisdiction the referee also has jurisdiction, except where the case is referred to him for a special purpose, or it is a question arising out of applications of a bankrupt for composition or discharge even though it be a case where the premises affected are in another county of the same federal judicial district. While this is true, applications for an injunction to stay proceedings of a court or officer must be heard and decided by the judge unless he refers the application or any specified issue arising thereon to the referee to ascertain and

3 A. B. R. 746, 99 Fed. 920, citing *Ex parte Christy*, 3 How. 292, 11 L. ed. 451; *Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 83, 173; *Moran v. Sturges*, 154 U. S. 256, 269, 270, 274, 38 L. ed. 981; *In re Bruss-Ritter*, 90 Fed. 651, 1 N. B. N. 39; *Lea v. Geo. M. West Co.*, 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237; *In re Smith*, 92 Fed. 135, 1 N. B. N. 356, 2 A. B. R. 9; *In re Kenney*, 1 N. B. N. 401, 2 A. B. R. 494, 95 Fed. 427, s. c. 2 N. B. N. 141, 3 A. B. R. 353, 97 Fed. 557, 558; *In re Clark*, 9 Blachf. 372, Fed. Cas. No. 2801; *Watson v. Bk.*, 2 Hughes, 200, Fed. Cas. No. 17279; *In re Whipple*, 6 Biss. 516, Fed. Cas. No. 17512; *In re Merchants' Ins. Co.*, 3 Biss. 162, Fed. Cas. No. 9441; *In re Miller*, 6 Biss. 30, Fed. Cas. No. 9551; *In re Kimball*, 1 N. B. N. 515, 97 Fed. 29, 3 A. B. R. 161; *In re Seebold*, 105 Fed. 910, 5 A. B. R. 358.

5—*In re Smith*, 8 A. B. R. 55, 113 Fed. 993; *Beach v. Macon Grocery Co.*, 116 Fed. 143, 8 A. B. R. 751; *In re Gutman & Wenk*, 114 Fed. 1009, 8 A. B. R. 252; *Dietzsch v. Huidekoper*, 103 U. S. (13 Otto) 494, 26 L. ed. 497; *Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 83; *Garner v. Second Nat. Bk. of Providence*, 87 Fed. 833; *James v. Central Trust Co.*, 98 Fed. 489; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

6—*In re Gutman & Wenk*, 114 Fed. 1009, 8 A. B. R. 252.

7—*Southern L. & T. Co. v. Benbow*, 1 N. B. N. 499, 96 Fed. 514, 3 A. B. R. 9.

8—*Samson v. Burton*, 4 N. B. R. 1, 5 Ben. 343, Fed. Cas. No. 12285.

9—*People v. Sheriff of Kings Co.*, 206 Fed. 566, 31 A. B. R. 84.

report the facts, in which case the referee also has like power with the court to stay suits in the state courts.<sup>10</sup>

It is held that when it is sought to stay a suit pending in a state court, it is the duty of the referee, when the matter is before him and he has jurisdiction, to inquire into the nature of the cause of action and determine whether the plaintiff in the state court is proceeding upon a claim which he asserts bona fide is not dischargeable; but, if the referee comes to the conclusion that such claim is not merely colorable, but is bona fide, he has no jurisdiction of the merits of the suit, but must remand the parties to the state court, and permit that court to pass upon the merits of the contention as to whether it is barred by the discharge in bankruptcy.<sup>11</sup>

#### § 1042. Stay compulsory—Voluntary and involuntary proceedings.

It should be observed that the first three subdivisions of section 11 of the act deal with suits pending when the petition is filed, that subdivision "a" makes the stay of all suits founded on dischargeable claims and pending when the petition is filed compulsory until an adjudication is made or the petition is dismissed; and leaves the further stay only to the court to determine, and also that though the phrase is "petition against him," voluntary proceedings are included.<sup>12</sup>

A creditor may, however, bring an action against the bankrupt upon a provable claim after his adjudication, no application for a discharge having been made. As said in a recent case, "If a suit antedate the adjudication, section 63a(5) allows it to be prosecuted to judgment; and reasons may readily exist to make even a post-dated suit desirable, e. g., to avoid the possible bar of the statute of limitations, or to liquidate the claim, or to fix a secondary liability on another person."<sup>13</sup>

10—In re Mussey, 2 N. B. N. R. 113, 99 Fed. 71, 3 A. B. R. 592; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; In re Sabine, 1 N. B. N. 45, 1 A. B. R. 315; In re Northrop, 1 A. B. R. 427; In re Huddleston, 1 N. B. N. 214, 1 A. B. R. 572; In re Bolinger, 1 N. B. N. 254; In re Rogers, 1 A. B. R. 541, 1 N. B. N. 211. And see In re Roger Brown & Co., 196 Fed. 758, 28 A. B. R. 336; contra,

In re Siebert, 133 Fed. 781, 13 A. B. R. 348. See, also, *ante*, § 333.

11—In re Lawrence, 163 Fed. 131, 20 A. B. R. 698.

12—Sec. 1, Act of 1898; In re Geister, 2 N. B. N. R. 297, 97 Fed. 322, 3 A. B. R. 228.

13—Chase v. Farmers' & Merchants' Nat. Bank of Baltimore, 202 Fed. 904, 30 A. B. R. 200.

### § 1043. Bankruptcy proceedings are in rem.

The estate is regarded as in custodia legis from the filing of the petition, and the bankruptcy court will not thereafter permit any interference with its possession even though it be by an officer of a state court acting under its process.<sup>14</sup> The assertion of any right against or to participate in the res so in custodia legis must be sought in the court in whose custody it is. An attempt to assert such right elsewhere would be a contempt. All persons interested in the res are regarded as parties to the bankruptcy proceedings, including not only the bankrupt and trustee but all the creditors, including lienors. Hence the district court has full jurisdiction over the liens and mortgages upon the bankrupt's property and may inquire into their validity and extent and grant the same relief as could the state courts but for the bankruptcy, without regard to the consent of the lienor.<sup>15</sup> Property in its possession cannot be interfered with by a sheriff under a writ of replevin issued out of a state court, and such proceeding will be stayed;<sup>16</sup> nor can a suit be maintained in a state court by one claiming to be owner to determine title and enjoin the officers of the bankruptcy court from proceeding;<sup>17</sup> nor to restrain a trustee from paying out to creditors a fund in his hands, pending the determination of a suit to establish a lien on such fund; but application must be made to the court of bankruptcy;<sup>18</sup> nor to prevent a trustee from collecting a note payable to the bankrupt;<sup>19</sup> nor will a state court interfere by injunction with a party applying for the benefit of the bankruptcy law;<sup>20</sup> nor by an injunction restraining the collection of

14—*Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; *Corbett v. Riddle*, 209 Fed. 811, 31 A. B. R. 330; *In re Rogers v. Stefani*, 156 Fed. 267, 19 A. B. R. 566; *In re Chambers*, 2 N. B. N. R. 388, 98 Fed. 865, 3 A. B. R. 537; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867; *Ex parte Johnson*, 167 U. S. 120, 42 L. ed. 103; *Jordan v. Taylor*, 98 Fed. 643; *Keegan v. King*, 96 Fed. 758, 3 A. B. R. 79; *Chapin v. James*, 11 R. I. 87; *In re Tune*, 115 Fed. 906, 8 A. B. R. 285.

Property title to which is vested in the trustee cannot be attached. *French v. White*, 78 Vt. 89, 22 R. A. (N. S.) 804, 18 A. B. R. 905.

15—*Carter v. Hobbs*, 1 N. B. N. 191, 92 Fed. 594, 1 A. B. R. 215.

16—*Crosby v. Spear*, 98 Me. 542, 11 A. B. R. 613; *In re Russell*, 101 Fed. 248, 3 A. B. R. 658; *In re Schloerb*, 2 N. B. N. R. 234, 3 A. B. R. 224, 97 Fed. 326; *In re Gutwillig*, 1 N. B. N. 19; *In re Agins*, 1 N. B. N. 180.

17—*Keegan v. King*, 96 Fed. 758, 3 A. B. R. 79.

18—*Chatt. Nat. Bank v. Rome Iron Co.*, 99 Fed. 82, 3 A. B. R. 582.

19—*Southern v. Fisher*, 16 N. B. R. 414.

20—*Fillingim v. Thornton*, 12 N. B. R. 92.



taxes, prevent a federal court proceeding to judgment in an action of which it has jurisdiction, nor from enforcing its judgment by mandamus to compel the levy and collecting of taxes to pay it.<sup>21</sup>

In order to preserve the property and protect the rights of all the creditors, a court of bankruptcy in which the bankruptcy proceedings are pending has the unquestionable jurisdiction and power to enjoin any disposition thereof which would be in violation of the spirit, intent and purpose of the act<sup>22</sup> and may fine and imprison any of said creditors for attempting to interfere without leave through proceedings in the state court.<sup>23</sup>

#### § 1044. State courts not to administer bankrupt's estate.

The jurisdiction of a state court does not extend to the administration of a bankrupt's estate,<sup>24</sup> so that an attempt on its part to collect and distribute the assets of an insolvent is in contravention of the bankruptcy law, although the law under which the state court proceeds does not provide for or purport to discharge the debtor from his liabilities.<sup>25</sup> When the right of the state court is to be questioned, it can only be done by the intervention of the trustee.<sup>26</sup>

In order that the state court may have proper notice of the bankruptcy proceedings, the bankrupt, who is defendant in such court, should file there a proper pleading setting up such proceedings.<sup>27</sup> After it is shown that the defendant has been

21—Clapp v. Otoe County, Neb., 104 Fed. 473.

22—In re Nathan, 1 N. B. N. 326, 563, 92 Fed. 590; In re Calendar, Fed. Cas. No. 2308; In re Camp, Id. 2346; In re Holland, 12 N. B. R. 403, Fed. Cas. No. 6605; In re Smith, Fed. Cas. No. 12993, 12994; In re Francis-Valentine Co., 1 N. B. N. 104, 529, 2 A. B. R. 522, 94 Fed. 793; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Russell, 101 Fed. 248, 3 A. B. R. 658; In re Chambers, 2 N. B. N. R. 388, 98 Fed. 865, 3 A. B. R. 537.

23—In re Winn, 1 N. B. R. 131, Fed. Cas. No. 17876; Markson v. Heaney, 4 N. B. R. 165, Fed. Cas. No. 9098; Irving v. Hughes, 2 N. B. R. 20, Fed. Cas. No.

7076; In re Whipple, 13 N. B. R. 373, 6 Biss. 516, Fed. Cas. No. 17512.

24—Thornhill v. Bank, 3 N. B. R. 110, Fed. Cas. No. 13990; In re Independent Ins. Co., 6 N. B. R. 260 Holmes, 103, Fed. Cas. No. 7011; In re Merchants Ins. Co., 6 N. B. R. 43, 3 Biss. 162, Fed. Cas. No. 9441; Carling v. Seymour Lumber Co., 113 Fed. 483, 8 A. B. R. 29; In re Rogers, 116 Fed. 435, 8 A. B. R. 723.

25—In re Reynolds, 127 Fed. 760, 11 A. B. R. 758; In re Merchants' Ins. Co., *supra*.

26—Valliant v. Childress, 11 N. B. R. 317; see Bear v. Chase, 99 Fed. 920, 3 A. B. R. 746. See In re Federal Biscuit Co., 203 Fed. 37, 29 A. B. R. 393.

27—In re Geister, 2 N. B. N. R. 297, 3 A. B. R. 228, 97 Fed. 322.

adjudged a bankrupt, the court is bound to take judicial notice that all his property is vested in the trustee, and in the case of proceeds of mortgaged property in its possession, not brought there by final process to enforce the mortgage lien, such proceeds must be paid to such trustee and the mortgagee remitted to the bankruptcy court to assert his lien.<sup>28</sup>

### § 1045. Nature and effect of stay.

A restraining order, under section 11, granted *ex parte*, with permission therein to move to vacate at any time, is in the nature of an order to show cause, and the party restrained thereby becomes a party to the proceeding in bankruptcy, even before adjudication, for the purpose of moving to vacate the order;<sup>29</sup> but not to make a motion to declare a preference in his favor in the proceeds of property attached by him in the state court, if he has not filed his claim in the bankruptcy court.<sup>30</sup> Such an order is in its nature temporary only, and should ordinarily be vacated as a matter of course on application of the creditor, after the bankrupt has been discharged.<sup>31</sup>

A stay of a suit pending in a state court is not a dismissal of the suit. It does not defeat the cause of action but merely suspends the proceedings in the state court so long as the injunction remains in force. If, therefore, in the further proceedings in the bankruptcy court, the petition in bankruptcy is dismissed, or if the injunction is dissolved, or if, in the end, the bankruptcy court should determine that the basis of the suit in the state court is a claim against which the discharge in bankruptcy is not a release, then the case pending in the state court may proceed as if it had not been interrupted. If, however, a bankruptcy court holds that the claim is discharged, then the bankrupt may go into the state court and plead his discharge as against the recovery.<sup>32</sup>

### § 1046. Adjudication not per se a stay or injunction.

The bankruptcy court may grant a stay of suits pending against a bankrupt, but in the absence of a restraining order, the

28—*Morris v. Davidson*, 11 N. B. R. 454.

29—*In re Globe Cycle Works*, 1 N. B. N. 421, 2 A. B. R. 447.

30—*In re Ogles*, 1 N. B. N. 400, 2 A. B. R. 514.

31—*In re Rosenthal*, 108 Fed. 368, 5 A. B. R. 799.

32—*New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 21 A. B. R. 474.

adjudication presents no reason why a suit should not be prosecuted.<sup>33</sup>

### § 1047. Class of suits stayed.

### § 1048. — In general.

Any suit interfering with the control of the court of bankruptcy over the bankrupt or his property, or with the due and complete administration of his estate, pursuant to the provisions of the bankrupt law will be stayed.<sup>34</sup>

The granting of a stay after adjudication is always discretionary, but this will not be exercised unless the suit to be stayed is founded upon a claim from which a discharge would be a release.<sup>35</sup>

Section 11a makes a distinction between suits upon claims from which a discharge would be a release and those from which it would not. The logic of this provision is plain. To prosecute to judgment a suit pending against a person at the time

33—*Maas v. Kuhn*, 130 App. Div. (N. Y.) 68, 22 A. B. R. 91; *Friedman v. Zweifler*, 74 Misc. (N. Y.) 448, 27 A. B. R. 412.

34—*In re Nuttall*, 201 Fed. 557, 29 A. B. R. 800; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 25 A. B. R. 282; *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 21 A. B. R. 474; *Mitchell Storebuilding Co. v. Carroll*, 193 Fed. 616, 27 A. B. R. 894; *Virginia Iron, Coal & Coke Co. v. Olcott*, 197 Fed. 730, 28 A. B. R. 321; *Booth v. Nickerson*, 1 N. B. N. 476, 96 Fed. 943, 2 A. B. R. 770; *In re Spencer*, 1 N. B. N. 154; *In re Gutman & Wenk*, 114 Fed. 1009, 8 A. B. R. 252.

35—*In re Hymes Buggy & Implement Co.*, 130 Fed. 977, 12 A. B. R. 477; *In re Alder*, 152 Fed. 422, 18 A. B. R. 240; *In re Katz*, 1 N. B. N. 165, 1 A. B. R. 19; *Reid v. Cross*, 1 N. B. N. 165, 1 A. B. R. 34; *In re Winn*, 1 N. B. R. 131, Fed. Cas. No. 17876; *In re Van Buren*, 19 N. B. R. 149, Fed. Cas. No. 16833; *In re Belden*, 6 N. B. R. 443, 5 Ben. 476, Fed. Cas. No. 1239; *McGehee v. Hentz*, 19 N. B. R. 136,

Fed. Cas. No. 8794; *Penny v. Taylor*, 10 N. B. R. 200, Fed. Cas. No. 10957; *Boyn-ton v. Ball*, 121 U. S. 457, 30 L. ed. 985; *Scott v. Ellery*, 142 U. S. 381, 35 L. ed. 1050; *In re Camelo*, 195 Fed. 632, 28 A. B. R. 353. See *In re Rogers*, 1 N. B. N. 211, 1 A. B. R. 541; see also Chap. XVII; *Mackel v. Rochester*, 135 Fed. 904, 14 A. B. R. 429; *Linstroth Wagon Co. v. Ballew*, 149 Fed. 960, 8 L. R. A. (N. S.) 2104, 18 A. B. R. 23; *In re Cole*, 106 Fed. 837, 5 A. B. R. 780.

Rule that where the question as to whether a discharge would operate as a release, a stay may be granted in the discretion of the court, applied to action in which it was alleged that the bankrupt intending to get property from plaintiffs with which to pay certain relatives, and intending to go into bankruptcy, when he ought to have known he was insolvent, offered to purchase goods and pay for them, but which did not allege that plaintiff made any inquiries as to defendant's financial condition, or that the latter made any misrepresentations. *In re Nuttall*, 201 Fed. 557, 29 A. B. R. 800.

the petition is filed is useless, if it is based upon a claim from which a discharge would be a release, unless necessary to settle disputed questions, establish the plaintiff's right, or, under the direction of the court of bankruptcy, liquidate a provable claim,<sup>36</sup> as under any circumstance each creditor would share equally with the others in the distribution of the estate and his rights would be fully preserved by proving his claim against the estate. If, however, the bankrupt is not discharged, the suit may then be prosecuted to judgment.

The power to stay suits in the state court is given only for the benefit of the bankrupt estate and if the estate has no interest in the suit or action, no stay should be granted.<sup>37</sup>

The character of the action in the state court is to be determined by the pleadings.<sup>38</sup> A stay is not, however, confined to technical debts or fixed liabilities,<sup>39</sup> consequently on a motion for a stay for the purpose of determining if a debt is dischargeable a claim sounding in tort on which a verdict assessing the damages has been rendered, but which is not yet in judgment, will be considered so far liquidated as to come within "judgments in actions."<sup>40</sup>

The bankruptcy court is without jurisdiction to stay a proceeding in rem where the state court has acquired jurisdiction of the res prior to the filing of the bankruptcy petition,<sup>41</sup> and where an action is commenced long prior to bankruptcy proceedings, the bankruptcy court has not jurisdiction to enjoin such action or to order the property turned over to the trustee in bankruptcy.<sup>42</sup>

36—63b, Act of 1898.

37—Rule held inapplicable where action was commenced by attachment within four months of bankruptcy upon a claim provable in bankruptcy and attachment was discharged by a bond given by a surety company, it appearing that an officer of the bankrupt entered into an indemnity agreement with the surety company under which the bankrupt conveyed certain property to the surety company, since the result of the prosecution of the attachment suit in such case would be an indirect appropriation of the property of the estate to the payment of the debt of the plaintiff. *In re Federal Biscuit Co.*, 203 Fed. 37, 29 A. B. R. 393.

38—*In re Adler*, 152 Fed. 422, 18 A. B. R. 240.

39—*In re Hilton*, 3 N. B. N. R. 105, 104 Fed. 981, 4 A. B. R. 774.

40—*In re Sullivan*, 1 N. B. N. 380, 2 A. B. R. 30.

41—*Tennessee Producer Marble Co. v. Grant*, 135 Fed. 322, 14 A. B. R. 288.

Section 11a does not apply to a suit in a state court to enforce an asserted right in rem. Stay of sale of real estate in an action to foreclose a mortgage denied. *In re Wagner*, 206 Fed. 364, 30 A. B. R. 396.

42—*Sample v. Beasley*, 158 Fed. 607, 20 A. B. R. 164; *Pickens v. Dent*, 106 Fed. 653, 5 A. B. R. 644, *aff'd* 9 A. B. R.

The court of bankruptcy cannot enjoin the bankrupt's co-licensee in a liquor license from applying for a renewal, nor require him to join in transferring it to a prospective purchaser, though such license, as far as bankrupt's interest is concerned, passes to the trustee;<sup>43</sup> nor can it enjoin attaching creditors, and a state court receiver appointed at their instance, because they do not become amenable to its jurisdiction by the filing of a petition against the debtor, though they are therein charged with having received an unlawful preference, unless they are made parties and served with process or voluntarily appear;<sup>44</sup> nor, where a creditor undertaking to reach assets, held in an alleged fiduciary capacity, by trustee process in a state court, enters into a stipulation to discontinue such suit which if carried out will avoid the necessity of any injunction, since such questions relate to the discharge and not to the assets or the trustee's right thereto, which is what the court seeks to protect;<sup>45</sup> nor proceedings on appeal taken by the bankrupt before bankruptcy.<sup>46</sup>

A suit by a creditor seeking to enforce his rights under a note containing a waiver of exemptions will not be stayed.<sup>47</sup>

Upon a petition for an injunction to restrain the enforcement of an execution from a state court, the court of bankruptcy is not bound by the finding of the state court that the debt is one not released by the discharge.<sup>48</sup>

### § 1049. — **Alimony.**

As has been said, the claim on which the judgment is founded must be one which is released by a discharge, to authorize the court of bankruptcy to stay further proceedings. Since Congress has by its amendment of February 5, 1903, specifically excepted alimony from the effects of a discharge, the court of bankruptcy will not stay proceedings to enforce payment of the same.

47; *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165, 47 L. ed. 122.

43—In *re Brodbine*, 1 N. B. N. 325, 279, 93 Fed. 643, 2 A. B. R. 53.

44—In *re Ogles*, 1 N. B. N. 326, 93 Fed. 426, 1 A. B. R. 671.

45—In *re Jackson*, 1 N. B. N. 531, 94 Fed. 797, 2 A. B. R. 501.

46—*O'Neil v. Dougherty*, 10 N. B. R. 294; *Flanagan v. Pearson*, 14 N. B. R. 37.

47—*Roden Grocery Co. v. Bacon*, 133 Fed. 515, 13 A. B. R. 251. See *ante*, § 1013.

48—*Knott v. Putnam*, 107 Fed. 907, 6 A. B. R. 80.

### § 1049½. — Suits to administer assignments.

A suit in a state court for the administration of an estate under a general assignment for the benefit of creditors should be stayed by the court of bankruptcy when an adjudication has been made within four months of such assignment, notwithstanding the state court had prior to the filing of the petition secured possession of the corpus of the estate;<sup>49</sup> and service of a copy of the injunction issued by the court of bankruptcy against the assignee is unnecessary, in order to put him in contempt for a violation thereof.<sup>50</sup> A protest by creditors, made in a state court, against further proceedings under a general assignment executed by the debtor before their petition in bankruptcy, does not have the effect of a writ of injunction from the federal court.<sup>51</sup>

### § 1050. — Attachment suits.

An attachment issued by a state court more than four months before the commencement of proceedings in bankruptcy will not be dismissed;<sup>52</sup> but, if issued within that period, it will be dissolved, though judgment has been entered, sale made and proceeds paid to attaching creditor.<sup>53</sup> A suit commenced by attachment within four months of bankruptcy in which the bankrupt gave a bond for the release of the attachment will be stayed prior to adjudication,<sup>54</sup> though after adjudication the suit may be prosecuted to a special judgment for the purpose of fulfilling the conditions of an attachment bond, and so perfecting the creditor's right against the surety on the bond.<sup>55</sup> If a levy be made upon the bankrupt's property upon an attachment granted within four months of the filing of the petition, the sheriff is not required to assume the responsibility of releasing

49—In re Knight, 125 Fed. 35, 11 A. B. R. 1; Lea v. West Co., 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237; In re McKee, 1 A. B. R. 311; In re Solomon, 2 N. B. N. R. 460; In re Gutwillig, 1 N. B. N. 554, 92 Fed. 337, 1 A. B. R. 388.

50—In re Krinsky, 112 Fed. 972, 7 A. B. R. 535.

51—In re Scholtz, 106 Fed. 834, 5 A. B. R. 782.

52—In re Snell, 125 Fed. 154, 11 A. B.

R. 35; Munson v. R. R. Co., 14 N. B. R. 173.

53—Dickerson v. Spaulding, 15 N. B. R. 213.

54—In re Eastern Commission & Importing Co., 129 Fed. 847, 12 A. B. R. 305.

55—In re Maaget, 173 Fed. 232, 23 A. B. R. 14; and see In re Mercedes Import Co., 166 Fed. 427, 21 A. B. R. 590, rev'g 20 A. B. R. 648.

the levy, but the trustee should apply to the court granting the attachment, for an order releasing the same.<sup>56</sup>

Where the bankruptcy court declines to adjudicate the debtor or unreasonably delays its action upon the bankruptcy petition, the state court may proceed to judgment in an attachment suit commenced after the filing of the petition in bankruptcy.<sup>57</sup>

A sale of property in the hands of an assignee for the benefit of creditors seized in attachment proceedings against the bankrupt will not be enjoined where the trustee has not commenced a plenary action to set aside the assignment.<sup>58</sup>

As to validity of attachments after the filing of the petition, see ante, section 864.

### § 1051. — Breach of promise and seduction.

Execution on a judgment for breach of promise and seduction will be stayed.<sup>59</sup>

### § 1052. — Contempt proceedings.

A bankrupt should at all times from his adjudication in bankruptcy until the hearing on his application for discharge be at the disposal of the referee and the court, and any proceeding which may or will result in his arrest and imprisonment during the pendency of bankruptcy proceedings, even though such arrest and imprisonment might be contempt of court and habeas corpus would lie, will be stayed;<sup>60</sup> but this is not so if the bankrupt were summoned to appear and filed a petition in bankruptcy between the time of the service and the date fixed for his exam-

56—Tennant Sons & Co. v. N. J. Oil & Meal Co., 31 A. B. R. 901; Hardt v. Schuylkill Plush & Silk Co., 69 App. Div. (N. Y.) 90, 8 A. B. R. 479.

57—Aeme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262.

58—In re Shinn, 185 Fed. 990, 25 A. B. R. 833.

59—In re Warth, 196 Fed. 571, 28 A. B. R. 41.

60—In re Summers, 1 N. B. N. 60; Wagner v. U. S., 2 N. B. N. R. 1116, 104 Fed. 133, 4 A. B. R. 596; In re Grist, 1 A. B. R. 89; In re Migel, 2 N. B. R.

153, Fed. Cas. No. 9538; In re Patterson, 1 N. B. R. 58, 2 Ben. 155, Fed. Cas. No. 10817; In re Williams, 11 N. B. R. 145, 6 Biss. 233, Fed. Cas. No. 17700; but see In re Graham, 1 N. B. N. 59; In re Baker, 1 N. B. N. 325; contra, In re Koronsky, 170 Fed. 719, 21 A. B. R. 851; In re Hall, 170 Fed. 721, 22 A. B. R. 498.

State court has no jurisdiction to punish a bankrupt for contempt for failing to obey an order to pay costs pending the bankruptcy proceedings. In re Summers, 1 N. B. N. 60.

ination.<sup>61</sup> Contempt proceedings instituted in a state court to enforce a judgment will be stayed if such judgment is a dischargeable debt.<sup>62</sup>

It is held that an application by the bankrupt for relief from a fine for civil contempt imposed by a state court subsequent to the adjudication should be made to that court.<sup>63</sup>

### § 1053. — Conversion.

The liability of an agent for failure to account for the proceeds of sales made by him,<sup>64</sup> as well as the liability of a broker for the conversion of the stock of a customer,<sup>65</sup> or the liability of a pledgor for conversion of goods returned to him by the pledgee,<sup>66</sup> being dischargeable, an action to enforce the same will be stayed. Though the state law provides that exemptions cannot be claimed against a judgment in tort, a suit in the state court alleged to be for damages for fraud and embezzlement while acting as a fiduciary may be stayed until a determination by the bankruptcy court of the right to a discharge, where the defendant claims the debt to be founded upon contract only in which case his exempt property would not be subject to levy in satisfaction of any judgment obtained by the plaintiff.<sup>67</sup>

### § 1054. — Costs.

Execution on a judgment for costs in an action for slander, recovered by defendant will not be stayed.<sup>68</sup>

### § 1055. — Creditors' suits.

It will be observed that two principles underlie the bankrupt act, (1) the bankrupt's discharge from his provable debts and (2) the equitable and ratable distribution of his collectible assets among his creditors. Wherever these principles are involved the district court has exclusive jurisdiction and pending suits in state courts may be stayed until the bankruptcy proceedings

61—Cent. Nat. Bank v. Graham, 1 N. B. N. 59.

62—In re Adler, 144 Fed. 659, 16 A. B. R. 414.

63—People v. Sheriff of Kings Co., 206 Fed. 566, 31 A. B. R. 84.

64—In re Hale, 161 Fed. 387, 20 A. B. R. 633.

65—In re Floyd, Crawford & Co., 15 A. B. R. 277.

66—In re Toklas Bros., 201 Fed. 377, 29 A. B. R. 709.

67—In re Butler-Kyser Mfg. Co., 174 Ala. 237, 27 A. B. R. 419.

68—In re Dowie, 202 Fed. 816, 29 A. B. R. 338.



are closed; but, if the cause of action pending in the state court is not dischargeable in bankruptcy or for some other reason the pending suit does not violate the spirit, intent and purpose of the act, it should not be enjoined. Therefore, since subject to certain stated exceptions prior liens upon the bankrupt's assets are not divested by bankruptcy proceedings, only the residue going to the trustee, a judgment creditor's bill seeking to subject specific assets to the payment of the judgment, filed more than four months before the bankruptcy proceedings, should not be stayed, but the trustee may intervene for the protection of the estate.<sup>69</sup> However, it is held that a creditor's bill brought against the bankrupt in a district other than that in which the bankruptcy proceedings are pending will be dismissed upon the fact of the pendency of such proceedings being brought to the court's attention.<sup>70</sup>

#### § 1056. — Ejectment.

Where a receiver or trustee appointed by the bankruptcy court has taken possession of a building containing bankrupt's stock in trade or property, he cannot be ousted by proceedings in ejectment brought by the landlord in the state court, but such proceeding will be enjoined especially where it appears that the enforcement of judgment therein would seriously interfere with the administration of the estate and cause loss to creditors. In such case the landlord must seek his remedy in the bankruptcy court which, in the exercise of its equitable powers, while giving the fullest recognition to the landlord's legal right, will regulate the time and manner of its exercise so as to cause no unnecessary loss to others<sup>71</sup> and will direct the receiver to surrender the premises at the expiration of such time as may be reasonably necessary for the execution of his trust (unless it is the purpose to assume the lease as an asset), awarding the landlord suitable compensation for such occupation.<sup>72</sup>

69—Blick v. Nimmo, 30 A. B. R. 770; Continental Bank v. Katz, 1 N. B. N. 165, 1 A. B. R. 19; Reid v. Cross, 1 N. B. N. 165, 1 A. B. R. 34; Treadwell v. Hallows, 12 N. B. R. 61; In re Pitts, 19 N. B. R. 63 Fed. Cas. No. 11190; Mason v. Warthen, 14 N. B. R. 346. But see Moore v. Green, 145 Fed. 472, 16 A. B. R. 648.

70—Cruchet v. Red Rover Mining Co., 155 Fed. 486, 18 A. B. R. 814.

71—Deweese v. Reinhard, 165 U. S. 386, 390, 41 L. ed. 757.

72—In re Chambers, 2 N. B. N. R. 388, 98 Fed. 865, 3 A. B. R. 537.

### § 1057. — Proceedings on judgments.

A court of bankruptcy has jurisdiction over a judgment creditor of the bankrupt for the purpose of enjoining him from proceeding in a state court for the enforcement of his judgment against property of the debtor, where the judgment was rendered null or inoperative by the adjudication of the debtor as a bankrupt within four months after its rendition, because all creditors are parties to the proceedings in bankruptcy, and also because the court has power to restrain any person from illegally possessing himself of assets of the estate.<sup>73</sup> The jurisdiction of the court in such case is not affected by the fact that the debt upon which it is based is not a provable claim and will not be affected by the discharge of the bankrupt.<sup>74</sup> Where the proceedings are against the bankrupt and another, it will enjoin them as to the bankrupt but not as to the other judgment debtor;<sup>75</sup> or will enjoin an action to revive a judgment so that it will operate as a lien on real estate;<sup>76</sup> or an action to enforce a lien when the trustee has appeared therein and the stay of execution is asked that parties may apply to the federal court.<sup>77</sup> The bankruptcy court will also restrain a threatened levy by a sheriff to satisfy a judgment against the trustee.<sup>78</sup>

73—In re Lesser, 3 A. B. R. 815, 2 N. B. N. R. 599, 100 Fed. 433, s. c. 99 Fed. 913, 3 A. B. R. 758; In re Kletchka, 1 N. B. N. 160, 92 Fed. 901, 1 A. B. R. 479; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7408; In re Pitts, 9 Fed. 542; Olney v. Tanner, 10 Fed. 101, 113; Becker v. Torrance, 31 N. Y. 631; First Nat. v. Shuler, 153 N. Y. 172; Kitchen v. Lowry, 127 N. Y. 53; In re Spencer, 1 N. B. N. 154; In re Globe Cycle Works, 1 N. B. N. 421, 2 A. B. R. 447; In re Kenney, 1 N. B. N. 401, 2 A. B. R. 494, 95 Fed. 427; Booth v. Nickerson, 1 N. B. N. 476, 96 Fed. 943, 2 A. B. R. 770; In re Francis-Valentine Co., 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522, aff'g 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188; In re Pruschen, 1 N. B. N. 526.

This is contradicted In re Easley, 1 N. B. N. 230, 1 A. B. R. 715, 93 Fed. 419, but as that was decided on the theory that § 67f only applied to involuntary proceedings, which position is now held

to be erroneous, it is of no force. See also Jones v. Leach, 1 N. B. R. 165, Fed. Cas. No. 7475; In re Tift, 19 N. B. R. 201, Fed. Cas. No. 14034; but the rule which obtained under the act of 1867 that an honest execution levied prior to the petition was not void, no longer obtains. Goddard v. Weaver, 6 N. B. R. 440, Fed. Cas. No. 5495; Beattie v. Gardner, 4 N. B. R. 106, Fed. Cas. No. 1195; In re Shuey, 9 N. B. R. 526, Fed. Cas. No. 12821.

An examination in supplementary proceedings may be stayed. In re Burke, 155 Fed. 703, 19 A. B. R. 51.

74—In re Green, 179 Fed. 870, 24 A. B. R. 665.

75—In re DeLong, 1 N. B. N. 26, 1 A. B. R. 66.

76—Bratton v. Anderson, 14 N. B. R. 99.

77—Rowe v. Page, 13 N. B. R. 366.

78—In re Neely, 108 Fed. 371, 5 A. B. R. 826.

Where a state court has acquired jurisdiction by levy of an execution on a judgment prior to the filing of the petition, a court of bankruptcy will not enjoin the sale of property under the execution upon petition of the bankrupt.<sup>79</sup> Neither will it enjoin the enforcement of judgment and execution against the surety on a bail bond taken in a state court suit pending at the date of the adjudication in bankruptcy.<sup>80</sup>

If the judgment was recovered more than four months prior to the filing of the petition in bankruptcy, the creditor may be permitted to enforce his judgment by execution against real property of the bankrupt or an interest therein on which it is a legal lien.<sup>81</sup> In case the suit is stayed the trustee will be subrogated to the rights of such plaintiffs and may continue it for the benefit of all the creditors.<sup>82</sup>

Proceedings upon a judgment against the bankrupt for personal injuries inflicted by a dog owned by his tenant will be stayed, since the judgment is a dischargeable debt.<sup>83</sup>

After the bankrupt's discharge, execution on a judgment upon a debt within the operation of the discharge, will be perpetually stayed,<sup>84</sup> and the enforcement of a judgment against the non-exempt portion of the bankrupt's salary becoming due after his adjudication will be enjoined until the question is determined whether he shall receive a discharge, in which case, however, an order will be made directing the bankrupt's employer to withhold such non-exempt portion of the salary until that question is determined.<sup>85</sup>

The act does not forbid the bringing of a suit against one who has been adjudged a bankrupt or the recovery of a judgment therein. Such suits or proceedings upon judgments therein may be stayed by the bankruptcy court, but the judgment is neither void nor voidable, and the plaintiff may pursue his

79—In re Shoemaker, 112 Fed. 648, 7 A. B. R. 437.

80—In re Franklin, 106 Fed. 666, 5 A. B. R. 284.

81—In re Arden, 188 Fed. 475, 26 A. B. R. 684. But see In re Vastbinder, 132 Fed. 718, 13 A. B. R. 148. But see In re Baughman, 138 Fed. 742, 15 A. B. R. 23.

82—In re Lesser, *supra*; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; Smith v. Meisenhemier, 1 N. B. N. 19; Goodwin

v. Sharkey, 3 N. B. R. 138; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6837; In re McNamara, 2 N. B. N. R. 341.

83—In re Lorde, 144 Fed. 320, 16 A. B. R. 201.

84—Barnes Mfg. Co. v. Norden, 67 N. J. L. 493, 7 A. B. R. 553.

85—In re Van Buren, 164 Fed. 883, 21 A. B. R. 338, s. c. 20 A. B. R. 896.

remedy in the state court against the exempt property of the bankrupt.<sup>86</sup>

The sale of the property of a surety on a forthcoming bond, given by the bankrupt, to satisfy a judgment on the bond will not be restrained.<sup>88</sup>

Effect of bankruptcy upon judgments obtained in actions commenced within the four-month period, see also ante, section 870.

### § 1058. — Proceedings to enforce liens.

A court of bankruptcy has power to stay proceedings in the state court seeking to take away from its trustee either the property itself or to impose a lien upon it,<sup>89</sup> and may stay proceedings to enforce valid liens against the bankrupt's property until the trustee can look into the matter and decide if any benefit can be secured from the encumbered property for the estate; and may stay such proceedings permanently as far as any personal judgment against the bankrupt is concerned.<sup>90</sup>

A suit brought to enforce a lien, the creation of which is charged to have been an act of bankruptcy, may be stayed where the property is still in the possession of the bankrupt<sup>91</sup> and lien holders may be enjoined from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof, though it is not claimed that the liens are fraudulent or preferential, or invalid for any other reason.<sup>92</sup>

A bankruptcy court, notwithstanding bankrupt has received his discharge, will enjoin an officer of a state court and all others from selling bankrupt's property under a decree procured by fraud, and direct its sale by the trustee in bankruptcy free of all liens, transferring to the proceeds of the sale all valid liens on the property.<sup>93</sup>

86—*Snyder v. Guthrie*, 6 Pa. Dist. Ct. Rep. 490, 17 A. B. R. 902.

88—*Terry v. Johnston*, 129 Fed. 354, 12 A. B. R. 17.

89—*In re Bluestone Bros.*, 174 Fed. 53, 23 A. B. R. 264.

90—*Porter v. Cummings*, 1 N. B. N. 520; *In re Ball*, 118 Fed. 672, 9 A. B. R. 276; *McKay v. Funk*, 13 N. B. R. 334; *Markson v. Heaney*, 12 N. B. R.

484; *In re Snedaker*, 3 N. B. R. 155; *In re Migell*, 2 N. B. R. 153, Fed. Cas. No. 9538.

91—*In re Donelly*, 188 Fed. 1001, 26 A. B. R. 304.

92—*In re Dana*, 167 Fed. 529, 21 A. B. R. 683.

93—*Southern L. & T. Co. v. Benbow*, 1 N. B. N. 499, 96 Fed. 514, 3 A. B. R. 9.

Creditors holding an assignment of wages may be enjoined from collecting wages due at the time of the filing of the petition, or becoming due thereafter.<sup>94</sup>

The bankruptcy court will so regulate the time and manner of enforcement of valid liens, as not to cause unnecessary loss to others.<sup>95</sup> Since the stay is purely discretionary with the bankruptcy court, unless it appears that a larger sum would be realized from a sale by the trustee in bankruptcy than under authority of the state court, and the general creditors would be the beneficiaries of this increased price, the proceedings in the state court to foreclose a mortgage or enforce a valid lien should not ordinarily be stayed,<sup>96</sup> but the trustee should be permitted to intervene or otherwise keep himself informed so as to protect the interest of the estate should a surplus be unexpectedly realized.<sup>97</sup> The same is true where the trustee claims that the amounts claimed by the mortgagees are subject to credits and set-offs;<sup>98</sup> nor will proceedings be stayed where the holder of a chattel mortgage took possession of the mortgaged property long prior to the filing of the petition and brought suit to foreclose such mortgage in a state court, that being the only court in which he could bring it;<sup>99</sup> but they will be stayed if such suit is commenced after the filing of the petition and the validity of the mortgage lien or some part of it is involved in the bankruptcy proceedings.<sup>1</sup> A suit to foreclose a valid lien commenced more than four months prior to bankruptcy,<sup>2</sup> or commenced within four months to enforce a lien created before that period,<sup>3</sup> will not be stayed, and the filing of a petition by the defendant in a state court proceeding to foreclose a lien on realty created more than four months before the filing of the petition, does not

94—In re Driggs, 171 Fed. 897, 22 A. B. R. 621; In re Sims, 176 Fed. 792, 23 A. B. R. 899.

95—In re Pollman, 16 A. B. R. 144.

96—In re Sabine, 1 N. B. R. 45, 1 A. B. R. 315; In re Pittelkow, 1 N. B. N. 234, 92 Fed. 901, 1 A. B. R. 472; see In re Kerosene Oil Co., 2 N. B. R. 529; In re Duryea, 17 N. B. R. 495; Augustine v. McFarland, Fed. Cas. No. 648; Eyster v. Gaff, 91 U. S. (1 Otto) 521, 23 L. ed. 403; Orr v. Tribble, 158 Fed. 897, 19 A. B. R. 849.

97—In re Holloway, 1 N. B. N. 264,

1 A. B. R. 659, 93 Fed. 638; In re Tait, 1 N. B. N. 140.

98—In re Porter, 109 Fed. 111, 6 A. B. R. 259.

99—Heath v. Shaffer, 1 N. B. N. 326, 399, 93 Fed. 647, 2 A. B. R. 98.

1—In re San Gabriel Sanatorium Co., 2 N. B. N. R. 827, 102 Fed. 310, 4 A. B. R. 197.

2—In re United Wireless Telegraph Co., 192 Fed. 238, 27 A. B. R. 1.

3—In re Rohrer, 177 Fed. 381, 24 A. B. R. 52.

affect the right of the plaintiff to proceed, unless he prove his demand in the bankruptcy court.<sup>4</sup>

Where the trustee abandons incumbered property, either voluntarily or by order of the court,<sup>5</sup> or takes no steps to redeem such property,<sup>6</sup> the secured creditor may foreclose his lien or mortgage in the state court, after first obtaining leave of the court of bankruptcy;<sup>7</sup> and a decree made and a sale had thereafter are valid and a good title passes.<sup>8</sup>

Though the bankrupt may apply for a stay at any time, it has been held that the trustee's application will be denied and he will be charged with costs where he waited until all the costs except those attending the sale had been incurred in a foreclosure suit.<sup>9</sup>

### § 1059. — Mechanics' liens.

It is abundantly established by the courts of last resort, federal and state, that when the jurisdiction of a state court to enforce the liens of a mechanic or materialman has attached, that jurisdiction will not be divested by proceedings in bankruptcy instituted subsequently thereto.<sup>10</sup> After the adjudication in bankruptcy, proceedings may be taken to enforce the liens<sup>11</sup> thus obtained, though the better practice is to first obtain leave of the bankruptcy court to enforce the same.

### § 1060. — Proceedings to remove official.

A proceeding to remove a city fireman for nonpayment of his debts will be restrained, he having obtained a discharge.<sup>12</sup>

4—*Reed v. Equitable Trust Co.*, 115 Ga. 780, 8 A. B. R. 242.

5—*In re Zehner*, 193 Fed. 787, 27 A. B. R. 536; *Bank v. Bank*, 11 N. B. R. 49.

6—*McKay v. Funk*, 13 N. B. R. 334.

7—*In re Brinkman*, 7 N. B. R. 421, Fed. Cas. No. 1884; *In re Duryea*, 17 N. B. R. 495, Fed. Cas. No. 1196; *In re Kerosene Oil Co.*, 2 N. B. R. 164, 3 Ben. 35, Fed. Cas. No. 7725.

8—*Eyster v. Gaff*, 13 N. B. R. 546, 91 U. S. (1 Otto) 521, 23 L. ed. 403; *Cutter v. Dingee*, 14 N. B. R. 294, 8 Ben. 469, Fed. Cas. No. 3518; *In re Wynne*, 4 N. B. R. 5, Fed. Cas. No. 18117; *Jerome v. McCarter*, 15 N. B. R. 546.

9—*In re Brinkman*, 6 N. B. R. 541, Fed. Cas. No. 1883; *The World Co. v. Brooks*, 3 N. B. R. 146.

10—*Hobbs v. Head & Dowst Co.*, 184 Fed. 409, 26 A. B. R. 63, aff'd 231 U. S. 692, 58 L. ed. 440, 31 A. B. R. 656; *Seibel v. Simeon*, 62 Mo. 255; see also *ante*, § 914.

11—*In re Grissler*, 136 Fed. 754, 13 A. B. R. 508; *In re Emslie*, 2 N. B. N. R. 992, 102 Fed. 291, 4 A. B. R. 126, rev'g 2 N. B. N. R. 324, 98 Fed. 716, 3 A. B. R. 516; *In re Beck Provision Co.*, 2 N. B. N. R. 532; *In re Drolesbaugh*, 2 N. B. N. R. 1079; *Clifton v. Foster*, 3 N. B. R. 162.

12—*In re Hicks*, 133 Fed. 739, 13 A. B. R. 654.

**§ 1061. — Receivership proceedings.**

Where the main purpose of a suit in a state court is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy of the mortgagor.<sup>13</sup> But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy upon pending state insolvency proceedings.<sup>14</sup>

A sale by a receiver appointed by the state court more than a year prior to the filing of the petition in bankruptcy will not be stayed.<sup>15</sup>

A stay should not be granted in an interlocutory proceeding for the appointment of a receiver to take charge of realty claimed by the plaintiff, in which the order was framed to avoid conflict between the state and federal courts as to the final disposition of the realty and the rents and profits which might accrue therefrom in the receiver's hands, further than to enjoin the granting of any money judgment against the defendant;<sup>16</sup> nor where a receiver had, more than four months before the bankruptcy proceedings, secured a judgment setting aside certain transfers by bankrupt as fraudulent, but he should be allowed to administer the property recovered for the benefit of the creditor he represents;<sup>17</sup> nor will a receiver appointed by a state court or attaching creditors be restrained, merely on a prayer in a petition in involuntary bankruptcy, from disposing of the property in his hands.<sup>18</sup>

**§ 1062. — Replevin.**

A replevin suit instituted by a vendor of chattels who rescinds for fraud is not affected by bankruptcy,<sup>19</sup> but where after an

13—*Merry v. Jones*, 119 Ga. 643, 11 A. B. R. 625.

14—*Merry v. Jones*, 119 Ga. 643, 11 A. B. R. 625.

15—*In re Sterlingworth Ry. Supply Co.*, 165 Fed. 267, 21 A. B. R. 342.

16—*Porter v. Cummings*, 1 N. B. N. 520.

17—*In re United Wireless Telegraph Co.*, 192 Fed. 238, 27 A. B. R. 1; *In*

*re Meyers*, 1 N. B. N. 293, 1 A. B. R. 347.

18—*Mather v. Coe*, 1 N. B. N. 554, 92 Fed. 333, 1 A. B. R. 504; *In re Ogles*, 1 N. B. N. 326, 1 A. B. R. 671, 93 Fed. 426, 1 A. B. R. 671.

19—*Linstroth Wagon Co. v. Bollew*, 149 Fed. 960, 8 L. R. A. (N. S.) 1204, 18 A. B. R. 23.

assignment for creditors a vendor of goods alleged to have been fraudulently obtained assigns his claim and the assignee replevies the goods, a miscellaneous seizure being made thereunder prior to the bankruptcy, proceedings under said replevin writ should be enjoined on account of the abuse of the replevin writ and the proper protection of bankrupt's other creditors.<sup>20</sup>

### § 1063. — Action for services.

An action for legal services rendered the bankrupt may be stayed, though it is alleged that the services were obtained through fraud and misrepresentation.<sup>21</sup>

### § 1064. — Stockholder's suit.

A stockholder's suit against the bankrupt, its director and a subsidiary company will not be enjoined where the receivers appointed therein have turned over all the assets of the corporation to the trustee in bankruptcy and there is a legitimate scope for the judgment of the state court.<sup>22</sup>

### § 1065. — Action to compel delivery of stock.

An action against a bankrupt corporation to compel delivery of a certificate of its stock will not be stayed.<sup>23</sup>

### § 1066. — Action by trustee of another estate.

An action against the bankrupt by the trustee of the estate of another bankrupt to recover an alleged preference will be restrained only in so far as it may attempt to seek the recovery of property in the possession of the trustee of the defendant, or to liquidate damages against the defendant's estate.<sup>24</sup>

### § 1067. — Unlawful detainer and distress for rent.

A writ of forcible detainer is not a suit within the meaning of section 11, so that it may be enjoined.<sup>25</sup> However, a sale of goods distrained for rent in arrear has been stayed.<sup>26</sup>

20—In re Gutwillig, 1 N. B. N. 19, 166, 90 Fed. 481.

21—Gleason v. Thaw, 185 Fed. 345, 34 L. R. A. (N. S.) 894, 25 A. B. R. 782, aff'g 180 Fed. 419, 24 A. B. R. 759.

22—In re United Wireless Tel. Co., 196 Fed. 153, 28 A. B. R. 394.

23—In re Clipper Mfg. Co., 179 Fed. 843, 24 A. B. R. 683.

24—In re Tomlinson, 193 Fed. 101, 27 A. B. R. 780.

25—In re Van Da Grift Motor Car Co., 192 Fed. 1015, 27 A. B. R. 474.

26—In re Lines, 133 Fed. 803, 13 A. B. R. 318.



**§ 1068. — Action for wrongful death.**

A claim for unliquidated damages founded in tort, unaccompanied with contractual liability is not provable and therefore not discharged and an action for damages for death by wrongful act will not be stayed.<sup>27</sup>

**§ 1069. Period during which stay may be had.**

Courts of bankruptcy will only interfere by summary order to avoid a conflict of jurisdiction between the officers of state courts and those of the court of bankruptcy when such conflict clearly appears to exist,<sup>28</sup> and their jurisdiction extends to the enjoining of state court bankruptcy proceedings, though the latter were commenced prior to the filing of the petition in the bankrupt court.<sup>29</sup> They will not restrain proceedings against a bankrupt in a state court unless bankruptcy proceedings are pending;<sup>30</sup> but as soon as they are commenced, the court of bankruptcy acquires sole jurisdiction and may enjoin further proceedings in other courts.<sup>31</sup>

The stay must be until after an "adjudication,"<sup>32</sup> which means the date of the entry of a decree that the defendant in a bankruptcy proceeding is a bankrupt, or, if such decree is appealed from, then the date when such a decree is finally confirmed.<sup>33</sup>

**§ 1070. Application for stay.****§ 1071. — Form of application and notice thereof.**

The application for stay when addressed to a court of bankruptcy, should be in the form of a motion or petition, setting forth the necessary facts as to the nature of the debt and grounds for relief, supported by affidavits. When the application is made to a state court direct, in addition to the foregoing, the better rule requires that it should be accompanied by a certified

27—In re New York Tunnel Co., 159 Fed. 688, 20 A. B. R. 25.

28—In re Davidson, 2 N. B. R. 49, 2 Ben. 506, Fed. Cas. No. 3598.

29—In re Citizens' Sav. Bk., 9 N. B. R. 152, Fed. Cas. No. 2735.

30—In re Richardson, 2 N. B. R. 74, 2 Ben. 517, Fed. Cas. No. 11774.

31—In re Vogel, 2 N. B. R. 138, Fed.

Cas. No. 16983; Zahm v. Fry, 9 N. B. R. 546, Fed. Cas. No. 18198; In re Ulrich, 8 N. B. R. 15, Fed. Cas. No. 14328; In re Wallace, 2 N. B. R. 52, Fed. Cas. No. 17094; Keenan v. Shannon, 9 N. B. R. 441, Fed. Cas. No. 7640.

32—See 11a Act of 1898.

33—Section 1 (2), Act of 1898.

copy of the petition in bankruptcy, and a copy of the motion should be served upon the party to be restrained. As a foundation for enforcing the order by proceedings in contempt, a copy should be served upon the parties against whom it runs. It has been held, however, that a stay directed to the debtor and "all other persons" if served upon the persons to be restrained, need not contain their names.<sup>34</sup> Injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, may be allowed and issued without notice,<sup>35</sup> but the bankruptcy court has no jurisdiction to issue an *ex parte* injunction, without notice or service of process, attempting to restrain a creditor from suing in a state outside of its jurisdiction.<sup>36</sup>

An injunction will not be granted where the grounds are alleged in the petition on information and belief merely, and the petition is not accompanied by affidavits sustaining the allegations.<sup>37</sup> If the papers disclose that the moving creditor lives at a distance, the application may be made by his attorney in his behalf. It should be apparent from the application papers, in which court the bankruptcy proceedings are pending.<sup>38</sup>

### § 1072. — Where made.

The application for stay may be made either to the state court direct or to the court of bankruptcy. If the purpose is to enjoin the action of some person not a party to the proceeding, he should be named in the petition and brought in by subpoena. Thus a bankrupt who is defendant in a state court should file in that court proper pleadings setting up the pendency of the bankruptcy proceedings and ask for a stay; as otherwise the court is without proper notice upon which to act; and it is also the necessary procedure because the creditors, who are plaintiffs in the suit to be stayed, being parties to such action are within the state court's jurisdiction, and will be bound accordingly, while they are not subject to the jurisdiction of the bankruptcy court, and otherwise have not had proper notice of the petition, nor in any way been brought within its actual jurisdiction.<sup>39</sup>

34—*In re Lady Bryan Min. Co.*, 6 N. B. R. 252, Fed. Cas. No. 7980.

35—See *In re Muller*, 3 N. B. R. 86; *Deady*, 513, Fed. Cas. No. 9912.

36—*Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262.

37—*In re Bloss*, 4 N. B. R. 37, Fed. Cas. No. 1562.

38—*In re Goldberg*, 117 Fed. 692, 9 A. B. R. 156.

39—*In re Geister*, 2 N. B. R. 297, 3 A. B. R. 228, 97 Fed. 322; *Hill v. Harding*, 107 U. S. (17 Otto) 631, 27

**§ 1073. Form of restraining order.**

When issued on a creditor's petition, the restraining order should conform to the language of the statute.<sup>40</sup>

**§ 1074. Ground of stay must be pleaded.**

The mere filing of a petition in bankruptcy does not divest the jurisdiction of a state court over an action;<sup>41</sup> but to affect such jurisdiction over pending actions, the adjudication or discharge must be pleaded,<sup>42</sup> which may be done at any time after the institution of bankruptcy proceedings, but, if the bankrupt does neither, a judgment rendered against him is lawful and valid.<sup>43</sup> A plaintiff will be estopped from proceeding further with his suit without an order authorizing it where the pendency of the bankruptcy proceedings has been suggested and not denied,<sup>44</sup> or where an affidavit of defense, setting up the adjudication, is filed and the time has not arrived for discharge.<sup>45</sup> If a discharge would be a bar to a suit restrained, the creditor's remedy is to oppose the discharge in the manner provided by the act.<sup>46</sup>

**§ 1075. Review of stay.**

The power of the bankruptcy court to stay pending suits after adjudication being purely discretionary, the appellate court will not interfere with its action in the matter on petition for review unless such discretion has been abused.<sup>47</sup> An order staying an action of replevin brought in a state court against a trustee in bankruptcy by a third party, is not a final decision or appealable, but may be brought before the appellate court for review by petition invoking the supervisory power of that court.<sup>48</sup>

L. ed. 493; *Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985; *Eyster v. Gaff*, 91 U. S. (1 Otto) 521, 23 L. ed. 403.

40—*In re Keiler*, 18 N. B. R. 10, Fed. Cas. No. 7647.

41—*In re Irving*, 14 N. B. R. 289, 8 Ben. 463, Fed. Cas. No. 7073; *Murphy v. Young*, 18 N. B. R. 505.

42—*Hellman v. Goldstone*, 161 Fed. 913, 20 A. B. R. 539; *In re Wesson*, 88 Fed. 855; *Serra e Hijo v. Hoffman*, 17 N. B. R. 124; *Haber v. Klauberg*, 15 N. B. R. 377; *Holden v. Sherwood*, 18 N. B. R. 111; *Bracken v. Johnson*, 15 N. B. R. 106, 4 Dill. 518, Fed. Cas. No. 1761; *Revere Copper Co. v. Dimock*, 19 N. B. R. 372; *Smith v. Engle*, 14 N.

B. R. 489; *Hubert v. Horter*, 14 N. B. R. 430.

43—*Cutter v. Evans*, 11 N. B. R. 448; *Flanagan v. Pearson*, 14 N. B. R. 37.

44—*Penny v. Taylor*, 10 N. B. R. 200, Fed. Cas. No. 10957.

45—*Frostman v. Hicks*, 15 N. B. R. 41.

46—*In re Archenbrow*, 11 N. B. R. 149, Fed. Cas. No. 504.

47—*New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 21 A. B. R. 474; *In re Lesser*, 2 N. B. R. 599, 100 Fed. 433, 3 A. B. R. 815.

48—Section 24, b, Act of 1898; *In re Russell*, 101 Fed. 248, 3 A. B. R. 658.

### § 1076. Dissolution of stay.

The general rule is that if the discharge is granted, it may be pleaded in the state court, but if refused, the injunction will be dissolved. If the judgment creditor seeks to have it dismissed, it must be by motion to dissolve and not by petition to dismiss;<sup>49</sup> and, if it restrained a suit pending adjudication, it is dissolved by a discharge in bankruptcy.<sup>50</sup> The fact that the bankrupt had given bond in an action to release an attachment prior to his bankruptcy, and the effect of his discharge on the liabilities of the sureties under the state statute, are matters which cannot be taken into consideration by the court on a motion to vacate the stay, but both parties should be remitted to their rights in the court where the action is pending.<sup>51</sup>

A stay may be vacated so as to permit the creditors to move the state court to punish the bankrupt for contempt committed prior to his adjudication.<sup>52</sup>

### § 1077. Permission to sue.

The bankruptcy court may restrain a secured creditor from enforcing his claim in any other court or it may authorize him to litigate his claim in a state court;<sup>53</sup> and this will be done as the justice of the case seems to require.<sup>54</sup> It may be permitted for the purpose of ascertaining the amount due, which amount shall be proved in the bankruptcy proceedings, but execution will be stayed;<sup>55</sup> or to liquidate a claim in composition cases;<sup>56</sup> or to prevent the running of the statute of limitations against it, or to make service, or that testimony may not be lost, in the case of a debt from which a discharge would not be a release;<sup>57</sup> or it may permit a sale under execution, where an injunction has

49—In re Mallory, 6 N. B. R. 22, 1 Sawy. 88, Fed. Cas. No. 8991.

50—In re Thomas, 3 N. B. R. 7, Fed. Cas. No. 13890.

51—In re Rosenthal, 108 Fed. 368, 5 A. B. R. 799.

52—In re Sims, 176 Fed. 645, 23 A. B. R. 899.

53—Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594; In re Brinkman, 7 N. B. R. 421, Fed. Cas. No. 1884; In re Duryea, 17 N. B. R. 495, Fed. Cas. No. 1196; In re Kerosene Oil Co., 2 N. B. R. 164, 3 Ben. 35, Fed. Cas. No.

7725; In re Holloway, 1 N. B. N. 264, 1 A. B. R. 659, 93 Fed. 638; In re Johnson, 127 Fed. 618, 11 A. B. R. 544.

54—In re Pittelkow, 1 N. B. R. 234, 1 A. B. R. 472, 92 Fed. 901.

55—Allen v. Montgomery, 10 N. B. R. 503; In re Rundle, 2 N. B. R. 49, Fed. Cas. No. 12138; In re Winn, 1 N. B. R. 132, Fed. Cas. No. 17876.

56—Ex p. Trafton, 14 N. B. R. 507, 2 Lowell, 505, Fed. Cas. No. 14133; In re Wehe, 1 N. B. N. 267.

57—In re Ghirardelli, 4 N. B. R. 42.

been granted restraining such sale, and the judgment creditors are bound by the order of the bankruptcy court and cannot recover the proceeds of the sale from the sheriff;<sup>58</sup> or a sale upon executions issued, on judgment notes dated six months previous and payable one day after date, no resistance being made to the judgments, the liens to remain on the proceeds which were held subject to the court's order;<sup>59</sup> or to bring an action of detainee;<sup>60</sup> but leave is not necessary to enable a landlord to sue a receiver in bankruptcy for fixtures removed from the premises during such receiver's occupancy.<sup>61</sup>

Where the bankrupt has given a bond conditioned for the payment of any judgment that might be recovered, the court in which the action is pending should be left free to take whatever steps it thinks equitable in the premises in accordance with its own practice.<sup>62</sup>

### § 1078. Revival of right to sue after bankruptcy.

Where an application for a discharge is pending no suit can be brought against the bankrupt until the application is disposed of, but after a discharge has been refused a creditor may institute and prosecute any action against the bankrupt as to after-acquired property which he might have instituted and prosecuted but for the adjudication in bankruptcy.<sup>63</sup>

Since the stay of a suit does not operate as a dismissal but merely suspends the proceedings, if the time within which a discharge may be granted expires without action, it has been held that the right of action revives, since bankruptcy proceedings are not terminated without a discharge.<sup>64</sup>

### § 1079. Defense of suits pending against bankrupt.

### § 1080. — Right and duty of trustee to defend.

A trustee may be ordered by the court to enter his appearance and defend any pending suit against a bankrupt.<sup>65</sup>

58—O'Brien v. Weld, 15 N. B. R. 405;  
Samson v. Clark & Burton, 6 N. B. R.  
403; Markson v. Heanty, 4 N. B. R. 165,  
1 Dill. 497, Fed. Cas. No. 9098.

59—In re Meyer, 1 N. B. N. 99.

60—In re Huddleston, 1 N. B. N. 214,  
1 A. B. R. 572.

61—In re Kelly Dry Goods Co., 102  
Fed. 747, 4 A. B. R. 528.

62—In re Mercedes Import Co., 166  
Fed. 427, 21 A. B. R. 590, rev'g 20 A.  
B. R. 648.

63—In re Barton's Estate, 144 Fed.  
540, 16 A. B. R. 569.

64—Wood v. Hazen, 15 N. B. R. 491.

65—Section 11 (b) of Act of 1898.

Suits begun against a bankrupt before the latter's bankruptcy may be defended or stayed, in the discretion of the court of bankruptcy, according as the interests of the bankrupt's creditors shall require;<sup>66</sup> and, if it is decided to defend them, the trustee is entitled to be made a party, and the bankrupt will be enjoined from interfering.<sup>67</sup> The trustee cannot be compelled to defend a pending suit against his own wishes and those of a majority of the creditors, where the chances of success are slight and the advantage, if any, to be gained is small,<sup>68</sup> and if he be appointed during the pendency of an action, the other defendants cannot make him a party defendant. If they have a claim for contribution against the bankrupt, their remedy is by intervention in the bankruptcy proceedings.<sup>69</sup>

### § 1081. — Necessary parties.

A bankrupt before bankruptcy, or his trustee thereafter, is a necessary party to suits concerning the bankrupt's property, as a suit in equity or an action at law,<sup>70</sup> though it is held that the trustee is not entitled to intervene in a suit begun by attachment to recover possession of the property of the bankrupt.<sup>71</sup> He is a proper though not a necessary party to a suit by the vendor of a chattel electing to rescind the sale for fraud, and to recover the property, where the property has been seized prior to the institution of the bankruptcy proceeding under a writ of sequestration.<sup>72</sup>

### § 1082. — Manner of becoming a party.

The trustee in bankruptcy should appear in the state court and, by pleading the adjudication of bankruptcy and his appointment as trustee, lay the foundation for the protection of his

66—*In re St. Albans Foundry Co.*, 2 N. B. N. R. 1093, 4 A. B. R. 594.

67—*Samson v. Burton*, 4 N. B. R. 1, Fed. Cas. No. 12285; *In re O'Connor*, 1 N. B. N. 132, 1 A. B. R. 381.

68—*Kessler v. Herklotz*, 132 App. Div. (N. Y.) 278, 22 A. B. R. 257; *In re Kearney Bros.*, 184 Fed. 190, 25 A. B. R. 757; *Serra e Hijo v. Hoffman*, 17 N. B. R. 124; and see *Victor Talking Mach. Co. v. Hawthorne etc. Co.*, 173 Fed. 617, 23 A. B. R. 234.

69—*Oliver v. Cunningham*, 19 N. B. R. 400, Fed. Cas. No. 10493.

70—*Walker v. Seigel*, 12 N. B. R. 394, Fed. Cas. No. 17085; *In re Carow*, 4 N. B. R. 178, Fed. Cas. No. 2426.

71—*Jewett Bros. v. Huffman*, 14 N. D. 110, 13 A. B. R. 738.

72—*Linstorth Wagon Co. v. Ballew*, 149 Fed. 960, 8 L. R. A. (N. S.) 1204, 18 A. B. R. 23.

rights. If he questions the jurisdiction of the state court, he can plead thereto in proper form. If the case be one that is removable under the provisions of the judiciary act, he can make the requisite showing. If he does not dispute the validity of any lien asserted by the plaintiff, he can set up his title and rights as trustee, subject to the admitted lien, and the state court will protect his rights in the premises. If he wishes to contest the validity or extent of the adverse claim asserted by the plaintiff in the state court, he can do so by answer or cross-bill.<sup>73</sup> It has been held that upon an application to intervene by a trustee, the statutes of the state and the rules and practice of its courts, govern as to whether or not the intervention will be permitted, the same as when any other party invokes such court's jurisdiction.<sup>74</sup>

### § 1083. — Effect of trustee's appearance.

The trustee will take up the case in the same situation which existed at the time of his intervention.<sup>75</sup> If he appears and pleads in an action he waives want of notice before the bringing of the suit<sup>76</sup> and, should he be substituted for the bankrupt, he is bound by the judgment and the bankruptcy court will not interfere to prevent its execution, nor will he be allowed to attack such judgment any more than any other party.<sup>77</sup>

### § 1084. — What trustee may plead.

A trustee may plead any defense which the bankrupt may plead, unless it is purely personal to the bankrupt, as is a plea of discharge,<sup>78</sup> which must be pleaded affirmatively in a proceeding by scire facias to revive a judgment as well as in an original suit.<sup>79</sup> Where, with the consent of the referee, a scire facias is issued after the adjudication and before the appointment of a trustee upon a mortgage given by the bankrupt, he will not be allowed to have such judgment opened, the testimony

73—Heath v. Shaffer, 1 N. B. N. 399, 93 Fed. 647, 2 A. B. R. 98.

74—Bank of Commerce v. Elliott, 109 Wis. 648, 6 A. B. R. 409.

75—Malloch v. Adams, 199 Fed. 542, 28 A. B. R. 916.

76—Rowe v. Page, 13 N. B. R. 366.

77—In re Van Alstine, 100 Fed. 929,

2 N. B. N. R. 642, 4 A. B. R. 42; In re Skinner, 3 A. B. R. 163, 97 Fed. 190.

78—Serra e Hijo v. Hoffman, 17 N. B. R. 124; In re Kitzinger, 19 N. B. R. 152, Fed. Cas. No. 7861.

79—In re Wesson, 88 Fed. 855, 4 Hughes 522.

showing the claim to be valid and his bankruptcy not relieving the defendant of the duty of filing an affidavit of defense; but the court will permit the trustee, after his appointment, to set up any meritorious defense and open the judgment for that purpose, except when it appears that the claim is valid and permission had been given to enforce it, in which latter case, however, the trustee should be permitted to intervene to be heard on any question arising upon subsequent proceedings.<sup>80</sup>

### § 1085. — Costs.

The trustee will incur no liability for costs accrued before his intervention, nor will he become personally liable for any costs whatever, so long as he acts in good faith.<sup>81</sup>

Where a non-resident trustee seeks to intervene in an admiralty suit pending in another district, the court in its discretion may determine whether he should give security for costs.<sup>82</sup>

### § 1086. — Removal of cause.

A trustee in bankruptcy cannot remove a cause, commenced in a state court against the bankrupt, to a federal court unless the necessary jurisdictional facts appear.<sup>83</sup>

### § 1087. Judgments after bankruptcy.

A judgment in an action against the bankrupt begun after the adjudication in bankruptcy does not bind the trustee not a party, even though the action was commenced before his appointment.<sup>84</sup>

### § 1088. Intervention of trustee as plaintiff in creditors' suit.

The trustee is not entitled to be substituted as plaintiff in a creditor's bill commenced by a creditor holding valid security, who has filed his claim unless such creditor has surrendered or waived his security.<sup>85</sup> Nor is he entitled to be substituted as

80—*Neiman v. Shoolbraid*, 2 N. B. N. R. 668.

81—*Malloch v. Adams*, 199 Fed. 542, 28 A. B. R. 916.

82—*Malloch v. Adams*, 199 Fed. 542, 28 A. B. R. 916.

83—*Swofford v. Cornucopia Mines of*

*Oregon*, 140 Fed. 957, 15 A. B. R. 564; and see *Heath v. Shaffer*, 1 N. B. N. 399, 93 Fed. 647, 2 A. B. R. 98.

84—*Hull v. Burr*, 61 Fla. 625, 26 A. B. R. 897.

85—*Kohout v. Chaloupka*, 69 Neb. 677, 11 A. B. R. 265.



plaintiff in a creditor's suit commenced more than four months prior to the bankruptcy proceedings.<sup>86</sup>

Whether the action was commenced more than four months prior to bankruptcy, must be determined as of the date of the service of the summons. If the action is to set aside an alleged fraudulent transfer of a partnership the service of summons upon one partner more than four months prior to the bankruptcy of the partnership will prevent its trustee from being substituted against the objection of the creditor.<sup>87</sup>

### § 1089. Intervention of receiver.

The receiver in bankruptcy is not bound to intervene in a suit against the bankrupt,<sup>88</sup> and an agreement by him providing for the appearance of the bankrupt in a proceeding in the state court is not an agreement that he himself should also appear.<sup>89</sup>

Where the receiver intervenes, in a cause, commenced in a state court against the bankrupt he cannot have the same removed to a federal court, unless the jurisdictional facts appear.<sup>90</sup>

### § 1090. Trustee to prosecute suits.

Section 11c of the act provides that a trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him,<sup>91</sup> so that the bankrupt cannot maintain a suit in his own name in

86—Ninth Nat. Bank v. Moses, 39 Misc. (N. Y.) 664, 11 A. B. R. 772; but see Blick v. Nimmo, 30 A. B. R. 770.

87—Ninth Nat. Bank v. Moses, 39 Misc. (N. Y.) 664, 11 A. B. R. 772.

88—American Graphophone Co. v. Leeds & Catlin Co., 174 Fed. 158, 23 A. B. R. 337.

89—In re Muncie Pulp Co., 151 Fed. 732, 18 A. B. R. 56.

90—Swofford v. Cornucopia Mines of Oregon, 140 Fed. 957, 15 A. B. R. 564.

91—Analogous provision in Act of 1867. "Section 14. . . . he may sue for and recover the said estate debts and effects, and may prosecute and defend all suits at law or in equity, pend-

ing at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt. . . .

"Section 16. . . . If, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with the like effect as if it had been originally commenced by him."

relation to property not exempt, after the appointment of a trustee.<sup>92</sup>

This provision applies only to suits in which the estate of the bankrupt has an interest, or which may be prosecuted by the trustee for the benefit of all the creditors, and not one that is personal to the bankrupt.<sup>93</sup>

An action by a bankrupt in a state court does not abate upon the adjudication in bankruptcy or the appointment of a trustee, and in the absence of an application by the trustee for substitution it may be prosecuted by the bankrupt.<sup>94</sup> The trustee may be made a party by supplemental bill to a suit in equity as the bankruptcy of the plaintiff merely makes such suit defective;<sup>95</sup> and it is not necessary to allege his representative character;<sup>96</sup> or be substituted on motion as appellant in a case before the U. S. supreme court on appeal where the appellant becomes bankrupt after appeal.<sup>97</sup> The trustee will not be substituted as plaintiff in a suit which has already proceeded to judgment against the bankrupt, where it appears that the only object of the motion for such substitution is to relieve the plaintiff of the judgment against him for costs.<sup>98</sup>

The trustee is not bound to intervene in a suit commenced by the bankrupt.<sup>99</sup>

Upon the question as to the effect of the trustee's refusal to prosecute a suit in which he is entitled to enter his appearance, the decisions are conflicting, it being held on the one hand that such suit must be dismissed,<sup>1</sup> and on the other that it might be prosecuted in the name of the bankrupt;<sup>2</sup> or more properly by

92—*Pickens v. Dent*, 106 Fed. 653, 5 A. B. R. 644, *aff'd* 187 U. S. 177, 47 L. ed. 128, 9 A. B. R. 47.

93—*In re Haensell*, 1 A. B. R. 286, 91 Fed. 355, 1 N. B. R. 340 (note); *Towle v. Davenport*, 16 N. B. R. 478; *Noonan v. Orton*, 12 N. B. R. 405; *In re Franks*, 2 A. B. R. 634, 95 Fed. 635; *In re Price*, 92 Fed. 987, 1 A. B. R. 606.

Trustee cannot be substituted as plaintiff in action for libel. *Epstein v. Handwerker*, 29 Okla. 337, 26 A. B. R. 712.

Bankrupt may maintain an action for personal injury sustained prior to the adjudication. *Sibley v. Nason*, 196 Mass. 125, 22 A. B. R. 712.

94—*Colgan v. Finek*, 30 A. B. R. 535.

95—*Bank v. Fowler*, 12 N. B. R. 289.

96—*Dambmann v. White*, 12 N. B. R. 438.

97—*Herndon v. Howard*, 4 N. B. R. 61, 9 Wall. 664, 19 L. ed. 809.

98—*Murtaugh v. Sullivan*, 74 Misc. (N. Y.) 517, 27 A. B. R. 431.

99—*Kessler v. Herklotz*, 132 App. Div. (N. Y.) 278, 22 A. B. R. 257; *Griffin v. Mut. Life Ins. Co.*, 119 Ga. 664, 11 A. B. R. 622.

1—*Towle v. Davenport*, 16 N. B. R. 478.

2—*Johnson v. Collier*, 222 U. S. 538, 56 L. ed. 306, 27 A. B. R. 454; *Griffin*

creditors.<sup>3</sup> There seems to be no good reason why the bankrupt should not be permitted to prosecute such suit where the trustee declines to do so.

While the approval of the court appointing the trustee is essential to the right of the trustee to prosecute a suit commenced by the bankrupt,<sup>4</sup> yet, such approval having been given, a court in another district has jurisdiction to permit the trustee to intervene in a suit pending in such court.<sup>5</sup> The trustee cannot, by intervening in a suit pending in a state, oust that court of jurisdiction.<sup>6</sup>

The trustee, when substituted as plaintiff in a suit commenced by the bankrupt, prior to his adjudication occupies no different position than the bankrupt would have occupied, and the trustee's rights as to the sale of the subject matter of the suit are those which the bankrupt would have possessed but for his adjudication.<sup>7</sup>

Where the trustee brings suit he may be required under state laws to give security for costs,<sup>8</sup> but where he is not authorized to intervene in an action commenced by the bankrupt and does nothing to create an estoppel to assert that he has taken no part in the prosecution thereof, he cannot be held liable for costs although he acquiesced in the continuance of the action.<sup>9</sup>

### § 1091. Actions by bankrupt after bankruptcy.

The bankrupt has title to all choses in action until the appointment and qualification of a trustee, and may institute suit thereon even after the filing of the petition.<sup>10</sup> In such case, upon

v. Mut. Life Ins. Co., 119 Ga. 664, 11 A. B. R. 622; *Hahlo v. Cole*, 112 App. Div. (N. Y.) 636, 15 A. B. R. 591; *Noonan v. Orton*, 12 N. B. R. 405.

3—*In re Groves*, 2 N. B. N. R. 466.

The surety upon an attachment bond given in an action commenced by the bankrupt may be substituted as plaintiff in the action where the trustee declines to continue the suit. *Blue Grass Canning Co. v. Steward*, 175 Fed. 537, 23 A. B. R. 726.

4—*Malloch v. Adams*, 199 Fed. 542, 28 A. B. R. 916; *Hahlo v. Cole*, 112 App. Div. (N. Y.) 636, 15 A. B. R. 591; *Kessler v. Herklotz*, 132 App. Div. (N. Y.) 278, 22 A. B. R. 257.

5—*Malloch v. Adams*, 199 Fed. 542, 28 A. B. R. 916.

6—*Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 A. B. R. 781.

7—*Earl v. Jacobs*, 142 N. W. 1079, 31 A. B. R. 90.

8—*Joseph v. Raff*, 78 N. Y. S. 310, 9 A. B. R. 227; *Joseph v. Makley*, 73 App. Div. (N. Y.) 156, 8 A. B. R. 18.

9—*Kessler v. Herklotz*, 22 A. B. R. 257.

10—*Johnson v. Collier*, 222 U. S. 538, 56 L. ed. 306, 27 A. B. R. 454; *Rand v. Iowa Cent. Ry. Co.*, 186 N. Y. 58, 16 A. B. R. 692, rev'g 96 App. Div. (N. Y.) 413, 12 A. B. R. 164.

the appointment of a trustee, the latter may intervene in the suit commenced by the bankrupt, or he may institute a new suit, in which case the one commenced by the bankrupt will abate.<sup>11</sup> If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, the bankrupt may continue the litigation.

The right of a bankrupt who, prior to the bankruptcy proceedings, had brought suit, reverts to him to commence such action after the trustees in bankruptcy have been discharged upon completion of their trusts, if they have done nothing in the original suit in the interval.<sup>12</sup>

11—See *ante*, § 1091.

12—Connor v. Southern Exp. Co., 9  
N. B. R. 138.

## CHAPTER XXVI

### SUITS BY AND AGAINST TRUSTEES

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## § 1092. Jurisdiction under section 23a.

### § 1093. — In general.

Section 23a deals with the jurisdiction of the United States circuit courts, and provides that "such courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy," (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity on the other), "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between

the bankrupts and such adverse claimants.”<sup>1</sup> This clause must be construed in connection with section 291 of the Judicial Code of 1911 which abolishes the circuit court and provides that “Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit court, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.” As a result, the district courts now exercise, in addition to the jurisdiction conferred in bankruptcy proceedings proper, jurisdiction in all matters, including that conferred by section 23a, formerly exercised by the circuit courts.

Section 23a, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the circuit court (now the district court) solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy. While the evident purpose of the act of 1898 was that the circuit court should be prohibited from entertaining jurisdiction of suits between the trustee and an adverse claimant to property which the creditors claimed belonged to the estate of the bankrupt, unless the bankrupt himself could have resorted to the circuit court for the assertion of such claim against the adverse claimant,<sup>2</sup> the act of February 5,

1—Analogous provision of Act of 1867. “Section 2. . . . That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending . . . shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.”

For provisions with reference to proceedings in law and equity, see G. O. XXXVII. The jurisdiction of circuit courts of the United States is set forth in U. S. Rev. Stat., §§ 629-657, as amended by the Act of August 13, 1888 (1 Supp. U. S. Rev. Stat. 611), and the acts specified in note 1 thereto.

2—*Bardes v. Bank*, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; *Hicks v. Knost*, 2 N. B. N. R. 734, 178 U. S. 541, 44 L. ed. 1183; *Mitchell v. McClure*, 2 N. B. N. R. 735, 178 U. S. 539, 44 L. ed. 1182; *Norcross v. Nathan*, 2 N. B. N. R. 405, 99 Fed.

1903, amending subdivision "b" of this section, expressly excepts actions to recover property, the transfer of which is voidable as a preference, or where such transfer was with the intent and purpose to hinder, delay or defraud his creditors. In view of the fact that the supreme court in the case of *Bardes v. Bank* held that subdivision "b" applied to the circuit as well as the district courts, it seems that the circuit courts also had jurisdiction over suits of this class by the trustee.

Where the amount in controversy exceeds \$3,000 and there is diverse citizenship the district courts have jurisdiction irrespective of the bankruptcy law.<sup>3</sup> The mere fact that the plaintiff is a trustee in bankruptcy does not, however, confer jurisdiction under section 23a.<sup>4</sup> Nor is the citizenship of the trustee material to the jurisdiction of a suit by him to recover assets in the hands of adverse claimants,<sup>5</sup> though in a controversy not within section 23 jurisdiction may be based on diversity of citizenship between the trustee and the defendant.<sup>6</sup>

A claimant could not be constrained to go into the district court to litigate his claim against the trustee, by the refusal of the circuit court to act, where such court had jurisdiction by reason of the amount involved and the citizenship of the parties.<sup>7</sup>

### § 1094. — Comparison of Acts of 1898 and 1867.

Under the act of 1898, four things were necessary to give the circuit court jurisdiction: (1) it must be a controversy at law or in equity, as distinguished from proceedings in bankruptcy; (2) between a trustee in bankruptcy as such and adverse claimants; (3) concerning property acquired or claimed by such trustee; and (4) such as the bankrupt himself might have brought in such circuit court if the bankruptcy proceedings had not intervened. By the amendatory act of 1903, this jurisdiction was doubtless extended to include the recovery of property under sections 60b and 67e. No general rule can be given for determining what is a controversy at law or in equity as distin-

14, 3 A. B. R. 613; *In re Murphy*, 2 N. B. N. R. 393, 3 A. B. R. 499.

3—See Act March 3, 1887, 25 Stat. L. 433.

4—*McEldowney v. Card*, 193 Fed. 475, 27 A. B. R. 937.

5—*Bush v. Elliott*, 202 U. S. 477, 50 L. ed. 1114, 15 A. B. R. 656.

6—*McEldowney v. Card*, 193 Fed. 475, 27 A. B. R. 937.

7—*McFarlan Carriage Co. v. Solanas*, 106 Fed. 145, 5 A. B. R. 442.



guished from proceedings in bankruptcy, but considerable assistance may be had by consulting the cases,<sup>8</sup> in which the United States supreme court has considered the question. They held that adverse claimants were those who claimed some property, or right of property, as a fund, or lien upon a fund, or a right to proceeds of a judgment, which it was also claimed had belonged to the bankrupt and been transferred to his assignee in bankruptcy. Under the act of 1867 the circuit courts had concurrent jurisdiction with the district courts of all suits at law or in equity between the assignee in bankruptcy and persons claiming an adverse interest touching any property or rights of property of said bankrupt transferable to or vested in such assignee. This practically coincides with the first three requisites under the present law and hence the decisions under the act of 1867 may be consulted to ascertain what are "suits at law or in equity" and "persons claiming an adverse interest touching property or rights of property of bankrupt transferable to assignee" as they will aid in determining what is "a controversy at law or in equity, as distinguished from proceedings in bankruptcy" and an "adverse claimant"; but, owing to the restriction imposed by the present act as to such controversies being such as the bankrupt might himself have been a party to if there had been no bankruptcy proceedings, few of those cases would now be within the jurisdiction of the district court by virtue of section 23a.<sup>9</sup>

8—*Morgan v. Thornhill*, 11 Wall. 65, 75, 20 L. ed. 60; *Marshall v. Knox*, 16 Wall. 551, 21 L. ed. 481; *Smith v. Mason*, 14 Wall. 419, 430, 20 L. ed. 748; *Burbank v. Bigelow*, 92 U. S. (2 Otto) 179, 23 L. ed. 542; *Bush v. Elliott*, 202 U. S. 477, 50 L. ed. 1114, 15 A. B. R. 656.

9—Consult *Payson v. Dietz*, 8 N. B. R. 193; 2 Dill. 504; Fed. Cas. No. 10861, an action by assignee to recover a debt in a state other than that where bankruptcy proceedings were pending: (In re Ballou, 3 N. B. R. 177; 4 Ben. 135; Fed. Cas. No. 818) to procure delivery of property suffered to be taken through legal proceedings with intent to prefer; (*Lewis v. U. S.*, 14 N. B. R. 64, 92 U. S. (2 Otto) 618, 23 L. ed. 513) a bill filed by the U. S. to obtain payment out

of a trust fund, held by a trustee appointed in bankruptcy proceedings; (*Sutherland v. L. S. S. C. R. & I. Co.*, 9 N. B. R. 298; Fed. Cas. No. 13643) a bill by an assignee against lien holders to ascertain the amount due and sell the property free from incumbrances; (*Hudson v. Schwab*, 18 N. B. R. 480; Fed. Cas. No. 6835) restraining an action of trover against a marshal for taking possession, under a warrant in bankruptcy, of certain goods claimed by the plaintiff in trover; (*Markson v. Heaney*, 4 N. B. R. 165; Fed. Cas. No. 9098) refusing to enjoin a foreclosure suit by a district court in another state; (*N. C. v. University*, 5 N. B. R. 466; 1 Hughes, 133, Fed. Cas. No. 10318) holding that it had no jurisdiction of a suit by a state against

Section 23a did not confer jurisdiction upon the circuit court in all controversies in which trustees as such were involved, but only in controversies between the trustee and adverse claimants, involving, generally speaking, the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee formed a part of the estate in bankruptcy.<sup>10</sup> It has no application where the controversy is not one with an adverse claimant as to right or title of the trustee to any property claimed by the trustee to have passed to him as part of the estate, but involves transactions between the defendant and the trustee himself, subsequent to the adjudication.<sup>11</sup>

Thus in a suit by the trustee in trover to recover the value of property belonging to the estate that has been converted by the defendant to his own use after the adjudication in bankruptcy, jurisdiction of the circuit court could not have been maintained under either clause of section 23, but, as in any other case in which the requisite amount was involved, might have been based upon diversity of citizenship between the trustee personally and the defendant.<sup>12</sup>

So, the circuit court had no jurisdiction under section 23a over a suit which involved merely the right of the trustee to recover for an alleged breach of contract for the purchase of property from the trustee.<sup>13</sup>

### § 1095. Jurisdiction under section 23b.

#### § 1096. — In general.

Section 23b of the act provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant,<sup>14</sup> except suits for the recovery of property under section

its citizens, neither the construction nor act of congress conferring such jurisdiction.

10—McElowney v. Card, 193 Fed. 475, 27 A. B. R. 937.

11—McElowney v. Card, 193 Fed. 475, 27 A. B. R. 937; Spencer v. Duplau

Silk Co., 191 U. S. 526, 48 L. ed. 287, 11 A. B. R. 563.

12—McElowney v. Card, 193 Fed. 475, 27 A. B. R. 937.

13—McElowney v. Card, 193 Fed. 475, 27 A. B. R. 937.

14—The amendment to this subdivision

60, subdivision b; and section 67, subdivision e; and section 70, subdivision e.”<sup>15</sup>

The original act of 1898 limited the jurisdiction of the federal courts to those cases which the bankrupt might have brought in the absence of a bankruptcy law, unless by consent of the proposed defendant. This necessarily excluded that large class of cases for the recovery of property in the hands of a third person or stranger to the bankruptcy proceedings under a conveyance either voidable as a preference or null and void as given with intent to hinder, delay or defraud creditors. The court of bankruptcy had no power by summary order to direct the surrender of such property to the trustee in bankruptcy nor to restrain its disposition, but resort must have been to the forum having jurisdiction over the person or property of the proposed defendant.<sup>16</sup> To meet the difficulty incident to such restricted jurisdiction, congress, by the act of February 5, 1903, specifically gave the federal courts jurisdiction over actions (1) to recover property transferred to a creditor who had reasonable cause to believe that a preference was thereby intended, as defined by the law, (2) to recover property conveyed, transferred, assigned or incumbered within four months of the filing of the petition in bankruptcy, with the intent and purpose on the bankrupt's part to hinder, delay and defraud

by the act of 1903 consists in the addition of the words at the end thereof, “except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.”

15—The amendment of 1910 adds the words, “and section 70, subdivision e.”

16—*Bardes v. Hawarden Bk.*, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; *Hicks v. Konst*, 178 U. S. 541, 44 L. ed. 1183, 4 A. B. R. 178, 2 N. B. N. R. 734; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 2 N. B. N. R. 735, 4 A. B. R. 177; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845, 5 A. B. R. 727; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413, 7 A. B. R. 421; *Pickens v. Roy*, 187 U. S. 177, 47 L. ed. 128; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620; *Bryan v.*

*Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 5 A. B. R. 623; *In re Baird*, 116 Fed. 765, 8 A. B. R. 649; *In re Silberhorn*, 105 Fed. 899, 5 A. B. R. 568; *In re Gerdes*, 102 Fed. 318, 4 A. B. R. 346; *In re San Gabriel Sanatorium Co.*, 111 Fed. 892, 7 A. B. R. 206; *In re Sheinbaum*, 107 Fed. 247, 5 A. B. R. 187; *In re Tollett*, 105 Fed. 425, 5 A. B. R. 305; *Woodruff v. Cheeves et al.*, 105 Fed. 601, 5 A. B. R. 296; *Real Estate Trust Co. v. Thompson*, 112 Fed. 945, 7 A. B. R. 520; *In re Ward*, 104 Fed. 985, 5 A. B. R. 215; *In re Michie*, 116 Fed. 749, 8 A. B. R. 734, 116 Fed. 749; *In re Steed*, 107 Fed. 682, 6 A. B. R. 73; *Bush v. Elliott*, 202 U. S. 477, 50 L. ed. 1114, 15 A. B. R. 656; *Haffenberg v. Chicago Title & Trust Co.*, 192 Fed. 874, 27 A. B. R. 708.

his creditors; and by the act of June 25, 1910, gave the federal courts jurisdiction over actions (3) to recover property transferred by the bankrupt, in fraud of creditors, prior to the four-month period.<sup>17</sup>

Suits of the character indicated could, under the amendments, be brought in either the circuit or district courts, since, under the decision of the supreme court, subdivision "b" of this section applied equally to both courts, but by an amendment to sections "60b," "67e," and "70e" it is provided that for the purpose of the recovery of such property "any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Accordingly the court of bankruptcy is now given jurisdiction over actions for the recovery of such property, irrespective of the amount involved, which is concurrent with the state courts, while the circuit court, during its existence, had a like jurisdiction where the amount exceeded \$2,000.

While the bankruptcy court has jurisdiction over a suit by the trustee to recover the value of property obtained by the bankrupt through fraud and transferred to the defendant with knowledge of the facts,<sup>18</sup> it has no jurisdiction of a suit to recover damages suffered by reason of the conspiracy between the bankrupt and defendant,<sup>19</sup> nor of a suit by the trustee to recover property in the hands of a third person, alleged to belong to the bankrupt, where there is no allegation of fraud, but merely a wrongful refusal to surrender.<sup>20</sup> The fact that a complaint contains an allegation of conversion does not, however, oust the court of jurisdiction.<sup>21</sup> Trust property belonging to the bankrupt, but never in his possession or transferred by him cannot be reached by a suit in bankruptcy court.<sup>22</sup>

The referee is not a court of bankruptcy within the meaning of section 23b, and while he has jurisdiction to set aside a fraudu-

17—*Newcomb v. Biwer*, 199 Fed. 529, 29 A. B. R. 15.

18—*In re McMahon*, 147 Fed. 684, 17 A. B. R. 530; *Lynch v. Bronson*, 160 Fed. 139, 20 A. B. R. 409.

19—*Lynch v. Bronson*, 177 Fed. 605, 24 A. B. R. 513.

20—*Harris v. First Nat. Bank*, 216 U. S. 382, 54 L. ed. 528, 23 A. B. R. 632.

21—*Grant v. Nat. Bank of Auburn*, 197 Fed. 581, 28 A. B. R. 712.

22—Rule applied where property was alleged to be held by wife under secret trust. *Newcomb v. Biwer*, 199 Fed. 529, 29 A. B. R. 15.

lent transfer where the res is in the possession of the court, he has no such jurisdiction where the property is not in the possession of the court.<sup>23</sup>

Section 23b relates only to suits by trustees and has no restrictive effect on the right of receivers (or trustees for that matter) to maintain or defend their possession of the goods seized as those of the bankrupt.<sup>24</sup> It should be observed that the amendments extending jurisdiction to the federal courts, apply only to suits by the trustee, and not by an adverse claimant, as to whom the jurisdiction remains the same as prior to the amendment. Adverse claimants may, in a proper case, sue or be sued in the federal courts when the bankrupt might have sued there on the same cause of action; that is, in case of diversity of citizenship and requisite amount involved. But when the adverse claimants come voluntarily into the court of bankruptcy and claim property in the possession of the trustee, wherever situated, or assert a lien thereon and seek to have it established and enforced or protected, the bankruptcy court has jurisdiction under subdivision 7 of section 2 of the act.<sup>25</sup>

### § 1097. — Different constructions.

This subdivision as it appeared in the act of 1898 was the source of much difference of opinion, but the amendments of 1903 and 1910, largely remove the difficulty. Three constructions were put upon the limitations imposed by this subdivision as it appeared before the amendments. The first confined its operation to the circuit courts;<sup>26</sup> the second gave to the state courts exclusive jurisdiction, except with the defendant's consent, of all suits concerning the bankrupt's estate brought by the trustee against any person other than the bankrupt;<sup>27</sup> and the third gave the state courts exclusive jurisdiction, except with the defendant's consent, of suits concerning the bankrupt's estate, if they were such as bankrupt himself could have brought had he not been a bankrupt, but reserved to the district court, at least concurrent jurisdiction, of those suits by the trustee

23—In re Overholzer, 23 A. B. R. 10.

24—In re Lipman, 201 Fed. 169, 29 A. B. R. 139.

25—In re MacDougall, 175 Fed. 400, 23 A. B. R. 762.

26—In re Sievers, 1 N. B. N. 168, 1 A. B. R. 117, 91 Fed. 366.

27—Perkins v. McCauley, 98 Fed. 286, 3 A. B. R. 445; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 511, 513, 44 L. ed. 864.

against a stranger, which the bankrupt himself could not have brought; as suits to set aside an assignment or restrain the sale of property held under an attachment avoided by the bankrupt act, or, as otherwise expressed, suits original with the trustee and not derived by him through those whom he represents.<sup>28</sup>

**§ 1098. — Supreme court decision—Bardes v. Bank.**

Notwithstanding the amendment which entirely changed the jurisdiction, the decision of the supreme court of the United States in the leading case of *Bardes v. Hawarden Bank*, is interesting as a treatment of the jurisdiction of the court, although the amendment of 1903 is designed to meet the obstacles presented by that decision. In that case the court stated that subdivision "b" applied to the district courts and to the circuit courts of the United States, as well as to the state courts, this appearing not only by the words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States circuit courts," in the first and third clauses. It positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the constitution, laws or treaties of the United States, he could have brought suit in the circuit court of the United States.<sup>29</sup> He could not have sued in a district court of the United States,<sup>30</sup> because such a court had no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of congress, a district court had the powers of a circuit court, or was given jurisdiction of a particular class of civil suits. Congress appeared by this subdivision to have clearly mani-

28—In *re Hammond*, 98 Fed. 845, 3 A. B. R. 466.

29—Act of Aug. 13, 1888, chap. 866, 25 Stat. L. 434.

30—Changed by the amendment of Feb. 5, 1903.

fested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, "unless by consent of the proposed defendant."<sup>31</sup> In other words the question of the forum in these cases was to be determined as if there were no bankruptcy.

Since congress has no constitutional power to impose upon the state courts the duty of administering any part of the bankrupt act, and since the preformance of such duty by such state courts is purely discretionary and they might at any time wholly renounce it or impose onerous conditions,<sup>32</sup> the question is suggested whether the foregoing decision of the supreme court<sup>33</sup> did not leave all actions by the trustees against adverse parties where the cause of action arose under the bankrupt act at the discretion of the state courts; and is not that fact a strong argument in favor of the construction contended for by those who held this subdivision applied if the cause of action existed in the bankrupt—that is, independently of the bankrupt law—but not if the cause of action was created in the trustee by the law, and are not both constructions equally consonant with the language of the subdivision? This view is strongly supported by a recent well considered opinion of a state supreme court which holds that bills by the trustee to reach property transferred in fraud of the bankruptcy act should not be brought in a state court.<sup>34</sup>

31—*Bardes v. Hawarden Bk.*, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 2 N. B. N. R. 734, 4 A. B. R. 178; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 2 N. B. N. R. 735, 4 A. B. R. 177; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845, 5 A. B. R. 727; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 511, 513, 44 L. ed. 864.

32—*In re Woodbury*, 2 N. B. N. R. 284, 98 Fed. 833, 837, 3 A. B. R. 457, citing *Sherman v. Bingham*, Fed. Cas. No. 12762; *Goodall v. Tuttle*, 7 N. B. R.

193, 3 Biss. 219, Fed. Cas. No. 5533; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330, 4 L. ed. 304; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715; see also *Clafin v. Houseman*, 93 U. S. (3 Otto) 130, 23 L. ed. 833; *Alleman v. Booth*, 21 How. 506, 16 L. ed. 169; *The Moses Taylor*, 4 Wall. 411, 429, 18 L. ed. 397; *Ex p. McNiel*, 13 Wall. 236, 20 L. ed. 624.

33—*Bardes v. Hawarden Bk.*, *supra*.

34—*Lyon v. Clark*, 2 N. B. N. R. 792, *rev'd* 2 N. B. N. R. 1100, in deference to *Bardes v. Bk.*, 178 U. S. 524, 44 L. ed.

### § 1099. — Decisions prior to *Bardes v. Bank* favoring jurisdiction.

Prior to the decision of the United States supreme court in *Bardes v. Bank*, the circuit courts of appeals in four circuits in passing upon various phases of the question, sustained in general the jurisdiction of courts of bankruptcy over controversies arising in bankruptcy proceedings,<sup>35</sup> in addition to which there are a number of similar decisions by other federal courts.<sup>36</sup> A careful examination of the decisions, however, shows much purely obiter discussion of this subdivision. In those cases of general assignments and legal proceedings rendered void by the bankruptcy proceedings, the persons claiming under them did not claim adversely, but by right of the bankrupt's title and their right ceased. The appointment of the receiver is specifically provided for,<sup>37</sup> and the enjoining of the others was a necessary incident to the execution of other powers of the court. In none is there a plenary suit by the trustee.

It was held, however, that actions by trustees in bankruptcy to set aside fraudulent conveyances as void at common law, or as preferences, or because in fraud of the bankruptcy law, could be brought in the district courts as courts of bankruptcy,<sup>38</sup> because, as said in one, this subdivision did not impair

1175, 2 N. B. N. R. 725, 4 A. B. R. 163; see also *Mueller v. Bruss*, 112 Wis. 406, 8 A. B. R. 442.

35—*In re Gutwillig*, 1 N. B. N. 554, 1 A. B. R. 388, 92 Fed. 337; s. c. below 1 N. B. N. 40, 1 A. B. R. 78, 90 Fed. 475; *Carriage Co. v. Stengel*, 1 N. B. N. 387, 95 Fed. 637, 2 A. B. R. 383; *Davis v. Bohle*, 1 N. B. N. 216, 92 Fed. 325, 1 A. B. R. 412, s. c. below, *In re Sievers*, 1 N. B. N. 168, 91 Fed. 366, 1 A. B. R. 117; *In re Francis-Valentine Co.*, 1 N. B. N. 529, 2 A. B. R. 522, 94 Fed. 793.

36—*In re Smith*, 1 N. B. N. 356, 2 A. B. R. 9, 92 Fed. 135; *In re Hammond*, 98 Fed. 845, 3 A. B. R. 466; *In re Fellerath*, 1 N. B. N. 292, 2 A. B. R. 40, 95 Fed. 121; *In re Kenney*, 1 N. B. N. 401, 2 A. B. R. 494, 95 Fed. 427; *In re Kletchka*, 1 N. B. N. 160, 92 Fed. 901, 1 A. B. R. 479; *In re Richards*, 1 N. B. N. 487, 2 A. B. R. 506, 94 Fed. 633; *In re Pittelkow*, 1 N. B. N. 234; 1 A. B.

R. 472, 92 Fed. 901; *In re Booth*, 1 N. B. N. 476, 2 A. B. R. 770, 96 Fed. 943; *In re Nathan*, 1 N. B. N. 563, 92 Fed. 590; *In re Kimball*, 1 N. B. N. 515, 3 A. B. R. 161, 97 Fed. 29; *Keegan v. King*, 96 Fed. 758, 3 A. B. R. 79; *Trust Co. v. Benbow*, 1 N. B. N. 499, 3 A. B. R. 9, 96 Fed. 514; *In re Fixen*, 1 N. B. N. 568, 2 A. B. R. 822, 96 Fed. 748.

37—Section 2 (3) Act of 1898.

38—*Robinson v. White*, 1 N. B. N. 513, 3 A. B. R. 88, 97 Fed. 33; *In re Newberry*, 2 N. B. N. R. 56, 3 A. B. R. 158, 97 Fed. 24; *Carter v. Hobbs*, 1 N. B. N. 529, 2 A. B. R. 224, 94 Fed. 108; s. c. 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594; *Norcross v. Nathan*, 2 N. B. N. R. 405, 99 Fed. 14, 3 A. B. R. 613; *Cox v. Wall*, 2 N. B. N. R. 572, 99 Fed. 546, 3 A. B. R. 664; *Trust Co. v. Marx*, 98 Fed. 456; *In re Woodbury*, 2 N. B. N. R. 284, 98 Fed. 83, 3 A. B. R. 457; *Lehman v. Crosby*, 99 Fed. 542, 2 N. B. N. R. 451,



the jurisdiction conferred by section 2, of the law, but related to the venue; and, in another, only when the cause of action existed originally in the bankrupt. For the last reason, an action by the trustee to subject to creditors an income held in trust for the bankrupt was cognizable in the bankruptcy court;<sup>39</sup> so also an action to quiet title,<sup>40</sup> or to determine the rights of the joint holders of a liquor license;<sup>41</sup> or an action to enforce the liability of stockholders for the unpaid subscription to stock upon call by trustee;<sup>42</sup> or by consent to set aside a bill of sale made within four months.<sup>43</sup>

### § 1100. — Early decisions against jurisdiction.

In a number of cases the opposite view was taken, and the district court sitting in bankruptcy was held not to have jurisdiction to determine by summary proceeding a controversy between the trustee as such and an adverse claimant concerning property claimed by the trustee, or by a trustee against a creditor of the bankrupt to recover money alleged to have been paid as a preference or in fraud of other creditors,<sup>44</sup> or the like, nor did it make any difference whether the cause of action existed in the bankrupt prior to the bankruptcy, or had arisen since.<sup>45</sup>

3 A. B. R. 662; *In re Kerski Bros.*, 1 N. B. N. 328, 2 A. B. R. 79; *Shutts v. Bk.*, 2 N. B. N. R. 320, 98 Fed. 705, 3 A. B. R. 492; *Hall v. Kincell*, 102 Fed. 301, 2 N. B. N. R. 745; *In re San Gabriel Sanatorium Co.*, 102 Fed. 310, 2 N. B. N. R. 827, 4 A. B. R. 197.

39—*In re Baudouine*, 1 N. B. N. 506, 3 A. B. R. 55, 96 Fed. 536, 101 Fed. 574, 3 A. B. R. 651.

40—*Murray v. Beal*, 2 N. B. N. R. 164, 3 A. B. R. 284, 97 Fed. 567.

41—*In re Brodbine*, 1 N. B. N. 279, 326, 93 Fed. 643, 2 A. B. R. 53.

42—*In re Crystal Spring Bottling Co.*, 96 Fed. 945, 3 A. B. R. 194.

43—*In re Connolly*, 2 N. B. N. R. 564, 100 Fed. 620, 3 A. B. R. 842, *aff'g* 2 N. B. N. R. 557.

44—*Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 2 N. B. N. R. 734, s. c. 1 N. B. N. 336, 2 A. B. R. 153, 94 Fed. 625; *Camp v. Zellars*, 94 Fed. 799.

45—*Perkins v. McCauley*, 98 Fed. 286; *Burnett v. Mercantile Co.*, 1 N. B. N. 138, 91 Fed. 365, 1 A. B. R. 229; *In re Abraham*, 1 N. B. N. 281, 2 A. B. R. 266, 93 Fed. 767; *contra*, *Pepperdine v. Headley*, 98 Fed. 863, 3 A. B. R. 455; *Lehman v. Crosby*, 2 N. B. N. R. 451, 99 Fed. 542, 3 A. B. R. 662.

See generally, as opposed to the jurisdiction of the Federal Courts in suits of this character unless diverse citizenship existed: *In re Abraham*, 93 Fed. 767, 2 A. B. R. 266; *Heath v. Shaffer*, 1 N. B. N. 399; 2 A. B. R. 98, 93 Fed. 647; *comp.* *In re Brooks*, 1 N. B. N. 240, 2 A. B. R. 531, 91 Fed. 508; *In re Buntrock Clothing Co.*, 1 N. B. N. 291, 1 A. B. R. 454, 92 Fed. 886; *In re Franks*, 95 Fed. 635, 2 A. B. R. 634; *In re Blair*, 102 Fed. 987, 2 N. B. N. R. 890, 4 A. B. R. 220; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182; 2 N. B. N. R. 735, s. c. 1 N. B. N. 138, 1 A. B. R. 53, 91 Fed. 621; s. c.

### § 1101. — Consent of defendant.

Section 23b, as amended, makes the consent of a defendant a condition precedent to the jurisdiction of the bankruptcy court in all actions by the trustee, except those for the recovery of property under sections 60b, 67e and 70e.

Prior to the amendment of 1910, the court of bankruptcy had no jurisdiction of controversies between the trustee and adverse claimants arising under section 70e, "unless by the consent of the defendant." For it was only such controversies arising under sections 60b and 67e that were, by the amendment, excepted from such consent.<sup>46</sup>

Under the amendment of 1910, the jurisdiction of the bankruptcy court is enlarged to entertain suits under section 70e without the consent of the defendant.<sup>47</sup>

A petition to redeem the property of a bankrupt from a lien is in the nature of an application to the bankruptcy court for its permission to pay off an uncontroverted lien, and cannot be entertained without the consent of the claimant.<sup>48</sup>

The bankruptcy court may acquire by consent of all parties in interest, jurisdiction to determine a controversy between the trustee and an adverse claimant concerning an indebtedness of a third party.<sup>49</sup>

A person will be deemed to have consented who, when proceedings are instituted against him by the trustee, appears and maintains the bona fides of the transfer,<sup>50</sup> or answers on the merits and proceeds to a hearing without objection.<sup>51</sup> In such

under title *In re Scott*, 1 N. B. N. 327; *In re Goldberg*, 1 A. B. R. 385; *Chattanooga Nat. Bank v. Rome Iron Co.*, 99 Fed. 82, 3 A. B. R. 582; *In re Rockwood*, 1 N. B. N. 134, 1 A. B. R. 272, 91 Fed. 363; *In re Fowler*, 1 N. B. N. 215, 1 A. B. R. 637; *In re Carter*, 1 N. B. N. 162, 1 A. B. R. 160; *In re Cohn*, 98 Fed. 75, 2 N. B. N. R. 299, 3 A. B. R. 421.

46—*Wood v. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384, 57 L. ed. 264, 29 A. B. R. 220; *In re Rathman*, 183 Fed. 913, 25 A. B. R. 246; *Gregory v. Atkinson*, 127 Fed. 183, 11 A. B. R. 495; *Sheppard v. Lincoln*, 184 Fed. 182, 25 A. B. R. 804; *Palmer v. Roginsky*, 175 Fed. 883, 23 A. B. R. 358; *Hull v. Burr*, 153 Fed.

945, 18 A. B. R. 541; but see *Hurley v. Devlin*, 149 Fed. 268, 17 A. B. R. 793.

47—*Parker v. Sherman*, 195 Fed. 648, 28 A. B. R. 379.

48—*In re Bacon*, 210 Fed. 129, 31 A. B. R. 777, aff'g 196 Fed. 986, 28 A. B. R. 565.

49—*In re Blake*, 150 Fed. 279, 17 A. B. R. 668.

50—*Kilgore v. Barr*, 75 S. E. 762, 28 A. B. R. 860; *Philips v. Turner*, 114 Fed. 726, 8 A. B. R. 171.

51—*Sheppard v. Lincoln*, 184 Fed. 182, 25 A. B. R. 804; *Detroit Trust Company v. Pontiac Savings Bank*, 196 Fed. 29, 27 A. B. R. 821; *Ryttenberg v. Schefer*, 131 Fed. 313, 11 A. B. R. 652; *In re*

cases he will not be permitted to raise the question of jurisdiction for the first time on exceptions to a decision of the referee adverse to him,<sup>52</sup> or on appeal.<sup>53</sup> The consent will also be implied where he submits his claim to such court in response to a petition for an order requiring the property in his possession to be turned over to the custody of the court,<sup>54</sup> or, if he enters his appearance and obtains an order assenting to the sale of property,<sup>55</sup> or, where a petition is filed to declare a chattel mortgage null and void and the case is submitted on the merits without objection.<sup>56</sup>

The consent necessary to give the court jurisdiction is to the tribunal and not to the mode of procedure and if that be unlawful, the appearance of the defendant and his contesting the proceedings do not confer jurisdiction, notwithstanding the fact that he answers to a rule to show cause.<sup>57</sup>

If the record fails to show a cause within the general jurisdiction of the court, such defect, as distinguished from a mere ground of objection to the local jurisdiction or venue of the suit under section 23b, cannot be waived by the defendants, and their consent to the jurisdiction will be unavailing to confer jurisdiction.<sup>58</sup> A general appearance by a defendant to a rule to show cause does not constitute consent,<sup>59</sup> nor does the filing by a general assignee of accounts for allowance and settlement, where objection is made to the jurisdiction before the final order on the merits,<sup>60</sup> nor an appearance in response to an order to turn over property alleged to belong to the estate, if during such

Kornit Mfg. Co., 192 Fed. 392, 27 A. B. R. 244; *Haffenberg v. Chicago Title & Trust Co.*, 192 Fed. 874, 27 A. B. R. 708; *McEldowney v. Card*, 193 Fed. 475, 27 A. B. R. 937; *In re Steuer*, 104 Fed. 976, 5 A. B. R. 209; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 5 A. B. R. 623.

52—*Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 2 N. B. N. R. 734, 4 A. B. R. 178; *In re Connolly*, 2 N. B. N. R. 564, 100 Fed. 620, 3 A. B. R. 842; *In re Adams*, 1 N. B. N. 503, 2 A. B. R. 415, 97 Fed. 188; *In re Durham*, 114 Fed. 750, 8 A. B. R. 115.

53—*Boonville Nat. Bank v. Blakey*, 107 Fed. 891, 6 A. B. R. 13.

54—*Wells & Co. v. Sharp*, 208 Fed. 393,

31 A. B. R. 344; *In re Klein*, 116 Fed. 523, 8 A. B. R. 559.

55—*Bryan v. Bernheimer*, *supra*.

56—*In re Riker*, 109 Fed. 63, 5 A. B. R. 724; s. c. 107 Fed. 96, 5 A. B. R. 720.

57—*Haffenberg v. Chicago Title & Trust Co.*, 192 Fed. 874, 27 A. B. R. 708; *Sinsheimer v. Simonson*, 107 Fed. 898, 5 A. B. R. 537; *Louisville Trust Co. v. Comingor*, 7 A. B. R. 421, 184 U. S. 18, 46 L. ed. 413.

58—*McEldowney v. Card*, 193 Fed. 475, 27 A. B. R. 937.

59—*In re Hemby-Hutchinson Pub. Co.*, 105 Fed. 909, 5 A. B. R. 569.

60—*In re Klein*, 116 Fed. 523, 8 A. B. R. 559.

proceedings, he raises the question of jurisdiction.<sup>61</sup> Consent is not to be assumed where an adverse claimant is made a party defendant to a petition for adjudication, although he participates in the proceedings before the referee, if objection is made to the exercise of jurisdiction;<sup>62</sup> nor is the mere proving of a claim in the bankruptcy proceedings evidence of assent,<sup>63</sup> nor the failure of an adverse claimant to abandon his claim upon the overruling of his objections to the court's jurisdiction.<sup>64</sup>

### § 1102. — Decisions under the act of 1867.

The decisions under the former act upon the question of suits by assignees against adverse parties in the district courts are generally inapplicable now.<sup>65</sup>

### § 1103. Ancillary jurisdiction.

The amendment of 1910 (clause 20 of section 2 of the act) provides that the courts of bankruptcy may exercise ancillary jurisdiction within their respective limits in aid of a trustee appointed in another district. Prior to the amendment it was held that the trustee could not sue to enforce rights or recover property in the bankruptcy court of another district, being confined to the same courts, state or federal that the bankrupt could have resorted to.<sup>66</sup> The rule is now otherwise.<sup>67</sup>

61—*Sinsheimer v. Simonson*, 107 Fed. 998, 5 A. B. R. 537; *In re Michie*, 116 Fed. 749, 8 A. B. R. 734.

62—*Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413, 7 A. B. R. 421.

63—*Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620; see *Pickens v. Roy*, 187 U. S. 177, 47 L. ed. 128.

64—*First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102.

65—*Sherman v. Bingham*, 7 N. B. R. 490, Fed. Cas. No. 12762; *Goodall v. Tuttle*, 7 N. B. R. 193, 3 Biss. 219, Fed. Cas. No. 5533; *Jobbins v. Montague*, 6 N. B. R. 509, Fed. Cas. No. 7330; *In re Fendley*, 10 N. B. R. 250, Fed. Cas. No. 4728; *Smith v. Mason*, 6 N. B. R. 1, 14 Wall. 419, 20 L. ed. 748; *In re Marter*,

12 N. B. R. 185, Fed. Cas. No. 9143; *In re Bonesteel*, 3 N. B. R. 127, 7 Blatch. 175, Fed. Cas. No. 1627; *Harmanson v. Bain*, 15 N. B. R. 173, 1 Hughes 188, Fed. Cas. No. 6072; *In re Krogman*, 5 N. B. R. 116, Fed. Cas. No. 7936; *In re Oregon Iron Wks.*, 17 N. B. R. 404, 4 Sawy. 168, Fed. Cas. No. 10562; *In re Campbell*, 17 N. B. R. 4, 3 Hughes 276, Fed. Cas. No. 2348; *Bill v. Beckwith*, 2 N. B. R. 82, Fed. Cas. No. 1406; *Stores v. Engel*, 19 N. B. R. 90, Fed. Cas. No. 13494; *Sanger v. Upton*, 13 N. B. R. 226, 91 U. S. (1 Otto) 56, 23 L. ed. 220.

66—*Hull v. Burr*, 153 Fed. 945, 18 A. B. R. 541; but see *Teague v. Anderson Hdwe. Co.*, 161 Fed. 765, 20 A. B. R. 424.

67—*In re Rathfon Bros.*, 200 Fed. 108, 29 A. B. R. 22.

## § 1104. State courts.

## § 1105. — Jurisdiction under acts of 1867 and 1898 compared.

Under sections 1 and 2 of the act of 1867, two distinct classes of jurisdiction were conferred on the district and circuit courts of the United States; by the first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of the assets amongst the creditors, and a discharge or refusal of a discharge of the bankrupt, and by the second, jurisdiction as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The jurisdiction of these courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld under a special clause in section 2 which gave those two courts concurrent jurisdiction of all suits at law or in equity, brought by the assignee against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of the bankrupt transferable to or vested in such assignee.<sup>68</sup>

The supreme court in the case of *Bardes v. Hawarden Bank* points out that Mr. Justice Clifford in an earlier case had called attention to the fact that the jurisdiction conferred by the act of 1867 was the regular jurisdiction between party and party as described in the judiciary act and the third article of the constitution.<sup>69</sup> That court repeatedly held under that act the right of an assignee to assert a title in property transferred by the bankrupt before bankruptcy and claimed by a third person adversely could only be enforced by a plenary suit, at law or in equity, under such second section, notwithstanding the broad terms used in the first;<sup>70</sup> and that the jurisdiction of the United States courts over all matters of bankruptcy as distinguished from suits at law or in equity was exclusive and as to such suits they had

68—*Bardes v. Hawarden Bk.*, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; see also *Lathrop v. Drake*, 91 U. S. (1 Otto) 516, 23 L. ed. 414; *Bush v. Elliott*, 202 U. S. 477, 50 L. ed. 1114, 15 A. B. R. 656.

69—*Morgan v. Thornhill*, 11 Wall. 65, 76, 80, 20 L. ed. 60.

70—*Smith v. Mason*, 14 Wall. 419, 20 L. ed. 748; *Marshall v. Knox*, 16 Wall. 551, 557, 21 L. ed. 481; *Eyster v. Gaff*, 91 U. S. (1 Otto) 521, 525, 23 L. ed. 403.

concurrent jurisdiction with the state courts. The similarity of section 2 of the act of 1898 to section 1 of the act of 1867 and the omission of any provision like that in section 2 of the act of 1867 was then noted and the court reached the conclusion that, under the act of 1898, there was no such concurrent jurisdiction as there was under the former act between the United States and state courts of suits between the trustee and adverse claimants of property alleged to belong to the bankrupt. This decision necessarily overruled the decisions under the act of 1898<sup>71</sup> holding the contrary, and made inapplicable a number of decisions under the former act.<sup>72</sup>

71—*Leidigh Car Co. v. Stengel*, 1 N. B. N. 387, 95 Fed. 637, 2 A. B. R. 383; *In re Russell*, 101 Fed. 248, 3 A. B. R. 658; *In re Francis-Valentine Co.*, 1 N. B. N. 529, 94 Fed. 793, 2 A. B. R. 522; *aff'g* 1 N. B. N. 532, 93 Fed. 953, 2 A. B. R. 188; *In re Baudouine*, 101 Fed. 574, 3 A. B. R. 651, overruling 1 N. B. N. 506, 96 Fed. 536, 3 A. B. R. 55; *In re Corbett*, 1 N. B. N. 326; *Carter v. Hobbs*, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594; *s. c.* 1 N. B. N. 529, 94 Fed. 108, 2 A. B. R. 224; *Wall v. Cox*, 101 Fed. 403, 4 A. B. R. 659, *rev'd* 181 U. S. 244, 45 L. ed. 845, 5 A. B. R. 727; *Hall v. Kinzell*, 2 N. B. N. R. 745, 102 Fed. 301; *Robinson v. White*, 1 N. B. N. 513, 97 Fed. 33, 3 A. B. R. 88; *In re Murphy*, 2 N. B. N. R. 393, 3 A. B. R. 499; *In re Woodbury*, 2 N. B. N. R. 284, 98 Fed. 833, 3 A. B. R. 457; *In re Cobb*, 1 N. B. N. 557, 96 Fed. 821, 3 A. B. R. 129; *In re Booth*, 1 N. B. N. 476, 96 Fed. 943, 2 A. B. R. 770; *In re Smith*, 1 N. B. N. 356; 92 Fed. 135, 2 A. B. R. 9; *Keegan v. King*, 96 Fed. 758, 3 A. B. R. 79; *In re Kletchka*, 92 Fed. 901, 1 A. B. R. 479, 1 N. B. N. 160; *In re Kenney*, 2 N. B. N. R. 140, 97 Fed. 554, 3 A. B. R. 353; *s. c.* 1 N. B. N. 401, 95 Fed. 427, 2 A. B. R. 494; *In re Nathan*, 1 N. B. N. 563, 92 Fed. 590; *In re Fellerath*, 1 N. B. N. 292, 95 Fed. 121, 2 A. B. R. 40; *In re Crystal Springs Bottling Co.*, 3 A. B. R. 194, 96 Fed. 945; *In re Fixen*, 2 N. B. N. R. 885, 102 Fed. 295, 50 L. R. A. 605, 4 A. B. R. 10; *s. c.* 1 N. B. N. 568, 96 Fed.

748, 2 A. B. R. 822; *Lehman v. Crosby*, 2 N. B. N. R. 451, 99 Fed. 542, 3 A. B. R. 662; *Louisville Tr. Co. v. Marx*, 98 Fed. 456, 3 A. B. R. 450; *In re Hammond*, 98 Fed. 845, 3 A. B. R. 466; *Shutts v. Bk.*, 2 N. B. N. R. 320, 98 Fed. 705, 3 A. B. R. 492; *Pepperdine v. Headley*, 98 Fed. 863, 3 A. B. R. 455; *In re Newberry*, 2 N. B. N. R. 56, 97 Fed. 24, 3 A. B. R. 158; *In re Kimball*, 1 N. B. N. 515, 97 Fed. 29, 3 A. B. R. 161; *In re Schloerb*, 2 N. B. N. R. 234, 97 Fed. 326, 3 A. B. R. 224; *Murray v. Beal*, 2 N. B. N. R. 164, 97 Fed. 567, 3 A. B. R. 284; *In re Richard*, 1 N. B. N. 487, 94 Fed. 633, 2 A. B. R. 506; *In re Siever*, 1 N. B. N. 68, 1 A. B. R. 117, 91 Fed. 366; *s. c.* as *Davis v. Bohle*, 1 N. B. N. 216, 92 Fed. 325, 1 A. B. R. 412; *In re Brooks*, 1 N. B. N. 240, 91 Fed. 508, 2 A. B. R. 531; *In re Gutwillig*, 1 N. B. N. 554, 92 Fed. 337, 1 A. B. R. 388, *aff'g* 1 N. B. N. 40, 90 Fed. 475, 1 A. B. R. 78; *Southern L. & T. Co. v. Benbow*, 1 N. B. N. 499, 96 Fed. 514, 3 A. B. R. 9; *In re Etheridge Furn. Co.*, 1 N. B. N. 139, 92 Fed. 329, 1 A. B. R. 112; *In re Pittelkow*, 1 N. B. N. 234, 92 Fed. 901, 1 A. B. R. 472; *In re Norcross v. Nathan*, 2 N. B. N. R. 405, 99 Fed. 414, 3 A. B. R. 613; and see *In re San Gabriel Sanatorium Co.*, 2 N. B. N. R. 827, 102 Fed. 310, 4 A. B. R. 197.

72—*Claffin v. Houseman*, 15 N. B. R. 50; *Samson v. Burton*, 4 N. B. R. 1, 5 Ben. 343, Fed. Cas. No. 12285; *Payson v. Dietz*, 8 N. B. R. 193, 2 Dill. 504, Fed. Cas. No. 10861; *Gilbert v. Priest*, 8 N. B.

This decision of the supreme court determined that the district court as a court of bankruptcy had no jurisdiction of any suits, at law or in equity, independent of the proceedings in bankruptcy as such; but that all such suits should be brought in the proper court, which is ordinarily a state court, unless the jurisdictional requirements exist outside of the bankrupt law for suing in a federal court; or it may inquire in a summary way as to an adverse claim made by a stranger, to the property, and if the claim be without foundation, order the property turned over to the trustee.<sup>73</sup> Property in the actual possession of a state court, draws to it the right to decide upon conflicting claims to its ultimate possession and control.<sup>74</sup>

### § 1106. — Illustrative cases.

The state courts have jurisdiction, though not exclusive in all cases, of actions by trustees in bankruptcy to set aside fraudulent conveyances, assignments or transfers by the bankrupt on the ground of their being void at common law, or as a preference, or as being in contravention of the bankruptcy act,<sup>75</sup> which jurisdiction is, by the amendments to the act, shared by the bankruptcy court;<sup>76</sup> to foreclose mortgages after leave had from the

R. 159; *Kidder v. Horrabin*, 18 N. B. R. 146; *Wente v. Young*, 17 N. B. R. 90; *Goodrich v. Wilson*, 14 N. B. R. 555; *Blake v. Ala. & Chatt. R. R. Co.*, 6 N. B. R. 331, Fed. Cas. No. 1493.

73—*In re Tune*, 8 A. B. R. 285; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845, 5 A. B. R. 727, rev'g 101 Fed. 403, 4 A. B. R. 659. See *post*, Chapter XXVII.

74—*Metcalf Bros. v. Barker*, 187 U. S. 165; *In re Lemmon & Gale Co.*, 112 Fed. 292, 7 A. B. R. 291; *In re Shoemaker*, 112 Fed. 648, 7 A. B. R. 437.

75—*Robinson v. White*, 1 N. B. N. 513, 3 A. B. R. 88, 97 Fed. 33; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 2 N. B. N. 734; s. c. 1 N. B. N. 336, 2 A. B. R. 153, 94 Fed. 625; *Carter v. Hobbs*, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594; *Norcross v. Nathan*, 2 N. B. N. R. 405, 99 Fed. 414, 3 A. B. R. 613; *Cox v. Wall*, 2 N. B. N. R. 572, 99 Fed. 546, 3 A. B. R. 664; *Perkins v. McCauley*, 98 Fed. 286, 3 A. B. R. 445; *Burnett v. Mercantile Co.*, 1 N. B. N. 138, 91 Fed. 365,

1 A. B. R. 221; *In re Abraham*, 1 N. B. N. 281, 2 A. B. R. 266, 93 Fed. 767, 779; *In re Corbett*, 1 N. B. N. 326; *In re Murphy*, 2 N. B. N. R. 393, 3 A. B. R. 499; *In re Woodbury*, 2 N. B. N. R. 284, 98 Fed. 833, 3 A. B. R. 457; *In re Cobb*, 1 N. B. N. 557, 3 A. B. R. 129, 96 Fed. 821; *In re Newberry*, 2 N. B. N. R. 56, 3 A. B. R. 158, 97 Fed. 24; *Isett v. Stuart*, 16 N. B. R. 191; *Gilbert v. Priest*, 8 N. B. R. 159; but see *Voorhees v. Frisbie*, 8 N. B. R. 152; *Claffin v. Houseman*, 15 N. B. R. 49, 93 U. S. (3 Otto) 130, 23 L. ed. 833; *Kemmerer v. Tool*, 12 N. B. R. 427; *Goodrich v. Wilson*, 14 N. B. R. 555; *Peiper v. Harmer*, 5 N. B. R. 252; *State v. Dewey*, 5 N. B. R. 466; *In re Cent. Nat. Bk.*, 6 N. B. R. 207, Fed. Cas. No. 2547; *Dambmann v. White*, 12 N. B. R. 438; but see *Bingham v. Clafflin*, 7 N. B. R. 412; *Bromley v. Goodrich*, 15 N. B. R. 289; *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771.

76—Sees. 60b, 67e, 70e, Act of 1898, as amended. *Frank v. Vollkommer*, 205 U.

bankruptcy court, the trustee being a party,<sup>77</sup> but it is discretionary with the bankruptcy court whether to grant such leave or have the property sold under its direction by the trustee;<sup>78</sup> of actions by the trustee against an adverse claimant of bankrupt's property;<sup>79</sup> actions to quiet title;<sup>80</sup> to reduce choses in action to money or to recover possession of the property of the bankrupt and to sell such property to satisfy a judgment rendered in favor of the trustee, or to set aside fraudulent conveyances;<sup>81</sup> to collect a debt due the estate;<sup>82</sup> to enforce a valid lien by a qualified judgment limited to the property encumbered.<sup>83</sup>

An adverse claimant may prosecute a plenary suit in a state court to determine the validity of its claim to property in the possession of the bankruptcy court,<sup>84</sup> and an action against the trustee to recover the value of property which the trustee took in his possession as the property of the bankrupt will not be stayed.<sup>85</sup> Possession by the bankruptcy court of the proceeds of the sale of mortgaged chattels does not deprive the state court of jurisdiction to set aside a mortgage as fraudulent, where the order of sale provided for the deposit of the proceeds thereof as a special fund to which the lien, if any, of the chattel mortgage applied.<sup>86</sup> As further illustrative of the jurisdiction of the state courts there are a number of cases decided under the act of 1867, which may be consulted, but in so doing it should

S. 521, 51 L. ed. 911, 17 A. B. R. 806, aff'g 107 App. Div. (N. Y.) 594, 14 A. B. R. 695; *Bowman v. Alpha Farms*, 153 Fed. 380, 18 A. B. R. 700.

77—*In re Pittelkow*, 1 N. B. N. 234, 1 A. B. R. 472, 92 Fed. 901; *In re Brooks*, 1 N. B. N. 240, 91 Fed. 508, 2 A. B. R. 531; *Heath v. Shaffer*, 1 N. B. N. 399, 2 A. B. R. 98, 93 Fed. 647; *In re Booth*, 1 N. B. N. 476, 2 A. B. R. 770, 96 Fed. 943; *Burlingame v. Parce*, 17 N. B. R. 246; *McHenry v. La Societe Francaise*, 16 N. B. R. 285, 95 U. S. (5 Otto) 58, 24 L. ed. 370; *Brown v. Gibbons*, 13 N. B. R. 407; *Reed v. Bullington*, 11 N. B. R. 408.

78—*In re Pittelkow*, *supra*; *In re Booth*, *supra*; *In re Brooks*, *supra*; *In re Devore*, 16 N. B. R. 56, Fed. Cas. No. 3847.

79—*Mitchell v. McClure*, 178 U. S. 539,

44 L. ed. 1182, 2 N. B. N. R. 735; s. c. 1 N. B. N. 138, 1 A. B. R. 53, 91 Fed. 621; *Blumberg v. Bryan*, 107 Fed. 673, 6 A. B. R. 20.

80—*Murray v. Beal*, 2 N. B. N. R. 164, 3 A. B. R. 284, 97 Fed. 567.

81—*In re Gerdes*, 2 N. B. N. R. 131, 102 Fed. 318, 4 A. B. R. 346; *Heath v. Shaffer*, 1 N. B. N. 399, 2 A. B. R. 98, 93 Fed. 647.

82—*In re Goldberg*, 1 A. B. R. 385; *Russell v. Owen*, 15 N. B. R. 322.

83—*Stoddard v. Locke*, 9 N. B. R. 73.

84—*Skilton v. Codrington*, 185 N. Y. 80, 15 A. B. R. 810.

85—*In re Mertens & Co.*, 147 Fed. 182, 16 A. B. R. 831.

86—*Frank v. Vollkommer*, 205 U. S. 521, 51 L. ed. 911, 17 A. B. R. 806, aff'g 107 App. Div. (N. Y.) 594, 14 A. B. R. 695.



be borne in mind that the state courts now have jurisdiction of many cases that, under the act of 1867, were tried in the United States district courts.<sup>87</sup>

The federal district court has no jurisdiction to enjoin the prosecution by the trustee of a suit against an adverse claimant commenced in the state court. In such case the state court having first acquired jurisdiction, its authority will prevail.<sup>88</sup>

### § 1107. — When state courts do not have jurisdiction.

Immediately upon the commencement of proceedings in bankruptcy, if the bankrupt's estate is in process of settlement by the state courts, further proceedings should be stayed,<sup>89</sup> as, in proceedings in bankruptcy as distinguished from controversies "arising in bankruptcy proceedings," the courts of bankruptcy have exclusive jurisdiction,<sup>90</sup> and obtain complete control over the property in the possession of the bankrupt and scheduled as owned by him from the filing of the petition, while it is brought in custodia legis from the date of adjudication. It is not, therefore, subject to interference by any other court until such jurisdiction is divested,<sup>91</sup> even though a state court may have obtained possession of the property under a voluntary general assignment, or otherwise, and be administering it thereunder, as its jurisdiction to proceed will at once cease.<sup>92</sup> Accordingly

87—In re Davis, 8 N. B. R. 167, Fed. Cas. No. 3619; Stevens v. Brown, 11 N. B. R. 568; Johnson v. Bishop, 8 N. B. R. 533, Fed. Cas. No. 7373; In re Mannheim, 7 N. B. R. 342, 6 Ben. 270, Fed. Cas. No. 9038; Mason v. Warthen, 14 N. B. R. 346.

88—Hull v. Burr, 206 Fed. 1, 30 A. B. R. 588.

89—In re Porterfield, 138 Fed. 192, 15 A. B. R. 11; In re McKee, 1 N. B. N. 139, 1 A. B. R. 311; see also Watson v. Bank, 11 N. B. R. 161, 2 Hughes, 200, Fed. Cas. No. 17279; In re Noonan, 10 N. B. R. 330, Fed. Cas. No. 10292; contra, Appleton v. Bowles, 9 N. B. R. 354.

For a full discussion of stay of proceedings in the state courts, see *ante*, Chapter XXV.

90—Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; In re Murphy, 2 N. B.

N. R. 393, 3 A. B. R. 499; Thornhill v. Bank, 3 N. B. R. 110, Fed. Cas. No. 13990.

91—In re Shcloerb, 2 N. B. N. R. 234, 3 A. B. R. 224, 97 Fed. 326; White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 4 A. B. R. 178; In re Emslie, 102 Fed. 290, 2 N. B. N. R. 992; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Horgan, 2 N. B. N. R. 233, 2 A. B. R. 253, 98 Fed. 414; In re Barrow, 1 N. B. R. 125, Fed. Cas. No. 1057; In re Solomon, 2 N. B. N. R. 460; In re Gerdes, 2 N. B. N. R. 131, 102 Fed. 318, 4 A. B. R. 346; Smith v. Buchanan, 4 N. B. R. 133, Fed. Cas. No. 13016; Hewett v. Norton, 13 N. B. R. 276, 1 Woods 68, Fed. Cas. No. 644.

92—Lea v. West Co., 174 U. S. 590, 43 L. ed. 1098, 1 N. B. N. 409, 2 A. B. R. 463; s. c. 1 N. B. N. 79, 1 A. B. R. 261, 91 Fed. 237; Bryan v. Bernheimer, 181

when the bankruptcy jurisdiction becomes vested, a state court has no authority to issue a writ of replevin against property in the trustee's possession.<sup>93</sup>

### § 1108. — Rule governing state courts.

While it is true that Congress cannot require state courts to administer the bankrupt law or enforce rights and duties created by any other federal law,<sup>94</sup> it is equally true that the state courts must obey the bankrupt law, as any other constitutional law, and hence, while not administering federal laws except by comity, if it appears that by virtue of the bankrupt law the state court has no jurisdiction of an action pending therein, it will so decide upon proper plea.<sup>95</sup> But in the suits brought by or against a trustee in bankruptcy, a state court is not acting under the bankruptcy law, but merely recognizes it as the source of its title.<sup>96</sup>

### § 1109. — Acts of state courts which bind federal courts.

Acts done by state courts in the proper exercise of their jurisdiction and not in conflict with the decrees or jurisdiction of federal courts, are valid and bind such federal courts.<sup>97</sup> Whenever a trustee in bankruptcy voluntarily submits himself to the jurisdiction of a state court, he cannot, after judgment, object to the power of such court, and a federal court cannot assume jurisdiction.<sup>98</sup> In general, decisions of state courts are not binding on the bankruptcy court, although provisions in the

U. S. 188, 45 L. ed. 814, 5 A. B. R. 623; *Leidigh Car Co. v. Stengel*, 1 N. B. N. 387, 2 A. B. R. 383, 95 Fed. 627; *In re Gutwillig*, 1 N. B. N. 40, 1 A. B. R. 78, 90 Fed. 475; s. c. 1 N. B. N. 554, 92 Fed. 337; *In re Sievers*, 1 N. B. N. 68, 1 A. B. R. 117, 91 Fed. 366; s. c. as *Davis v. Bohle*, 1 N. B. N. 216, 1 A. B. R. 412, 92 Fed. 325; *Southern Loan & Trust Co. v. Benbow*, 1 N. B. N. 499, 3 A. B. R. 9, 96 Fed. 514; *In re Merchants Ins. Co.*, 6 N. B. R. 43, 3 Biss. 162; *In re Bousefield*, 17 N. B. R. 152, Fed. Cas. No. 1704.

93—*In re Russell*, 101 Fed. 248, 3 A. B. R. 658; *In re Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 2 N. B. N. R. 234, 3 A. B. R. 224, 97 Fed. 326.

94—*In re Woodbury*, 2 N. B. N. R.

284, 98 Fed. 833, 837, 3 A. B. R. 457; citing *Sherman v. Bingham*, Fed. Cas. No. 12762; *Goodall v. Tuttle*, Id. 5533, 7 N. B. R. 193, 3 Biss. 219; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330, 4 L. ed. 97; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715.

95—*In re Cent. Bank*, 6 N. B. R. 207, Fed. Cas. No. 2547.

96—*Cook v. Waters*, 9 N. B. R. 155.

97—*Robinson v. White*, 97 Fed. 33, 1 N. B. N. 513, 3 A. B. R. 88; *In re Keiler*, 18 N. B. R. 10, Fed. Cas. No. 7647.

98—*Scott v. Kelly*, 12 N. B. R. 96, 22 Wall. 57; *Winchester v. Heiskell*, 119 U. S. 450, 30 L. ed. 462, 120 U. S. 273, 30 L. ed. 664; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313.

state insolvent laws may be similar to those of the bankrupt act.<sup>99</sup>

### §1110. Courts of District of Columbia.

The Supreme Court of the District of Columbia, holding an equity court, may entertain jurisdiction in a suit for the establishment of an equitable lien against the property of the bankrupt.<sup>1</sup>

### § 1111. Trustee's rights of action.

#### § 1112. — In general.

The sole right to maintain an action for the benefit of creditors lies in the trustee.<sup>2</sup> The trustee may, as a general rule, maintain all actions, both at law and in equity, for the recovery and preservation of the assets, both real and personal, of the bankrupt's estate that the bankrupt himself, but for the bankruptcy, could have maintained,<sup>3</sup> enter his appearance and defend any pending suit against the bankrupt, by order of the court;<sup>4</sup> or, with the approval of the court, prosecute any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though commenced by him.<sup>5</sup> He may institute suits for the purpose of reducing choses in action to money or recover property from third persons, or to set aside transfers of property to third persons alleged to be fraudulent as to creditors, including payments in money or property to preferred creditors, or foreclose a mortgage,<sup>6</sup> and in such case it is not necessary for him first to obtain the consent of creditors or an order of the bankruptcy court to justify him in maintaining such suit.<sup>7</sup>

99—In re Knight, 8 N. B. R. 436, Fed. Cas. No. 7880.

1—Crosby v. Miller, 16 A. B. R. 805.

2—Dunn-Salmon Co. v. Pillmore, 85 Misc. (N. Y.) 546, 19 A. B. R. 172; Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 22 A. B. R. 643.

3—Cartwright v. West, 173 Ala. 198, 26 A. B. R. 831.

4—Sec. 11b, Act of 1898; In re Klein, 1 N. B. N. 486, 3 A. B. R. 174, 97 Fed. 31.

5—Sec. 11c, Act of 1898.

6—Bardes v. Bank, 2 N. B. N. R. 725, 3 A. B. R. 680, 178 U. S. 524, 44 L. ed. 1175; In re Gerdes, 102 Fed. 318, 4 A. B.

R. 346, rev'g 2 N. B. N. R. 131; Hicks v. Knost, 2 N. B. N. R. 734, 178 U. S. 541, 44 L. ed. 1183, 4 A. B. R. 178; In re Cohn, 2 N. B. N. R. 299, 3 A. B. R. 421, 98 Fed. 75; Mather v. Coe, 1 N. B. N. 554, 92 Fed. 333, 1 A. B. R. 504; In re Fowler, 1 N. B. N. 215, 1 A. B. R. 637; In re Brodbine, 1 N. B. N. 279, 326, 2 A. B. R. 53, 93 Fed. 643; Burlingame v. Parce, 17 N. B. R. 246; Russell v. Owen, 15 N. B. R. 322.

7—In re Meadows, Williams & Co., 181 Fed. 911, 25 A. B. R. 100; Traders' Ins. Co. of Chicago v. Mann, 118 Ga. 381, 11 A. B. R. 269; Chism v. Bank of Friars Point, 27 So. 610, 5 A. B. R. 56.

Upon the petition of a creditor, the trustee may be required to institute litigation for the recovery of property upon the filing of a bond conditioned upon the payment of costs therein.<sup>8</sup>

It is not the duty of the trustee to litigate every question that may be called to his notice by the creditors, however frivolous or apparently lacking in support it may be, and on the other hand he should not, by requiring indemnity in every instance against the costs and expenses of suit, cast the risk of controversy upon the particular creditor who may request that it be undertaken.<sup>9</sup> While it is his duty to sue whenever such course is necessary to collect or reduce to money the assets of the estate, there should at least be probable cause for believing that a right of action exists.<sup>10</sup> He is not justified in rushing the estate into doubtful or unproductive litigation. It is not his privilege to use the estate to settle questions of law which may arise. If success is doubtful in the case of a claim alleged to be due the estate and the saving in dividends in the event of success will not pay the expense of litigation, it is his duty to abandon the claim, unless the creditors or a substantial majority of them, desire the litigation to proceed.<sup>11</sup>

It is sufficient to show that he will probably succeed, certainty not being required, when he applies for instructions relative to a suit the creditors wish him to bring, but, if an offer of settlement has been made, it must appear that the suit will probably realize more.<sup>12</sup>

Wherever it is for the best interest of the estate, the trustee will be authorized to institute suit; thus he may have a partner enjoined in an action for an accounting by one partner against another, which was pending at the time the firm was adjudged bankrupt,<sup>13</sup> or have reinstated, on motion, a case which has been compromised and dismissed by the bankrupt's counsel before the trustee's appointment, but after the adjudication, although the bankrupt had assigned the subject matter of the action to his counsel for his fees;<sup>14</sup> or may enforce a judgment which was

8—In re Bailey, 151 Fed. 953, 18 A. B. R. 226.

9—In re Baird, 112 Fed. 960, 7 A. B. R. 448.

10—In re Meadows, Williams & Co., 181 Fed. 911, 25 A. B. R. 100.

11—In re Harper, 175 Fed. 412, 23 A. B. R. 918.

12—Dutcher v. Wright, 16 N. B. R. 331, 94 U. S. (4 Otto) 553, 24 L. ed. 130.

13—In re Clark, 3 N. B. R. 123, 4 Den. 88, Fed. Cas. No. 2798.

14—Home Ins. Co. v. Hollis, 14 N. B. R. 337.

recovered in a suit instituted in the name of the husband and wife on the wife's choses in action, to which suit the trustee was made party plaintiff with the bankrupt's wife, and distribute the proceeds among the creditors;<sup>15</sup> or, upon petition in a state court, have a judgment which was obtained within four months of the bankruptcy, set aside.<sup>16</sup> Where under the state law the income from a trust fund is liable to the claims of the creditors of the beneficiary, the trustee may sue to enforce such liability.<sup>17</sup>

Where the bankrupt owns property in common, his trustee does not become a tenant in common but is merely a trustee for the tenant in common and cannot maintain a suit for partition in the state court.<sup>18</sup>

The trustee may prosecute suits to recover assets in a district other than that in which the decree of bankruptcy is entered.<sup>19</sup> The jurisdiction of the federal courts depends upon the citizenship of the bankrupt, and not upon the citizenship of the trustee, and in suits by the trustee the requisite diversity of citizenship, as well as the requisite amount or value of the matter in controversy, must appear on the face of the record.<sup>20</sup>

### § 1113. — Trustee represents creditors as well as bankrupt.

Section 70e expressly provides that the trustee "may avoid any transfer by the bankrupt of his property which any creditor might have avoided." Whatever his relation to the bankrupt's property in other respects may be, for the purpose of attacking transfers of property by the bankrupt, the trustee stands in the shoes of judgment as well as general creditors besides succeeding to all the rights of the bankrupt, and may therefore maintain or defend proceedings in regard to the bankrupt's property, which the latter himself could not.<sup>21</sup> He stands for and repre-

15—*In re Boyd*, 5 N. B. R. 199, 2 Hughes 349, Fed. Cas. No. 1745.

16—*Jordan v. Downey*, 12 N. B. R. 427.

17—*In re Tiffany*, 133 Fed. 799, 13 A. B. R. 310.

18—*Hobbs v. Frazier*, 56 Fla. 796, 22 A. B. R. 634; *Lindsay v. Runkle*, 18 Ohio St. 325, 24 A. B. R. 612.

19—*In re Rathfon Bros.*, 200 Fed. 108, 29 A. B. R. 22; *Teague v. Anderson*

*Hdwe. Co.*, 161 Fed. 765, 20 A. B. R. 424; *In re Phelps*, 2 N. B. N. R. 484, 3 A. B. R. 396.

20—*Mayer v. Cohrs*, 188 Fed. 443, 26 A. B. R. 695.

21—*In re McNamara*, 2 N. B. N. R. 341; and cases cited under "Nature of Trustee's title, *ante*, § 744 et seq., see also *In re Harrison*, 2 N. B. N. R. 541; *In re St. Helen's Mill Co.*, 10 N. B. R. 411, 3 Sawy. 88, Fed. Cas. No. 12222; *Barnewall*

sents all persons interested in the estate of the bankrupt, and may enforce equitable as well as legal rights of creditors.<sup>22</sup>

The trustee may prosecute in a state court, a suit instituted therein by a creditor prior to bankruptcy. If he neglects to do so the creditor may apply to the bankruptcy court for an order requiring the trustee to prosecute the suit, or upon refusal, may, after making him a party, prosecute the suit.<sup>23</sup>

#### § 1114. — Title to bankrupt's choses in action.

See ante, section 765.

#### § 1115. — As to fraudulent conveyances.

As all conveyances, or transfers, made by a debtor subsequent to the passage of the act, and within four months prior to the filing of the petition, with the intent and purpose to hinder, delay or defraud his creditors are null and void, except as to purchases in good faith, and for a present fair consideration, the property so affected becomes a part of the assets of the estate and the trustee may proceed to enforce his rights thereto, either in the court of bankruptcy or a state court.<sup>24</sup> He is not, however, limited to recovering property transferred within four months of the filing of the petition in bankruptcy, but, if he discovers any that has been transferred by bankrupt at any time within the state statute of limitation in fraud of creditors,<sup>25</sup> whose claims existed at the time of such transfer, he may have them set aside, and, until they are so set aside, he has no title to such property.<sup>26</sup> The trustee has the same rights,

v. Jones, 14 N. B. R. 278, Fed. Cas. No. 1027.

The representation is not confined to creditors who have liens on the property of the bankrupt, but applies equally to simple creditors. Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 30 L. R. A. (N. S.) 552, 22 A. B. R. 442, aff'g 162 Fed. 988, 20 A. B. R. 746.

Section 70e authorizes the trustee to invoke the relief furnished by state laws to creditors for annulling transfers made by their debtors. Manning v. Evans, 156 Fed. 106, 19 A. B. R. 217.

22—In re Martin, 173 Fed. 597, 23 A. B. R. 151.

23—Blick v. Nimmo, 30 A. B. R. 770.

24—Sections 67e and 70e Act of 1898; Newcomb v. Biwer, 199 Fed. 529, 29 A. B. R. 15; Prescott v. Galluccio, 164 Fed. 618, 21 A. B. R. 229; Hull v. Hudson, 80 Atl. 674, 26 A. B. R. 725.

25—In re Chaplin, 115 Fed. 162, 8 A. B. R. 121; In re Schenck, 116 Fed. 554, 8 A. B. R. 727; Andrews v. Mather, 134 Ala. 358, 9 A. B. R. 296; Thomas v. Roddy, 122 App. Div. (N. Y.) 851, 19 A. B. R. 873; but see Skewis v. Barthell, 152 Fed. 534, 18 A. B. R. 429; Hobbs v. Frazier, 61 Fla. 611, 26 A. B. R. 887.

26—In re Grahs, 1 N. B. N. 164, 1 A. B. R. 465; Pratt v. Curtis, 6 N. B. R. 139, 2 Lowell 87, Fed. Cas. No. 11375.

with respect to setting aside fraudulent conveyances by the bankrupt, as the bankrupt's creditors, or any of them, had by the common law or the statutory law of the particular state;<sup>27</sup> and it is not as a penalty, but has its operation in the vesting of the title in the trustee after the transfer is declared void.<sup>28</sup> The trustee's right to have a transfer made more than four months prior to bankruptcy set aside does not depend upon any creditor's having obtained a judgment and issued execution thereon, nor is his right affected by the fact that there are creditors who might have maintained the action, such creditors having filed their claims in the bankruptcy proceedings and having been made parties to the action by the trustee.<sup>29</sup>

The trustee waives his right to have a transfer set aside by obtaining an order requiring the bankrupt to turn over the proceeds thereof, with full knowledge of the facts,<sup>30</sup> and cannot have a conveyance set aside as fraudulent against creditors, if it appears that there are no provable debts,<sup>31</sup> or if the creditors are barred by the statute of the right to participate in a distribution of the bankrupt's estate, by reason of their failure to file their claims in time,<sup>32</sup> or if the property fraudulently conveyed is not needed to pay claims of creditors.<sup>33</sup> The discharge in bankruptcy, however, in no way affects the trustee's right of action, the discharge being personal to the bankrupt.<sup>34</sup>

Where under the state law only judgment creditors could maintain an action to declare a creditor's chattel mortgage invalid for want of re-filing, the trustee may institute proceedings to have such mortgage so declared for the benefit of the estate.<sup>35</sup>

27—See 47a (2) as amended June 25, 1910; section 70e, Act of 1898; *In re McNamara*, 2 N. B. N. R. 341; *In re Tollett*, 2 N. B. N. R. 1096; *Mitchell v. Mitchell*, 147 Fed. 280, 17 A. B. R. 382; *Schmitt v. Dahl*, 88 Minn. 506, 11 A. B. R. 226; *Cartwright v. West*, 173 Ala. 198, 26 A. B. R. 831; *Bush v. Export Storage Co.*, 136 Fed. 918, 14 A. B. R. 138; *In re Mullen*, 101 Fed. 413, 4 A. B. R. 224; *In re Harrison*, 2 N. B. N. R. 541; *In re McNamara*, *Id.* 341.

28—*Cook v. Waters*, 9 N. B. R. 155.

29—*Thomas v. Roddy*, 122 App. Div. (N. Y.) 851, 19 A. B. R. 873.

30—*Thomas v. Sugarman*, 157 Fed. 669, 15 L. R. A. (N. S.) 1267, 19 A. B. R. 509.

31—*Nicholas v. Murray*, 18 N. B. R. 469, Fed. Cas. No. 10223.

32—*Cartwright v. West*, 173 Ala. 198, 26 A. B. R. 831.

33—*Deland v. Miller & Cheney Bank*, 119 Iowa 368, 11 A. B. R. 744, *McKey v. Smith*, 255 Ill. 465, 28 A. B. R. 864.

34—*Blick v. Nimmo*, 30 A. B. R. 770; *Stephenson v. Bird*, 168 Ala. 363, 25 A. B. R. 909.

35—*In re Harrison*, 2 N. B. N. R. 541; *In re Booth*, 2 N. B. N. R. 377, 98 Fed.

Where an insolvent fraudulently assigned a lease, the trustee can enforce the resulting trust in the creditors' favor in the hands of subsequent transferees with notice;<sup>36</sup> or may sue a debtor who pays money under his creditor's order to a third person, intending thereby to enable his creditor to prefer such third person, as such debtor will be deemed still to hold such money;<sup>37</sup> or for damages for injury or detention of goods by a party to whom the bankrupt transferred them contrary to the law.<sup>38</sup>

If the creditor benefited by such fraud agrees to restore to the trustee the money value of such property or to purchase any rights of action which may exist against him in favor of the trustee, suit to recover the property fraudulently conveyed should not be brought, if, in the court's judgment, it is likely to net the estate less than the amount offered in settlement.<sup>39</sup>

An objection that the trustee has no right to attack the validity of a chattel mortgage because it does not appear that he represented any but simple creditors cannot be raised for the first time upon appeal.<sup>40</sup>

Creditors may sue to set aside fraudulent conveyances no trustee having been appointed.<sup>41</sup>

Where an action has been commenced by a creditor, the trustee upon his appointment, may intervene and become subrogated to the rights of the creditor, notwithstanding the fact that in such action personal judgment may be obtained against the bankrupt.<sup>42</sup>

See also "Fraudulent transfers or conveyances," ante, section 782 et seq.

975, 3 A. B. R. 574; In re Leigh, 1 N. B. N. 526, 96 Fed. 806, s. c. 1 N. B. N. 425, 2 A. B. R. 606; In re Yukon Woolen Co., 96 Fed. 326, 1 N. B. N. 420, 2 A. B. R. 805; Bostwick v. Foster, 18 N. B. R. 123, 14 Blatch. 436, Fed. Cas. No. 1682; contra, In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re Ohio Co-op. Shear Co., 2 A. B. R. 775, 1 N. B. N. 477; In re McKay, 1 A. B. R. 292, 1 N. B. N. 133.

36—Jones v. Lawson, 33 Fed. 632.

37—Fox v. Gardner, 12 N. B. R. 137, 21 Wall. 475, 22 L. ed. 685.

38—Shumann v. Fleckstein, 15 N. B. R. 324, 4 Sawy. 174, Fed. Cas. No. 12826.

39—In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396; Southard v. Benner, 19 N. B. R. 124.

40—Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911, 17 A. B. R. 806, aff'g 107 App. Div. (N. Y.) 594, 14 A. B. R. 695.

41—Guarantee Title & Trust Co. v. Pearlman, 144 Fed. 550, 16 A. B. R. 461; Conti v. Sunseri, (Pa. Ct. Com. Pl.) 18 A. B. R. 898.

42—Conti v. Sunseri, (Pa. Ct. Com. Pl.) 18 A. B. R. 898.



## § 1116. — As to preferences.

Any preference given by a bankrupt within four months before the filing of the petition and before the adjudication, where the person benefited had reasonable cause to believe a preference would be effected, is voidable at the discretion of the trustee;<sup>43</sup> as is also any payment to counsel except to the extent of a reasonable amount.<sup>44</sup>

The distinction between a creditor who is innocently preferred and one who received his preference with reasonable cause to believe a preference would be effected, is drawn in section 60b.<sup>45</sup> In the latter case<sup>46</sup> if the preference was given within the four months' period, the creditor has no option as to retaining or surrendering it, but it is discretionary with the trustee whether he will avoid it,<sup>47</sup> and he is the proper person to bring suit.<sup>48</sup> The nature and situation of the property which is the subject of the preference will determine the course to be pursued. If the bankrupt has procured or suffered a judgment to be entered and nothing more has been done, further proceedings may be stayed;<sup>49</sup> if an execution has been issued and levied, the same course may be pursued. If the money has been collected and is still in the sheriff's hands, the trustee may apply to the court in which the execution issued for an order directing the sheriff to turn it over to him, and if he refuses, sue him for money had and received, or proceed against him by attachment for contempt.<sup>50</sup>

The allowance of a claim or the failure of the trustee to contest the allowance in no way affects his right to sue for and recover an unlawful preference from the claimant,<sup>51</sup> nor does the registration of the title to the land conveyed by the bankrupt affect the right of action of the trustee.<sup>52</sup> A creditor without

43—Section 60b, Act of 1898; *In re Nathan*, 2 N. B. N. R. 613; *Colt v. Sears*, 38 Atl. Rep. 1056.

44—Section 60d, Act of 1898.

45—*Rudolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897.

46—Section 60b, Act of 1898.

47—*In re Castle*, 2 N. B. N. R. 985, 4 A. B. R. 357; *In re Nathan*, 2 N. B. N. R. 613.

48—Section 67, Act of 1898. See *post* § 1143.

49—Section 11, Act of 1898.

50—Section 70, Act of 1898.

51—*Utah Ass'n of Credit Men v. Boyle Furn Co.*, 39 Utah 518, 26 A. B. R. 867; *Buder v. Columbia Distilling Co.*, 9 A. B. R. 331.

52—*Morris v. Small*, 160 Fed. 142, 20 A. B. R. 138.

notice may acquire rights in the property superior to those of the trustee.<sup>53</sup>

### § 1117. — Contest of administrator's account.

The trustee of an heir may contest the account of an administrator or representative of the decedent's estate, in order to determine the bankrupt's interest therein, and he may do so, notwithstanding the bankrupt objects.<sup>54</sup>

### § 1118. — Accounting from assignee.

The trustee may demand an accounting from an assignee to whom the bankrupt's property was leased for the benefit of creditors.<sup>55</sup>

### § 1119. — Rights as to property in custody of law.

The trustee can take advantage of any remedy open to a subsequent attaching creditor in an attachment suit, since he represents creditors as well as bankrupt;<sup>56</sup> and the trustee may intervene in such suit and apply to the state court for an order directing such officer or person to turn the property or its value over to him.<sup>57</sup> The state court may first, however, charge the assets with the payment of the costs and expenses incurred in bringing the same into the state court, before requiring the delivery to be made to the trustee.<sup>58</sup>

The trustee may summarily recover by proceedings in the bankruptcy court, goods replevied from him.<sup>59</sup> While he

53—In re Mullen, 101 Fed. 413, 4 A. B. R. 224; Phelps v. Curtis, 16 N. B. R. 85; see, generally, Barnes Mfg. Co. v. Norden, 67 N. J. L. 493, 7 A. B. R. 553.

54—In re Clute, 1 N. B. N. 386, 2 A. B. R. 376.

55—Gill v. Bell's Knitting Works, 137 App. Div. (N. Y.) 553, 24 A. B. R. 275.

56—Beers v. Place, 4 N. B. R. 150, Fed. Cas. No. 1233.

57—In re Frank, 95 Fed. 635, 2 A. B. R. 634; In re Price, 1 N. B. N. 240, 92 Fed. 987, 1 A. B. R. 606; In re Lesser, 2 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815; In re Klein, 1 N. B. N. 486; 3 A. B. R. 174, 97 Fed. 31; Connor v. Long, 104 U. S. 228, 26 L. ed. 723; Johnson v. Bishop, 8 N. B. R. 533, Fed. Cas. No. 7373; see Metcalf v. Barker, 187 U. S.

165, 47 L. ed. 122, 9 A. B. R. 36; contra, In re Francis-Valentine Co., 1 N. B. N. 532, 2 A. B. R. 188, 93 Fed. 953, aff'd 1 N. B. N. 529, 2 A. B. R. 522, 94 Fed. 793; In re Kenney, 2 N. B. N. R. 140, 3 A. B. R. 353, 97 Fed. 554; Richardson v. New Orleans Deb. Redemp. Co., 102 Fed. 780, 52 L. R. A. 67; same v. New Orleans Coffee Co., Id. 785; In re Tyler, 104 Fed. 778; In re Lengert Wagon Co., 110 Fed. 927, 6 A. B. R. 535; Wilson v. Parr, 115 Ga. 629, 8 A. B. R. 230.

58—Wilson v. Parr, 115 Ga. 629, 8 A. B. R. 230.

59—White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 2 N. B. N. R. 721, 4 A. B. R. 178; In re Russell, 101 Fed. 248, 3 A. B. R. 658; In re Vogel, 3 N. B. R. 198, 7 Blatch. 18, Fed. Cas. No. 16982.

cannot attack collaterally a sale under attachment of property in the sheriff's possession before the filing of the petition, he may intervene and claim the property;<sup>60</sup> or he may sue to enjoin the sheriff from paying over to a creditor the proceeds of a sale under the attachment and ask that they be paid to him,<sup>61</sup> or he may proceed in the bankruptcy court if the lien is avoided by the law.

### § 1120. — Rights as to collateral.

The trustee can recover possession of property in the possession of any one as collateral subject to any valid lien such person might have on the proceeds of such property.<sup>62</sup>

### § 1121. — Action for conspiracy.

The trustee, being vested with the rights of a judgment creditor, may bring an action of trespass on the case based on a conspiracy to fraudulently conceal and transfer property of the bankrupt,<sup>63</sup> but he cannot maintain such action where it is not alleged that the defendants received any part of the property.<sup>64</sup> However, a bill averring a conspiracy to defraud the creditors of the bankrupt by a shipment of goods is not demurrable because not identifying the particular defendant who received the goods.<sup>65</sup>

### § 1122. — Liability of corporate officers.

A right of action given by statute to the creditors of a corporation against any officers thereof sanctioning the creation of an excessive indebtedness has been held not to pass to the trustee.<sup>66</sup> Proceedings to determine the amount due the bankrupt from its officers and to compel the later to turn over to the trustee the amount so ascertained are not controversies as distinguished from proceedings in bankruptcy.<sup>67</sup>

60—*Valliant v. Childress*, 11 N. B. R. 217.

61—*Pennington v. Lowenstein*, 1 N. B. R. 157, Fed. Cas. No. 10938.

62—*In re Cobb*, 1 N. B. N. 557, 3 A. B. R. 129, 96 Fed. 821.

63—*Sattler v. Slonimsky*, 199 Fed. 592, 28 A. B. R. 729.

64—*Strasburger v. Bach*, 157 Fed. 918, 19 A. B. R. 732.

65—*Strasburger v. Bach*, 157 Fed. 918, 19 A. B. R. 732.

66—*In re Beachy & Co.*, 170 Fed. 825, 22 A. B. R. 538.

67—*In re Kornit Mfg. Co.*, 192 Fed. 392, 27 A. B. R. 244.

### § 1123. — Assignment of trustee's right of action.

See post, section 1269.

### § 1124. — Form of suit.

Whether a suit to set aside a fraudulent or preferential conveyance should be for goods or their value is optional, subject to the direction of the court, though, in a proper case it should be for the value instead of for the goods, especially if the transferee were a party to the fraud. The action may be for an accounting,<sup>68</sup> or in assumpsit.<sup>69</sup> The trustee may sue in trover for a conversion of goods occurring either before or after bankruptcy, and in a declaration may join a count upon the bankrupt's title, and a count upon the trustee's title.<sup>70</sup>

### § 1125. — Stockholders' liability.

The extent of the stockholders' statutory liability and the character of that liability depend upon and are determined by the charter of the corporation or the statute of the state which created it.<sup>71</sup> The capital stock of the corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation.<sup>72</sup> In determining the rights of a trustee against stockholders of a bankrupt corporation, a distinction should be observed between the liability of the stockholder to the corporation on his subscription and the statutory liability of stockholders to creditors of the corporation. The former passes to the trustee as an asset while the latter does not.<sup>73</sup> While the unpaid subscriptions constitute a trust fund for the benefit of the creditors yet such unpaid balances are not the primary or regular fund for the payment of corporate debts,<sup>74</sup> and the trustee of a bankrupt corporation can only sue

68—*Parker v. Black*, 143 Fed. 560, 16 A. B. R. 202; *McNulty v. Feingold*, 129 Fed. 1001, 12 A. B. R. 338.

69—*Reber v. Ellis Bros.*, 185 Fed. 313, 25 A. B. R. 567.

70—*Burns v. O'Gorman*, 150 Fed. 226, 17 A. B. R. 815.

71—*Cook on Corp.*, § 223; *Hale v. Hardon*, 95 Fed. 747; *Hale v. Taylor*, 104 Fed. 757; *Hale v. Allison*, 102 Fed. 790; *Kiskadden v. Steinle*, 203 Fed. 375, 29 A. B. R. 346; *In re Jassoy Co.*, 178 Fed. 515, 23 A. B. R. 622.

72—*Cook on Corp.*, § 199; *Sawyer v. Hoag*, 17 Wall. 610-620; 21 L. ed. 731; *In re Miller Electrical Maintenance Co.*, 111 Fed. 515, 6 A. B. R. 701; *In re Flood-Pratt Dairy Co.*, 23 A. B. R. 148.

73—*Breck v. Brewster*, 138 N. Y. S. 821, 31 A. B. R. 842; and see *Babbitt v. Read*, 173 Fed. 712, 23 A. B. R. 254; *In re Beachy & Co.*, 170 Fed. 825, 22 A. B. R. 538; *Thrall v. Union Maid Tobacco Co.*, 19 Ohio Dec. 732, 22 A. B. R. 287.

74—See *Dutcher v. Bk.*, 11 N. B. R. 457, 12 Blatchf. 435, Fed. Cas. No. 4203.

the stockholders for such amounts as have been determined by a preliminary investigation and assessment to be necessary to pay the debts and expenses, and cannot enforce payment of the stockholders' liability upon unpaid subscriptions for capital stock, unless an assessment has been made by the bankruptcy court, or under its direction, ratably distributing the liability of the bankrupt estate among the subscribers to the stock.<sup>75</sup>

It has been held that while ordinarily a corporate creditors' suit to enforce payment of unpaid subscriptions cannot be brought until after judgment at law has been obtained against the corporation and execution returned unsatisfied, yet this remedy against the corporation need not be first exhausted where it has been adjudged bankrupt and a dissolution has in this way been brought about, but the trustee may proceed directly against the stockholders.<sup>76</sup>

The court of bankruptcy may levy an assessment upon the stockholders of a bankrupt corporation as fully as the stockholders or directors could have done.<sup>77</sup>

When the assets of a bankrupt corporation are insufficient to pay its debts, the trustee, under the direction of the court of bankruptcy, has authority to call upon its stockholders to pay enough of the unpaid balance of their stock subscriptions as will meet the deficiency of the other assets. The fact that its directors have incurred a statutory liability by contracting excessive debts or by paying dividends when the corporation was insolvent, or by which it became insolvent, will not prevent such call, as the original liability remains, the statutory liability being added thereto, and the creditor is not obliged to exhaust that remedy, nor has the corporation, or its trustee any right to pursue it. It is not an asset of the corporation, but security for the creditors, who may follow it or not, at their pleasure, with all other securities, till they are paid in full.<sup>78</sup> The trustee can ask for an assessment upon corporate

75—*Rosoff v. Gilbert Transportation Co.*, 204 Fed. 349, 30 A. B. R. 359; *Hunt v. Sharkey*, 31 A. B. R. 894.

76—*Cook on Corp.*, § 200; *States Savings Association v. Kellogg*, 52 Mo. 583.

77—*In re Newfoundland Syndicate*, 196 Fed. 443, 28 A. B. R. 119; *In re Munger Vehicle Tire Co.*, 168 Fed. 910,

21 A. B. R. 395; *In re Monarch Corporation*, 177 Fed. 464, 24 A. B. R. 428; *Upton v. Hansbrough*, 10 N. B. R. 368, 3 Biss. 417, Fed. Cas. No. 16801.

78—*In re Crystal Spring Bottling Co.*, 96 Fed. 945, 3 A. B. R. 194; citing *Institution v. Sprague*, 43 Vt. 502; *In re Merrill*, 173 U. S. 131; see *Myers v. Seely*, 10

stock as shall be needed to pay debts and expenses, provided the stock shall be found to be in fact partly unpaid for, no matter what the original terms of issue were,<sup>79</sup> and may sue for the recovery of unpaid stock subscriptions though the same are payable in specifics fraudulently overvalued.<sup>80</sup>

Upon petition of the trustee for an assessment by the bankruptcy court, the indebtedness of the corporation may be proved by presentation of the proofs of claim.<sup>81</sup> In a plenary suit against a stockholder, he cannot question the validity of the assessment,<sup>82</sup> or the findings of the court in bankruptcy as to the amount paid for the stock, as to the indebtedness of the corporation, or as to the amount of the assessments, but he may set up any individual defense he may have to the action.<sup>83</sup>

While the order of the bankruptcy court directing the trustee to institute a suit for the recovery of stock subscriptions is a sufficient call or assessment to authorize the bringing of an action by him,<sup>84</sup> and a finding by the referee of the amount due by the stockholders is not a necessary preliminary to such action,<sup>85</sup> yet the enforcement of an assessment against the stockholders is plenary in its nature, and, except with the consent of the stockholders, cannot be made in the bankruptcy court.<sup>86</sup>

There are various methods by which stockholders may seek to avoid their liability to corporate creditors; as, first, by a cancellation or withdrawal from the contract; second, by a release from their obligation to pay the full par value of the stock; third, by a transfer of the stock. In each of these cases, however, a court of equity does its utmost to protect the cor-

N. B. R. 411, Fed. Cas. No. 9994; *Michener v. Payson*, 13 N. B. R. 49, Fed. Cas. No. 9524.

79—*In re Monarch Corporation*, 177 Fed. 464, 24 A. B. R. 428.

80—*Allen v. Grant*, 122 Ga. 552, 14 A. B. R. 349.

81—*In re Remington Automobile & Motor Co.*, 153 Fed. 345, 18 A. B. R. 389, aff'g 139 Fed. 766, 15 A. B. R. 214.

82—*Clevenger v. Moore*, 71 N. J. L. 148, 12 A. B. R. 738.

83—*In re Remington Automobile & Motor Co.*, 153 Fed. 345, 18 A. B. R. 389, aff'g 139 Fed. 766, 15 A. B. R. 214; *Sternbergh v. Duryea Power Co.*, 161 Fed.

540, 20 A. B. R. 625, rev'g 159 Fed. 783, 20 A. B. R. 219; *In re Newfoundland Syndicate*, 201 Fed. 917, 29 A. B. R. 858.

84—*Allen v. Grant*, 122 Ga. 552, 14 A. B. R. 349.

85—*Babbitt v. Read*, 173 Fed. 712, 23 A. B. R. 254.

86—*Kiskadden v. Steinle*, 203 Fed. 375, 29 A. B. R. 346; *In re Newfoundland Syndicate*, 196 Fed. 443, 28 A. B. R. 119; *In re Howe Mfg. Co.*, 193 Fed. 524, 27 A. B. R. 477.

Jurisdiction cannot be obtained by publication. *In re Hutchinson & Wilmoth*, 158 Fed. 74, 19 A. B. R. 313.

porate creditors, and a rigid scrutiny will be made in the interest of creditors into every transaction of such a nature.<sup>87</sup> A stockholder cannot, after a company has become insolvent, avoid his liability on the ground that it was falsely represented to him that no assessment could be made on his stock.<sup>88</sup>

The trustee may recover against a transferee of stock,<sup>89</sup> although record of the transfer was not made but waived,<sup>90</sup> the same as if an assessment had been ordered by the corporation before bankruptcy, and an order of the court requiring payment of such sum by a certain date is conclusive of the trustee's right to sue;<sup>91</sup> but he cannot recover from one who refused to accept. He may sue for the balance due on a stock subscription from one who has assigned shares not fully paid up, and concerning some of which the transfer has not been noted on the bank's books, where a by-law makes invalid a transfer of stock by one indebted to the bank;<sup>92</sup> or for the balance due upon stock-notes, as in the case of a mutual fire insurance company where the stockholders pay part cash and give their notes for the balance of the stock, and a portion remains unpaid on the company's bankruptcy and there are losses unsettled.<sup>93</sup> The action may be maintained against an officer who has resold his stock to the bankrupt, even though at the time of such resale there were no creditors.<sup>94</sup>

Evidence of misrepresentations made to a stockholder, when he subscribed for stock, by an agent of the corporation, is admissible in an action by the trustee to collect an assessment made on unpaid subscriptions.<sup>95</sup>

### § 1126. — Usurious contracts.

Unless there is a law limiting the rate of interest that may be exacted for the use of money there can be no usury. If the

87—Cook on Corp., § 199.

88—Upton v. Hansbrough, 10 N. B. R. 368, 3 Biss. 417, Fed. Cas. No. 16801; Farrar v. Walker, 13 N. B. R. 82, 3 Dill. 506, note Fed. Cas. No. 4679.

89—Allen v. Grant, 122 Ga. 552, 14 A. B. R. 349; Wilbur v. Stockholders, 18 N. B. R. 178, Fed. Cas. No. 17636; Pullman v. Upton, 17 N. B. R. 489, 96 U. S. (1 Otto) 328, 24 L. ed. 818.

90—Upton v. Burnham, 8 N. B. R. 22, 3 Biss. 431, Fed. Cas. No. 16798.

91—Sanger v. Upton, 13 N. B. R. 226, 91 U. S. (1 Otto) 56, 23 L. ed. 220.

92—In re Bachman, 12 N. B. R. 223, Fed. Cas. No. 707.

93—See Jenkins v. Armour, 14 N. B. R. 276, 6 Biss. 312, Fed. Cas. No. 7260.

94—Union Trust Co. v. Amery, 67 Wash. 1, 27 A. B. R. 499.

95—Michener v. Payson, 13 N. B. R. 49, Fed. Cas. No. 9524.

parties had in contemplation a loan, it makes no difference however disguised, the contract will be usurious if it be so in other respects, and a note void for usury in its inception cannot be enforced by an innocent purchaser for value. The rate of interest to govern will be that of the state in which the contract is made, though it has been held that parties may contract for interest according to the law of the place of performance.<sup>96</sup> Accordingly, the trustee in bankruptcy has the same right with reference to the recovery of usurious interest and the like, as is given by the state law to any other person.<sup>97</sup> In the case of a national bank the rate of interest is fixed by federal law,<sup>98</sup> and if an excessive rate is charged it is subject to the penalty provided by the federal law, which is exclusive of any state penalty,<sup>99</sup> and twice the amount of the interest may be recovered in an action in the nature of an action of debt, provided such action be commenced within two years of the time when such usurious transaction occurred.<sup>1</sup> Creditors who are given the right by statute to attack the validity of a mortgage given by their debtor to another creditor on the ground of usury are under no equity which requires them to pay the debt of such other creditor as a condition precedent to the existence of such right. The court may enjoin a sale of the property pending a determination of the validity of the mortgage.<sup>2</sup>

### § 1127. Form of proceeding.—At law or in equity.

A trustee seeking to set aside and annul a transfer of property, previously made by the bankrupt, alleged to have been fraudulent under the bankruptcy law and as against creditors, may appropriately proceed by bill in equity, and will not be required to first seek his remedy at law.<sup>3</sup> An action by the

96—*Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 340; *Andrews v. Pond*, 13 Pet. 65, 77, 10 L. ed. 61.

97—*Wheeslock v. Lee*, 10 N. B. R. 363, 17 Id. 563; *In re Kellogg*, 113 Fed. 120, 7 A. B. R. 623.

98—U. S. Rev. Stat., §§ 5197, 5198.

99—*Farmers & Mechanics Nat. Bk. v. Dearing*, 91 U. S. (1 Otto) 29, 23 L. ed. 196.

1—U. S. Rev. Stat., § 5198; *Darby v. Inst.*, 4 N. B. R. 195, Fed. Cas. No. 3571.

2—*In re Miller*, 118 Fed. 360, 9 A. B. R. 274.

3—*Phillips v. Kleinman*, (Pa. Ct. Com. Pl.) 23 A. B. R. 266; *Beasley v. Coggins*, 48 Fla. 215, 12 A. B. R. 355; *Hobbs v. Frazier*, 61 Fla. 611, 26 A. B. R. 887; *McKey v. Smith*, 255 Ill. 465, 28 A. B. R. 864; *Wall v. Cox*, 101 Fed. 403, 4 A. B. R. 659, rev'd 181 U. S. 244, 45 L. ed. 845, 5 A. B. R. 727; *Mitchell v. Mitchell*, 147 Fed. 280, 17 A. B. R. 382; *Off v. Hakes*, 142 Fed. 364, 15 A. B. R. 696;



trustee is properly brought in equity whenever it is necessary to set aside a written instrument to enable him to reclaim the property.<sup>4</sup>

An action by the trustee to recover a sum of money as a preference is an action at law upon an implied contract, and cannot be entertained by a court having no jurisdiction over such actions.<sup>5</sup>

In Alabama, it is held that a suit to set aside a transfer as being a voidable preference cannot be maintained in the chancery court, even though the statute gives such court jurisdiction to set aside fraudulent conveyances.<sup>6</sup>

### § 1128. Conditions precedent to trustee's right of action.

#### § 1129. — Demand.

A fraudulent transfer being absolutely void,<sup>7</sup> a suit in the nature of trover may be brought by the trustee without alleging and proving a demand for and refusal to restore the property transferred, notwithstanding bankrupt has been discharged.<sup>8</sup>

A demand before suit is not necessary where it is to be presumed that it would have been unavailing.<sup>9</sup> A demand for the property is sufficient notice of an intent to treat the transaction as void.<sup>10</sup>

#### § 1130. — Tender of purchase price.

A tender of purchase price by the trustee is not a condition precedent to a suit to set aside a fraudulent conveyance.<sup>11</sup>

Parker v. Black, 151 Fed. 18, 18 A. B. R. 15; aff'g 143 Fed. 560, 16 A. B. R. 202; Sheldon v. Parker, 66 Neb. 610, 11 A. B. R. 152; contra, Warmath v. O'Daniel, 159 Fed. 87, 16 L. R. A. (N. S.) 414, 20 A. B. R. 101.

4—Lessen v. Bradford Realty Co., 116 App. Div. (N. Y.) 212, 17 A. B. R. 524; aff'g 47 Misc. (N. Y.) 463, 15 A. B. R. 123.

5—Cohn v. Small, 120 App. Div. (N. Y.) 211, 18 A. B. R. 817; see Graver v. Abrahams, 203 Fed. 782, 29 A. B. R. 365.

6—Redd v. Wallace, 145 Ala. 209, 21 A. B. R. 839.

7—Section 67e, Act of 1898.

8—Wright v. Skinner, 136 Fed. 694, 14 A. B. R. 500; In re Pierce, 103 Fed. 64, 2 N. B. N. R. 984, 4 A. B. R. 554.

9—Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596, 17 A. B. R. 675.

Suit to recover preference. Utah Ass'n of Creditmen v. Boyle Furniture Co., 43 Utah 523, 31 A. B. R. 488.

10—Grant v. National Bank of Auburn, 197 Fed. 581, 28 A. B. R. 712.

11—Johnston v. Forsyth Merc. Co., 127 Fed. 845, 11 A. B. R. 669.

**§ 1131. — Judgment at law.**

A judgment at law is not a necessary condition precedent to a suit by the trustee to set aside a fraudulent or preferential transfer.<sup>12</sup>

**§ 1132. — Suit against receiver.**

Where the receiver improperly turns over property to a third person both he and such third person are primarily liable to the trustee, and it is no defense to a suit by the trustee against such third person to recover the property that the receiver has not first been sued.<sup>13</sup>

**§ 1133. — Proof of claims.**

The trustee may commence suit to set aside a fraudulent transfer without waiting for proof of claims to be filed against the estate.<sup>14</sup>

**§ 1134. — Order of court.**

No special order is necessary to enable the trustee to sue to collect a debt owing the estate or to set aside a fraudulent or preferential transfer, as such actions are incident to his duty and title to the bankrupt's property.<sup>15</sup>

**§ 1135. Notice of pendency of action.**

A statute authorizing the filing of notices of pendency of actions concerning real estate applies to an action by the trustee to set aside a fraudulent conveyance.<sup>16</sup> An application to cancel a notice of pendency of an action should be made to the court in which the action is commenced.<sup>17</sup>

12—Wall v. Cox, 161 Fed. 403, 4 A. B. R. 659, rev'g 181 U. S. 244, 45 L. ed. 845, 5 A. B. R. 727; Mitchell v. Mitchell, 147 Fed. 280, 17 A. B. R. 382; Off v. Hakes, 142 Fed. 364, 15 A. B. R. 696; Parker v. Black, 151 Fed. 18, 18 A. B. R. 15; Sheldon v. Parker, 66 Neb. 610, 11 A. B. R. 152; contra, Warmath v. O'Daniel, 159 Fed. 87, 16 L. R. A. (N. S.) 414, 20 A. B. R. 101.

13—Whitney v. Wenman, 140 Fed. 959, 14 A. B. R. 591,

14—Oliver v. Hilgers, 88 Minn. 35, 11 A. B. R. 178.

15—In re Meadows, Williams & Co., 181 Fed. 911, 25 A. B. R. 100; Traders' Ins. Co. of Chicago v. Mann, 118 Ga. 381, 11 A. B. R. 269; Chism v. Bank, 27 So. 610, 5 A. B. R. 56; McKey v. Smith, 255 Ill. 465, 28 A. B. R. 864.

16—In re Goldberg, 22 A. B. R. 503.

17—In re Miller, 64 Misc. (N. Y.) 467, 22 A. B. R. 759,

**§ 1136. Defenses.****§ 1137. — Former adjudication.**

An order of the referee allowing a creditor to retain an alleged preference and claim for the balance is an adjudication that the creditor has not received a preference and unless appealed from is binding in an action by the trustee to recover the alleged preference.<sup>18</sup>

An order in a summary proceeding which does not find the party proceeded against liable to pay over<sup>19</sup> or an order in summary proceedings directing the release of property by the receiver<sup>20</sup> or an order passing the receiver's account in which he credits himself with the transfers of property to a third person,<sup>21</sup> is not conclusive in a suit to recover the property.

It is held, however, that a decision of the bankruptcy court upon an issue of its jurisdiction, that the possession of certain property was in an adverse claimant at the time of bankruptcy, is a final adjudication and operates as an estoppel against the trustee in a suit against the claimant in a state court.<sup>22</sup>

**§ 1138. — Collateral attack on adjudication.**

The adjudication cannot be attacked in a suit to set aside a preference upon the ground that one of the petitioners was not in fact a creditor of the bankrupt,<sup>23</sup> nor on any grounds except jurisdictional defects affirmatively appearing on the face of the record.<sup>24</sup>

**§ 1139. — Limitations.**

A trustee may maintain an action to set aside a conveyance at any time within two years after the estate is closed provided the same is not barred by the state law.<sup>25</sup> The estate is closed

18—Clendening v. Red River Valley Nat. Bank of Fargo, 12 N. Dak. 51, 11 A. B. R. 245.

19—Murray v. Joseph, 146 Fed. 260, 16 A. B. R. 704.

20—Conti v. Sunseri, 18 A. B. R. 891.

21—Whitney v. Wenman, 140 Fed. 959, 14 A. B. R. 591.

22—Chicago Title & Trust Co. v. National Storage Co., 174 Ill. App. 365, 31 A. B. R. 410.

23—Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 20 A. B. R. 349.

24—See *ante* § 296.

25—Section 11d, Act of 1898; Sheldon v. Parker, 66 Neb. 610, 11 A. B. R. 152.

*Effect of limitation.*—It was held, under the Act of 1867, that this limitation applied only to cases brought in regard to property held adversely to the bankrupt and assignee, or cases where suit was brought to recover a debt due bankrupt;

within the meaning of the act when the final account is approved, all the funds distributed and the trustee discharged, and the fact that property fraudulently conveyed by the bankrupt had not been administered does not operate to extend the period of limitations.<sup>26</sup>

Courts of bankruptcy may close estates whenever they have been fully administered, though they may be re-opened whenever it appears that they were closed before being fully administered; in which event it would seem that, although the two years had commenced to run, the fact that an estate was re-opened would cause the two-year period to run from the time it was last closed. Under the act of 1867 the limitation began to run when the estate vested in the assignee as such;<sup>27</sup> but under the present act it does not begin to run until the estate has been closed. The limitation here is a statutory limitation as to suits by or against a trustee in bankruptcy in his capacity as such; but, even if the action be commenced within two years after the estate has been closed, there is another limitation growing out of the nature of the action or the character of the other parties to the suit, established by the *lex fori*, which must also be considered. An action may be barred by the one and not by the other. This is contrary to the decision of the supreme court of Georgia which holds, that the limitation prescribed by section 11d applies to the exclusion of limitations prescribed by the states and though a cause of action in favor of or against the trustee in bankruptcy be barred by the state statute an action thereon may nevertheless be maintained at any time within two years after the closing of the estate.<sup>28</sup>

The two years' limitation can not be pleaded in an action by

and, in other cases, that the limitation was a bar to recovery by the assignee although he had no notice of the existence of the property sought to be recovered. (*Freelander v. Holloman*, 9 N. B. R. 331, Fed. Cas. No. 5081; *Bean v. Brookmire*, 4 N. B. R. 57, Fed. Cas. No. 1168; *Norton v. De La Villeburn*, 13 N. B. R. 304, 1 Woods, 163, Fed. Cas. 10350.) Where more than two years after his appointment an assignee was substituted as plaintiff in an action commenced in the name of the bankrupt and

a recovery had, the bankrupt could not claim the amount recovered on the ground that the limitation of the act barred his remedy at time of substitution. *Maybin v. Raymond*, 15 N. B. R. 353, Fed. Cas. No. 9338.

26—*Kinder v. Scharff*, 129 La. 218, 26 A. B. R. 765.

27—*Foreman v. Bigelow*, 18 N. B. R. 457, Fed. Cas. No. 9434.

28—*Arnold Grocery Co. v. Shackelford*, 140 Ga. 585, 31 A. B. R. 119.

the purchaser at a trustee's sale to recover possession;<sup>29</sup> nor where the defendant files a bill of review four years after a judgment declaring a mortgage on the bankrupt's real estate void in a suit in equity brought by the trustee, for a bill of review is not a suit within the meaning of the limitation of the act.<sup>30</sup>

It has been held that the statute of limitations begins to run against the trustee's right to set aside a conveyance as fraudulent from the time he has knowledge, actual or constructive, of the facts surrounding the transfer.<sup>31</sup>

### § 1140. Abatement of proceedings.

#### § 1141. — Death or removal of trustee.

The death, removal or resignation of the trustee does not abate any suit or proceeding which he is prosecuting or defending at the time, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.<sup>32</sup> His successors may be brought into the case by supplemental bill.<sup>33</sup>

#### § 1142. — Death or insanity of bankrupt.

See ante, chapter XI.

#### § 1143. Parties plaintiff.

After bankruptcy proceedings are begun, the trustee, and not a creditor, must, ordinarily, bring a suit to set aside a conveyance claimed to be void,<sup>34</sup> or in fraud of creditors or any one

29—*Steele v. Moody*, 16 N. B. R. 558.

30—*Wilt v. Stickney*, 15 N. B. R. 23, Fed. Cas. No. 17854.

31—*Beattys v. Straiton*, 142 App. Div. (N. Y.) 369, 25 A. B. R. 808.

32—Section 46a, Act of 1898; analogous provision of Act of 1867. "Section 14. . . . and no suit in which the assignee is a party shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be.

"Section 15. . . . No suit pending in the name of the assignee shall be

abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him."

33—*Hull v. Burr*, 63 Fla. 440, 28 A. B. R. 837.

34—*Frost v. Latham & Co.*, 181 Fed. 866, 25 A. B. R. 313; *Barker v. Franklin*, 37 Misc. (N. Y.) 292, 8 A. B. R. 468; *In re Carter*, 1 N. B. N. 162, 1 A. B. R. 160; *In re Pearson*, 1 N. B. N. 474, 2 A. B. R. 819; *In re Adams*, 1 N. B. N. 167, 1 A. B. R. 94; *In re Griffith*, 1 N. B. N.

of them,<sup>35</sup> though in case the trustee neglects or refuses to act, the creditor may prosecute the suit, the trustee being made a party thereto.<sup>36</sup> The trustee's right of action cannot be assigned.<sup>37</sup>

Where the bankrupt has, by a preferential transfer, assigned a fire insurance policy to a creditor, and the creditor has surrendered the policy to the trustee without a re-assignment, the latter holds the beneficial interest in the policy and can in an action commenced by him on the policy, by amendment substitute the holder of the legal title as plaintiff suing for his use.<sup>38</sup>

A receiver in bankruptcy is neither a necessary or proper party to an action to set aside a preferential transfer.<sup>39</sup>

#### § 1144. Parties defendant.

Both the bankrupt and the party through whom the property was transferred to defendant should be made parties to a suit to recover property of the estate.<sup>40</sup> A fraudulent grantee or transferee, who has conveyed or transferred all the property to another fraudulent grantee or transferee, is a proper but not a necessary party.<sup>41</sup> A person in whose favor a judgment has been rendered is a necessary party to a suit by the trustee to deprive him of the proceeds of the judgment, and such suit must be instituted in a jurisdiction in which such person can be sued.<sup>42</sup>

The words "such person" in section 60b refer either to the person receiving the preference or the person benefited thereby, and accordingly, the trustee may proceed against the surety on a note, the payee of which has received a preferential payment.<sup>43</sup>

546; *Thurmond v. Andrews, et ux.*, 13 N. B. R. 157.

Trustee held proper party to sue to set aside preferential mortgage recorded within four months though executed prior thereto. *Dulany v. Morse*, 39 App. Cas. D. C. 523, 29 A. B. R. 275.

35—*In re Gurney*, 15 N. B. R. 373, 7 Biss. 414, Fed. Cas. No. 5873.

36—*Blick v. Nimmo*, 30 A. B. R. 770; see *ante* § 716.

37—*Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co.*, 175 Fed. 335, 23 A. B. R. 595. See, also, *post* § 1269.

38—*Traders' Ins. Co. of Chicago v. Mann*, 118 Ga. 381, 11 A. B. R. 269.

39—*Frost v. Latham & Co.*, 181 Fed. 866, 25 A. B. R. 313.

40—*Phillips v. Kleinman*, (Pa. Ct. Com. Pl.) 23 A. B. R. 266.

41—*Skillen v. Endelman*, 39 Misc. (N. Y.) 261, 11 A. B. R. 766.

42—*Bryan v. Curtis*, 30 App. Cas. (D. C.) 234, 19 A. B. R. 894, *aff'd* 18 A. B. R. 90.

43—*In re Sanderson*, 149 Fed. 273, 17 A. B. R. 871.

If the person receiving the preference is without the jurisdiction of the court, and the person benefited thereby is within the jurisdiction, the trustee may proceed against the latter.<sup>44</sup>

Where a preference is obtained through a judgment and levy of execution, the trustee may proceed by suit in equity to set aside the lien, making the sheriff, as well as the creditor, a party if the money be still in the hands of the sheriff,<sup>45</sup> but it is not necessary to join as parties the sheriff levying the execution of other execution creditors.<sup>46</sup>

An action to recover property fraudulently or preferentially transferred may be maintained against the board of trustees of a township.<sup>47</sup>

The bankrupt is not an indispensable party to a suit to enforce a resulting trust against lands in the possession of the trustee.<sup>48</sup>

#### § 1145. Intervention by creditors.

Creditors may intervene in a suit to set aside a fraudulent or preferential conveyance.<sup>49</sup>

#### § 1146. Possession of property pending suit.

If the trustee is in possession of property at the time of the commencement of a suit to determine the title thereto, he should be permitted to retain possession thereof pending suit.<sup>50</sup> On the other hand, the possession of a creditor will not ordinarily be disturbed,<sup>51</sup> though the court may compel delivery of property in the possession of an adverse claimant, even before appointment of a trustee, where necessary for its preservation, as where the conveyance by which the claimant holds is alleged to be fraudulent and the claimant financially irresponsible.<sup>52</sup> So, where the facts clearly indicate the dishonest, fraudulent and corrupt

44—In re Sanderson, 149 Fed. 273, 17 A. B. R. 871.

45—Warren v. Bank, 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. No. 17202.

46—Grant v. Nat. Bank of Auburn, 197 Fed. 581, 28 A. B. R. 712.

47—Painter v. Napoleon Tp., 156 Fed. 289, 19 A. B. R. 412.

48—Buckingham v. Estes, 128 Fed. 584, 12 A. B. R. 182.

49—Allen v. McMannes, 156 Fed. 615, 19 A. B. R. 276.

50—In re Mundle, 139 Fed. 691, 14 A. B. R. 680.

51—See Ommen v. Talcott, 175 Fed. 259, 23 A. B. R. 570.

Creditor held entitled to possession of the property, and to collect rents and income therefrom, pending a determination of whether the transfer of the property to him was a preference. In re Blake, 171 Fed. 298, 22 A. B. R. 612.

52—In re Knopf, 144 Fed. 245, 16 A. B. R. 432.

character of the transfer and an imminent danger of loss and dissipation of the property transferred, the court may require that it be delivered to a receiver to await the appointment of a trustee and the determination of the suit to determine its validity.<sup>53</sup>

### § 1147. Injunction and sequestration pending suit.

The bankruptcy court may restrain an alleged fraudulent transferee of property of the bankrupt from disposing of the same until the matter in controversy can be regularly disposed of,<sup>54</sup> and in a plenary suit commenced by the trustee, the court may issue a writ of sequestration or injunction to prevent a removal of property involved from the district.<sup>55</sup>

### § 1148. Stay of proceedings.

A suit in the bankruptcy court may be stayed until determination of a suit in state court which has first acquired jurisdiction.<sup>56</sup>

### § 1149. Process.

The trustee has authority to attempt recovery of property found in a district other than that of his appointment although neither personal service within the district of his appointment nor entry of appearance of the bankrupt is shown by the record.<sup>57</sup>

Where a plenary suit is commenced by the trustee against an adverse claimant residing in another district, the latter may be brought in by a service of process under section 738 of the Revised Statutes providing for service by special order of the court.<sup>58</sup>

### § 1150. Rules of practice in general.

A proceeding by the trustee to set aside a fraudulent conveyance or illegal preference is not a proceeding in bankruptcy,

53—*Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. 295, 17 A. B. R. 237; *Webb v. Manheim*, 109 App. Div. (N. Y.) 63, 16 A. B. R. 472.

54—*In re Berkowitz*, 173 Fed. 1012, 22 A. B. R. 231, 233; *Lawrence v. Lowrie*, 133 Fed. 995, 12 A. B. R. 297.

55—*Horskins v. Sanderson*, 132 Fed. 415, 13 A. B. R. 101; *Pyle v. Texas*

*Transport & Terminal Co.*, 185 Fed. 309, 25 A. B. R. 829.

56—*Davis v. Planters' Trust Co.*, 196 Fed. 970, 28 A. B. R. 495.

57—*Hills v. McKinniss Co.*, 188 Fed. 1012, 26 A. B. R. 329.

58—*Horskins v. Sanderson*, 132 Fed. 415, 13 A. B. R. 101.



but, while ancillary to such proceeding and authorized to be instituted in either state or federal court, it must be governed so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted.<sup>59</sup>

### § 1151. Petition or complaint.

### § 1152. — Caption.

Where the trustee sues in a representative capacity, the title of the complaint should indicate that the suit is brought in his representative capacity. Ordinarily the word "as" should follow the trustee's name, but where it appears from averments of the complaint that the action is by the plaintiff as trustee, the omission of the word will not be fatal.<sup>60</sup>

### § 1153. — Allegations in general.

An allegation of residence is not necessary in a suit to set aside a preferential or fraudulent transfer,<sup>61</sup> but where jurisdiction depends upon diversity of citizenship such citizenship or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings, or appear positively and with equal distinctness in other parts of the record.<sup>62</sup> A mere averment that the trustee or the defendant is a resident of a particular state does not import that he is a citizen so as to confer jurisdiction.<sup>63</sup>

A petition in a suit to recover property preferentially transferred by the bankrupt need not be technical or formal, or in the exact language of the statute.<sup>64</sup> The averments must, however, be clear and unequivocal, and all the essential elements of a voidable preference<sup>65</sup> including insolvency of the bank-

59—*Kraver v. Abrahams*, 203 Fed. 782, 29 A. B. R. 365; *Westall v. Avery*, 171 Fed. 626, 22 A. B. R. 673.

60—*Newland v. Zodikow*, 39 Misc. (N. Y.) 541, 11 A. B. R. 770.

61—*Wright v. Skinner*, 136 Fed. 694, 14 A. B. R. 500.

62—*McEldowney v. Card*, 193 Fed. 475, 27 A. B. R. 937.

63—*McEldowney v. Card*, 193 Fed. 475, 27 A. B. R. 937.

64—*In re Leech*, 171 Fed. 622, 22 A. B. R. 599; *Lesser v. Bradford Realty Co.*, 116 App. Div. (N. Y.) 212, 17 A. B. R. 524, aff'g 47 Misc. (N. Y.) 463, 15 A. B. R. 123.

65—*Painter v. Napoleon Township*, 156 Fed. 289, 19 A. B. R. 412; *In re Leech*, 171 Fed. 622, 22 A. B. R. 599; *Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897.

rupt,<sup>66</sup> the resultant advantage to the preferred creditor,<sup>67</sup> and the reasonable cause to believe a preference would result,<sup>68</sup> should be alleged, but an omission of such allegations may be cured by amendment.<sup>69</sup> Where the suit is instituted by the trustee of a partnership estate, the petition should allege the insolvency of the individual partners.<sup>70</sup> An allegation that the effect of a transfer was to enable defendant to obtain a greater percentage of his debt than other creditors of the same class has been held to be the statement of a conclusion,<sup>71</sup> but there are decisions to the contrary.<sup>72</sup> It is unnecessary to allege specifically that the transfer complained of is voidable by the plaintiff as trustee for the bankrupt.<sup>73</sup>

Prior to the amendment of 1910, it was held necessary to allege the fact that the property of the bankrupt was not sufficient to pay his creditors in full,<sup>74</sup> but an omission in this regard was amendable.<sup>75</sup> The amendment is held to have changed the rule.<sup>76</sup> The amount of secured and unsecured debts, or debts entitled to priority should be alleged<sup>77</sup> but it is not necessary to allege and prove that claims of creditors have been filed and allowed, or that the bankrupt is indebted to general creditors who may share in the preference recovered.<sup>78</sup> In alleging fraud

66—*Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897.

67—*Hart v. Emerson-Brantingham Co.*, 203 Fed. 60, 30 A. B. R. 218; *West v. Bank of Lahoma*, 16 Okla. 328, 16 A. B. R. 733.

68—*Templeton v. Kehler*, 173 Fed. 575, 23 A. B. R. 41; *Peck v. Connell*, 8 A. B. R. 500; *Hicks v. Longhorst*, Ohio Ct. Com. Pl., 6 A. B. R. 178.

69—Bill failing to allege the element of reasonable belief of the creditor may be amended even after entry of the decree. *Carey v. Donohue*, 209 Fed. 328, 31 A. B. R. 210.

70—*Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897.

71—*Grant v. Nat. Bank of Auburn*, 197 Fed. 581, 28 A. B. R. 712.

72—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 43 Utah 523, 31 A. B. R. 488; *Crooks v. People's Nat. Bank*, 46 App. Div. (N. Y.) 335, 3 A. B. R. 243.

73—*Lesser v. Bradford Realty Co.*, 116

App. Div. (N. Y.) 212, 17 A. B. R. 524, aff'g 47 Misc. (N. Y.) 463, 15 A. B. R. 123.

A petition stating facts showing the unlawful preference, the filing of the petition in bankruptcy and the adjudication, the demand of the trustee for possession and the defendant's refusal to deliver the property, sufficiently shows the plaintiff's interest in the property. *Lesser v. Bradford Realty Co.*, Id.

74—*McKey v. Smith*, 255 Ill. 465, 28 A. B. R. 864; *Deland v. Miller & Cheney Bank*, 119 Iowa 368, 11 A. B. R. 744.

75—*Prescott v. Galluccio*, 164 Fed. 618, 21 A. B. R. 229.

76—*Kraver v. Abrahams*, 203 Fed. 782, 29 A. B. R. 365.

77—*Grant v. National Bank of Auburn*, 197 Fed. 581, 28 A. B. R. 712.

78—*Gering v. Leyda*, 186 Fed. 110, 26 A. B. R. 137. A petition alleging that at the time of the transfer in question the bankrupt was hopelessly insolvent

in a suit to set aside a fraudulent conveyance the facts and circumstances relied upon must be clearly set out.<sup>79</sup>

A petition in an action under 67f attacking a lien acquired by legal proceedings, must allege that at the time of the filing of the petition in bankruptcy, the lien acquired was in effect,<sup>80</sup> but a petition under that section by which the trustee seeks to enforce a lien held by a creditor before bankruptcy need not allege that the trustee has been subrogated to the rights of attachment creditor after due notice, since such notice can be given the original lien holders by service of summons in the action and their rights determined in the trial thereof.<sup>81</sup>

Where the trustee seeks to recover property of the bankrupt in an action which the bankrupt could have maintained but for the intervention of the bankruptcy, he is not required to allege that he has not sufficient assets of the estate in his hands to pay the liabilities thereof.<sup>82</sup>

In an action by the trustee to recover an insurance policy or the proceeds thereof as belonging to the estate of the bankrupt, the interest of the bankrupt must be alleged. In case the bankrupt was named as beneficiary, the terms and conditions upon which he was so named must appear.<sup>83</sup>

### § 1154. — Multifariousness.

A bill in equity to recover a payment or set aside a transfer made by the bankrupt within the four-month period is not demurrable because alleging two causes of action, one based on the fact that the payment or transfer was a voidable preference, and the other on the fact that it was a fraudulent transfer.<sup>84</sup>

and that his indebtedness amounted to a specified sum, and that the only unexempt property was the property conveyed to the defendant held to sufficiently charge that at the time of the transfer complained of the bankrupt was indebted to the general creditors, who were not secured, and who were entitled to share in the preference recovered. *Id.*

79—*McKey v. Smith*, 255 Ill. 465, 28 A. B. R. 864; *Johnston v. Forsyth Merc. Co.*, 127 Fed. 845, 11 A. B. R. 669.

80—*Rodolf v. First Nat. Bank of Tulsa*, 30 Okla. 631, 28 A. B. R. 897.

81—*Corey v. Blackwell Lumber Co.*, 24 Idaho 642, 31 A. B. R. 135.

82—*Drew v. Myers*, 81 Neb. 750, 22 A. B. R. 656.

83—*Carr v. Myers*, 211 Pa. St. 349, 15 A. B. R. 116.

84—*Corey v. Blackwell Lumber Co.*, 24 Idaho 642, 31 A. B. R. 135; *Kraver v. Abrahams*, 203 Fed. 782, 29 A. B. R. 365; *Wright v. Skinner*, 136 Fed. 694, 14 A. B. R. 500; *Grant v. National Bank of Auburn*, 197 Fed. 581, 28 A. B. R. 712.

**§ 1155. — Prayer for judgment.**

A prayer for judgment in excess of the value of the property is no ground for demurrer.<sup>85</sup>

**§ 1156. — Variance.**

Proof of a fraudulent transfer will not support an action under section 60b to set aside a transfer as preferential.<sup>86</sup>

A new trial will not be granted, in an action by the trustee for conversion, upon the ground of variance between a declaration counting on the trustee's title and proof tending to show title in the bankrupt at the time of the alleged conversion, where the variance was not pointed out at the trial, since such objection could have been overcome by an amendment of the pleading to conform with the proof.<sup>87</sup>

**§ 1157. Demurrer or plea.**

Demurrers and pleas in federal equity suits have been abolished by the new rules.<sup>88</sup> It has been held that a general demurrer will not be allowed in a suit to set aside a fraudulent conveyance unless accompanied by an answer which denies the fraud.<sup>89</sup>

**§ 1158. Answer.**

In an action to set aside a fraudulent transfer, a mere denial in the answer of the averment in the bill that the claims of the creditors were filed within the statutory period, without more, does not sufficiently invoke the defense of the statutory bar of the claims. Such defense must be presented by a special plea.<sup>90</sup>

**§ 1159. Cross-bill.**

A cross-bill seeking an accounting with the bankrupt and claiming a lien on any sum which may be recovered as a preference will be dismissed.<sup>91</sup> Where the court denies the defendant the right to file a cross-bill, it may allow him the right to detain

85—Grant v. Nat. Bank of Auburn, 197 Fed. 581, 28 A. B. R. 712.

86—Stern v. Mayer, 113 App. Div. (N. Y.) 181, 16 A. B. R. 763.

87—Burns v. O'Gorman, 150 Fed. 226, 17 A. B. R. 815.

88—Equity rule, 29.

89—Johnston v. Forsyth Merc. Co., 127 Fed. 845, 11 A. B. R. 669.

90—Cartwright v. West, 173 Ala. 198, 26 A. B. R. 831.

91—Lovell v. Latham & Co., 186 Fed. 602, 26 A. B. R. 599.

in his hands, pending a final determination of the case by the court of appeals, such part of the recovery as will cover his claim against the estate.<sup>92</sup>

### § 1160. Jury trial.

All issues of fact, except as otherwise provided in bankruptcy proceedings, must be tried by jury,<sup>93</sup> but issues of fact in civil cases in the district court may be tried without a jury, whenever the parties file a stipulation in writing waiving the jury. Where the facts are not in dispute the defendant is not entitled to a jury trial.<sup>94</sup>

A jury trial is proper in an action to set aside a fraudulent or preferential transfer;<sup>95</sup> to determine the amount of rent due which accrued while the assignee occupied the premises;<sup>96</sup> to determine if a creditor took an assignment of property from the debtor with knowledge or reason to know of latter's insolvency;<sup>97</sup> to weigh inadequacy of price as an evidence of fraud in a sale by an insolvent vendor;<sup>98</sup> and, in the court's discretion, but not as matter of right, to determine the amount to be allowed as a fee to the attorney of a creditor out of such creditor's distributive share.<sup>99</sup>

### § 1161. Burden of proof.

In an action by the trustee, proof of his appointment as trustee throws the burden upon the defendants to show that he does not represent creditors, and that creditors in existence at the time of the filing of the petition have subsequently been paid.<sup>1</sup> In proceedings to recover money or property obtained by way of preference, the act of the bankrupt complained of, that the transfer created a preference and that the creditor had reasonable cause to believe a preference would be effected must be shown,<sup>2</sup> the

92—*Ommen v. Talcott*, 175 Fed. 259, 23 A. B. R. 570.

93—U. S. Rev. Stat., §§ 648, 649, 566.

94—*In re Plant*, 148 Fed. 37, 17 A. B. R. 272.

95—*Allen v. Gray*, 201 N. Y. 504, 25 A. B. R. 423, rev'g 139 App. Div. (N. Y.) 423, 24 A. B. R. 642; *Grant v. National Bank of Auburn*, 197 Fed. 581, 28 A. B. R. 712; *contra*, *Westall v. Avery*, 171 Fed. 626, 22 A. B. R. 673.

96—*Buckner v. Jewell*, 14 N. B. R. 286, 2 Woods 220, Fed. Cas. No. 3060.

97—*Ecker v. McAllister*, 17 N. B. R. 42.

98—*Rhoads v. Blatt*, 16 N. B. R. 32.

99—*In re Rude*, 101 Fed. 805, 4 A. B. R. 319.

1—*Oliver v. Hilgers*, 88 Minn. 35, 11 A. B. R. 178.

2—*Hart v. Emerson-Brantingham Co.*, 203 Fed. 60, 30 A. B. R. 218; *Mays v.*

burden of proof being on the trustee.<sup>3</sup> The relation and conduct of the parties may in some cases, however, be sufficient to establish a *prima facie* case.<sup>4</sup>

When the consideration paid for a transfer is shown by the record to have been adequate, the burden shifts to the trustee to show that the defendant purchased in bad faith.<sup>5</sup> Insolvency at the date of the adjudication need not be proved. The adjudication is conclusive on such question.<sup>6</sup>

The burden of proving *bona fides*, in an action under section 67e has been held to be on the transferee.<sup>7</sup>

### § 1162. Evidence.

An order of the referee giving the trustee leave to sue to set aside a conveyance is no evidence of his election and qualification as trustee.<sup>8</sup> The petition in bankruptcy and the schedules filed by the bankrupt have been held inadmissible against the objection of the defendant,<sup>9</sup> but there is authority to the contrary.<sup>10</sup>

### § 1163. Instructions.

A preference need not be defined in the absence of request for such definition.<sup>11</sup>

Fritton, 11 N. B. R. 229, 20 Wall. 414, 22 L. ed. 389; In re Baker, 14 N. B. R. 433, Fed. Cas. No. 763.

3—Ogden v. Reddish, 200 Fed. 977, 29 A. B. R. 531; Parsons v. Topliff, 14 N. B. R. 547; In re Carlile, 199 Fed. 612, 29 A. B. R. 373; Baden v. Bertenshaw, 68 Kan. 32, 11 A. B. R. 308; Butler Paper Co. v. Goembel, 143 Fed. 295, 16 A. B. R. 26; Calhoun County Bank v. Cain, 152 Fed. 983, 18 A. B. R. 509; Getts v. Janesville Wholesale Grocery Co., 163 Fed. 417, 21 A. B. R. 5; Allen v. Gray, 63 Misc. (N. Y.) 219, 21 A. B. R. 828; In re Varley & Bauman Clothing Co., 191 Fed. 459, 26 A. B. R. 840; McDonald v. Clearwater Shortline Ry. Co., 164 Fed. 1007, 21 A. B. R. 182; Dougherty v. First Nat. Bank of Canton, 197 Fed. 241, 28 A. B. R. 263.

4—In re Sanger, 169 Fed. 722, 22 A. B. R. 145.

5—Shelton v. Price, 174 Fed. 891, 23 A. B. R. 431.

6—Breckons v. Snyder, 211 Pa. St. 176, 15 A. B. R. 112.

7—In re Schocht Motor Car Co., 31 A. B. R. 624.

Under the law of New Jersey, a voluntary conveyance by a person in debt, even if solvent, whereby the property is placed out of the reach of existing creditors, is conclusively fraudulent. Ridge-way v. Kendrick, 208 Fed. 849, 31 A. B. R. 497.

8—McKey v. Smith, 255 Ill. 465, 28 A. B. R. 864.

9—Halbert v. Pranke, 91 Minn. 204, 11 A. B. R. 620.

10—Schedules admissible. Utah Ass'n of Creditmen v. Boyle Furniture Co., 43 Utah 523, 31 A. B. R. 488.

11—Wickwire v. Webster City Savings Bank, 153 Iowa 225, 27 A. B. R. 157.

**§ 1164. Verdict.**

Where the court charged in effect that a transfer was to be regarded as fraudulent if the creditor made a loan with the knowledge that the money was to be used in paying an existing debt, a general verdict of the jury will not be construed as a finding that an intent to defraud, of which the creditor had knowledge, existed.<sup>12</sup>

**§ 1165. Judgment or decree—Amount of recovery.**

A decree in a suit in a bankruptcy court, may direct the defendant who has been found to have received a preference, to pay over the full amount of his preference, with interest, less the amount of any dividend he is entitled to,<sup>13</sup> but where the suit to recover a preference is brought in a district other than that of the adjudication, judgment may be entered for the full amount of the verdict before the final account of the trustee is filed, though the defendant claims to have a provable debt.<sup>14</sup>

Interest should be allowed only from the date of demand. In case no formal demand is made, interest can be allowed only from the time of the commencement of the suit.<sup>15</sup>

A fraudulent transferee is required to return only the amount received over and above actual consideration advanced,<sup>16</sup> and should be credited with payments benefiting the bankrupt estate.<sup>17</sup>

A trustee suing to recover securities on the ground of preference cannot elect to take their value at the time of the preference, they having declined in value prior to trial, where he has expressly agreed that the transferee might use its judgment in selling.<sup>18</sup> Where the property has been sold by the

12—*Van Iderstine v. National Discount Co.*, 227 U. S. 575, 57 L. ed. 652, 29 A. B. R. 478, aff'g 174 Fed. 518, 23 A. B. R. 345.

13—*Page v. Rogers*, 211 U. S. 575, 53 L. ed. 332, 21 A. B. R. 496, rev'g 140 Fed. 596, 15 A. B. R. 502; *Allen v. McMannes*, 156 Fed. 615, 19 A. B. R. 276.

14—*Templeton v. Kehler*, 173 Fed. 574, 23 A. B. R. 39.

15—*Wilson v. Mitchell Woodbury Co.*, 31 A. B. R. 837; *Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 43 Utah 523,

31 A. B. R. 488; *Benjamin v. Chandler*, 142 Fed. 217, 15 A. B. R. 439; *Kaufman v. Tredway*, 195 U. S. 271, 49 L. ed. 190, 12 A. B. R. 682.

16—*Jackson v. Sedgwick*, 189 Fed. 508, 26 A. B. R. 836.

17—*Eichholz v. Polack*, 140 App. Div. (N. Y.) 551, 25 A. B. R. 243.

18—*National City Bank of New York v. Hotchkiss*, 231 U. S. 50, 58 L. ed. 115, 31 A. B. R. 291, aff'g 201 Fed. 664, 29 A. B. R. 289.

defendant at a price equal or in excess of that which the trustee could have realized, the liability of the defendant should not exceed the net proceeds he received, with the costs of the suit.<sup>19</sup> Where the trustee sues in assumpsit to recover the proceeds of a void attachment, the recovery is limited to the amount realized by the defendant and cannot include the amount received by other attaching creditors by virtue of a concurring attachment.<sup>20</sup> Where a lease of all the property of the bankrupt, though a fraudulent transfer, was not a wilful trespass, the recovery should not include profits earned by the lessee without deducting reasonable expenditures made by it in earning such profits.<sup>21</sup>

A preferred creditor cannot reduce the damages recoverable by the trustee by a partial return of the property received by him.<sup>22</sup>

In an action by the trustee to recover a debt due the bankrupt, the defendant's counterclaim or setoff can be allowed only to the extent necessary to extinguish the trustee's claim and no affirmative judgment can be rendered against the trustee.<sup>23</sup>

### § 1166. Costs and attorney's fees.

A trustee or receiver suing to recover alleged assets of the estate will not be required to give security for costs, nor be held personally liable for same, unless it is made to appear that he is acting in bad faith, or unreasonably or oppressively, in bringing the suit, and this is especially true where the assets of the estate are sufficient to pay the costs.<sup>24</sup> And though there be a showing of no assets out of which to pay the costs, he will not be required to secure them or be personally liable for them, except under circumstances that make it equitable and fair to the adverse party that indemnity be given.<sup>25</sup> The trustee suing in a district other than that of his appointment may, however, be required to give security for costs.<sup>26</sup>

19—*Allen v. McMannes*, 156 Fed. 615, 19 A. B. R. 276.

20—*State Bank of Chicago v. Cox*, 143 Fed. 91, 16 A. B. R. 32.

21—*In re Medina Quarry Co.*, 179 Fed. 929, 24 A. B. R. 769.

22—*Wilson v. Mitchell-Woodbury Co.*, 31 A. B. R. 837.

23—*Frank v. Mercantile Nat. Bank*, 182 N. Y. 264, 14 A. B. R. 125.

24—*In re Barrett*, 132 Fed. 362, 12 A. B. R. 626; *Ryker v. Gwynne*, 116 N. Y. S. 10, 21 A. B. R. 95; but see *In re Havens*, 182 Fed. 367, 25 A. B. R. 116; *In re Preston*, 6 N. B. R. 545, Fed. Cas. No. 11394.

25—*In re Barrett*, 132 Fed. 362, 12 A. B. R. 626.

26—*Osborne v. Pennsylvania Ry. Co.*, 159 Fed. 301, 20 A. B. R. 277.



Where a judgment striking off as preferential a judgment against the bankrupt is reversed solely on the ground that the issues had not been submitted to a jury, the bankruptcy court may authorize a purchaser of property from the bankrupt which is subject to the lien of the judgment, to pay the costs of further litigation, no funds being available to the trustee and he having made a compromise offer to the creditor.<sup>27</sup>

Where in an action by the trustee to recover moneys as belonging to the bankrupt, the defendant sets up that a third person claims to be the equitable assignee of the fund, and such third party intervenes, the original defendant may, notwithstanding a verdict for the trustee, be allowed reasonable attorney's fees.<sup>28</sup>

27—*In re Geiselhart*, 181 Fed. 622, 25 A. B. R. 318.

28—*Caten v. Eagle etc. Ass'n*, 177 Fed. 996, 23 A. B. R. 130.

## CHAPTER XXVII

### SUMMARY PROCEEDINGS

- § 1167. Summary jurisdiction.
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#### § 1167. Summary jurisdiction.

#### § 1168. — In general.

The test of jurisdiction to proceed in a summary way or by summary proceedings to determine adverse claims to property, real or personal, is possession of such property in or by the bankrupt at the time of the filing of the petition. Where a third person holds property at the time of the bankruptcy merely as agent or bailee of the bankrupt, and asserts no adverse claim thereto, the bankruptcy court, which includes the referee,<sup>1</sup> may by summary proceedings compel the delivery thereof to the trustee in bankruptcy; but, where he acquires the possession prior to the bankruptcy, and claims the right to hold the property as against the bankrupt or the trustee, making a real, though fraudulent and voidable, adverse claim, and does not

<sup>1</sup>—Section 1 (7), Act of 1898; see  
*post* § 1174.

consent to the jurisdiction, he is entitled to have his rights determined in a plenary suit, in the state court or district court.<sup>2</sup> The doctrine is summed up by Chief Justice Fuller in

2—The authority of the referee, and of the court of bankruptcy in summary proceedings is limited to determining whether the claim made is colorable merely, or is in fact adverse to the claimant, and according as it determines that question will it deny or retain jurisdiction of the controversy. *Shea v. Lewis*, 206 Fed. 877, 30 A. B. R. 436; *In re Bacon*, 210 Fed. 129, 31 A. B. R. 777, aff'g 196 Fed. 986, 28 A. B. R. 565; *In re Cotton*, 209 Fed. 124, 31 A. B. R. 568; *In re Carlile*, 199 Fed. 612, 29 A. B. R. 373; *In re Shea*, 211 Fed. 365, 31 A. B. R. 697; *In re Auerbach*, 202 Fed. 192, 29 A. B. R. 791; *In re Walsh Bros.*, 163 Fed. 352, 21 A. B. R. 14; *In re Friedman*, 161 Fed. 260, 20 A. B. R. 37, aff'g 153 Fed. 939, 18 A. B. R. 712; *Cooney v. Collins*, 176 Fed. 189, 23 A. B. R. 840; *In re Logan*, 196 Fed. 678, 28 A. B. R. 543; *In re Cohn*, 18 A. B. R. 786; *Linstorth Wagon Co. v. Ballew*, 149 Fed. 960, 8 L. R. A. (N. S.) 1204, 18 A. B. R. 23; *In re Norris*, 177 Fed. 598, 24 A. B. R. 444; *Bear Gulch Placer Min. Co. v. Walsh*, 198 Fed. 351, 28 A. B. R. 724; *In re Schoenfeld*, 190 Fed. 53, 27 A. B. R. 64; *In re Pickens & Bro.*, 184 Fed. 954, 26 A. B. R. 6; *In re Mills*, 179 Fed. 409, 25 A. B. R. 278; *Mound Mines Co. v. Hawthorne*, 173 Fed. 882, 23 A. B. R. 242; *In re Big Cahaba Coal Co.*, 190 Fed. 900, 26 A. B. R. 910; *In re Glenn*, 185 Fed. 554, 25 A. B. R. 806; *In re Harris*, 156 Fed. 875, 19 A. B. R. 635; *In re Mimms & Parham*, 193 Fed. 276, 27 A. B. R. 469; *In re Flynn & Co.*, 126 Fed. 422, 11 A. B. R. 318; *In re Teschmacher & Mrazay*, 127 Fed. 728, 11 A. B. R. 547; *In re Sunseri*, 156 Fed. 103, 18 A. B. R. 231; *In re Scherber*, 131 Fed. 121, 12 A. B. R. 616; *In re Andre*, 135 Fed. 736, 13 A. B. R. 132; *In re New York Wheel Works*, 132 Fed. 203, 13 A. B. R. 60; *In re Adams*, 130 Fed. 788, 12 A. B. R. 367; *In re Kane*, 131 Fed. 386, 12 A. B. R. 444; *Goodnough Mercantile Stock Co. v. Gallo-*

*way*, 156 Fed. 504, 19 A. B. R. 244; *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. ed. 402, 23 A. B. R. 519; *In re Rathman*, 183 Fed. 913, 25 A. B. R. 246; *Johnston v. Spencer*, 195 Fed. 215, 27 A. B. R. 800; *In re Moore*, 104 Fed. 869, 5 A. B. R. 151; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 5 A. B. R. 623; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

The court of bankruptcy has jurisdiction to determine by summary proceedings after reasonable notice to the claimants all controversies between the trustee and adverse claimants over liens upon and title and possession of (1) property in the possession of the bankrupt when the petition was filed, (2) property held by third parties for him, (3) property lawfully seized by the marshal as bankrupt's under clause 3 of § 2 of the Act, and (4) property claimed by the trustee which has been lawfully reduced to actual possession by the officers of the court. These controversies relative to the property of the bankrupt are within the court's jurisdiction under § 2 of the Act and are not controversies at law or in equity as distinguished from proceedings in bankruptcy within the meaning of § 23. A plenary suit may be maintained in the bankruptcy court to determine the controversies above specified which it has jurisdiction to determine by summary proceedings. *Clay v. Waters*, 178 Fed. 385, 24 A. B. R. 293.

Decisions prior to 1903; *In re Baudouine*, 101 Fed. 574, 3 A. B. R. 651; *In re Bryant*, 2 N. B. N. R. 1058; *In re Griffith*, 1 N. B. N. 546; *In re Pearson*, 1 N. B. N. 474, 2 A. B. R. 819; *In re Fowler*, 1 N. B. N. 215, 1 A. B. R. 637; *In re Buntrock Clothing Co.*, 1 N. B. N. 291, 92 Fed. 886, 1 A. B. R. 454; *In re Brodbine*, 1 N. B. N. 279, 93 Fed. 643, 2 A. B. R. 53; *In re Cohn*, 2 N. B. N. R. 299, 98 Fed. 75, 3 A. B. R. 421; *Smith v. Mason*, 6 N. B. R. 1, 14 Wall.

the case of *Babbett v. Dutcher*,<sup>3</sup> where it is said: "There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third person or agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim to title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding of the delivery of the property to the trustee, without the formality of a formal litigation."

Mere possession by the bankrupt does not confer summary jurisdiction if the facts show that he was not the true owner of the property and did not hold it as such.<sup>4</sup> Funds on deposit in a bank may be regarded as constructively in possession of the trustee so as to vest the bankruptcy court with jurisdiction to summarily determine claims thereto.<sup>5</sup>

419, 21 L. ed. 748; *Bardes v. Hawarden Bk.*, 178 U. S. 524, 44 L. ed. 1175, 2 N. B. N. R. 725, 4 A. B. R. 163; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183; 2 N. B. N. R. 734, 4 A. B. R. 178; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 2 N. B. N. R. 735, 4 A. B. R. 177; *s. c.* In re *Scott*, 1 N. B. N. 327; *Knight v. Cheney*, 5 N. B. R. 305, Fed. Cas. No. 7883; In re *Marter*, 12 N. B. R. 185, Fed. Cas. No. 9143; In re *Bonesteel*, 3 N. B. R. 127, 7 Blatch. 175, Fed. Cas. No. 1627; *Rogers v. Winsor*, 6 N. B. R. 246, Fed. Cas. No. 12023; *Kidder v. Horrabin*, 18 N. B. R. 146; see as to decisions prior to amendment: In re *Franks*, 95 Fed. 635, 2 A. B. R. 634; In re *Abraham*, 1 N. B. N. 281, 2 A. B. R. 266, 93 Fed. 767; In re *Price*, 1 N. B. N. 240, 92 Fed. 987, 1 A. B. R. 606; *Connor v. Long*, 104 U. S. (14 Otto) 228, 26 L. ed. 723; In re *O'Con-*

*ner*, 1 N. B. N. 132, 1 A. B. R. 381; In re *Lesser*, 100 Fed. 433, 2 N. B. N. R. 559; see *Metcalf v. Barker*, 187 U. S. 165, 47 L. ed. 122, 9 A. B. R. 36; *contra*, In re *Francis Valentine Co.*, 1 N. B. N. 529, 2 A. B. R. 522, 94 Fed. 793; *aff'g* 1 N. B. N. 532, 2 A. B. R. 532, 93 Fed. 953.

3—*Babbitt v. Dutcher*, 216 U. S. 102, 54 L. ed. 402, 23 A. B. R. 519; citing *Bardes v. First Nat. Bank of Hawarden*, 178 U. S. 524, 44 L. ed. 1175, 4 A. B. R. 163; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620, 9 A. B. R. 525, *aff'g* 106 Fed. 666, 6 A. B. R. 285; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 5 A. B. R. 623; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

4—In re *Logan*, 196 Fed. 678, 28 A. B. R. 543.

5—In re *Ransford*, 194 Fed. 658, 28 A. B. R. 78.

The court is without jurisdiction in proceedings against a partnership, none of whose members are adjudged bankrupt, to summarily take the individual estate of a solvent partner without his consent.<sup>6</sup>

### § 1169. — Determination of existence of adverse claim.

The mere refusal to surrender property, or the assertion by a person that he holds an adverse claim thereto, even with an intention to protect it with the usual process of law does not constitute an adverse holding and will not oust the summary jurisdiction of the bankruptcy court to ascertain whether any basis for such claim actually exists. It is only when the evidence indicates that the asserted claim is not false or fraudulent that the court is deprived of jurisdiction.<sup>7</sup> The court of bankruptcy or referee has, therefore, the undoubted power to examine into the claim and determine whether it is merely colorable or not.<sup>8</sup> It is held, however, that a claim, though fraudulent, may, nevertheless, be adverse,<sup>9</sup> and that a plenary suit must be resorted to if the uncontradicted facts asserted by a claimant are sufficient, if true, to make out a real adverse claim, no matter how ill supported it may appear to be.<sup>10</sup> An order directing a special master to take testimony and report his opinion is not a decision that the adverse claim is merely colorable so as to prevent its determination in a plenary action.<sup>11</sup>

6—In re Bertenshaw, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 19 A. B. R. 577.

7—Metcalf v. Barker, 187 U. S. 165, 47 L. ed. 122; Peck v. Jenness, 7 How. 612, 12 L. ed. 320; Eyster v. Gaff, 91 U. S. (1 Otto) 521, 23 L. ed. 403; Marshall v. Knox, 16 Wall. 551, 21 L. ed. 481; In re Tune, 115 Fed. 906, 8 A. B. R. 285; In re Baird, 116 Fed. 765, 8 A. B. R. 649; In re Ellis Bros. Printing Co., 156 Fed. 430, 19 A. B. R. 472; In re Cohn, 18 A. B. R. 786.

8—Shea v. Lewis, 206 Fed. 877, 30 A. B. R. 436; In re Shea, 211 Fed. 365, 31 A. B. R. 697; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; In re Tune, 8 A. B. R. 285; Jaquith v. Rowley, 188 U. S. 620, 47 L. ed. 620; In re Waukesha Water Co., 116 Fed. 1009, 8 A. B. R. 715; Johnston v. Spen-

cer, 195 Fed. 215, 27 A. B. R. 800; In re Ironclad Mfg. Co., 191 Fed. 831, 27 A. B. R. 490; In re Kane, 131 Fed. 386, 12 A. B. R. 444; In re New York Wheel Works, 132 Fed. 203, 13 A. B. R. 60; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 12 A. B. R. 673; In re Franklin Suit & Skirt Co., 197 Fed. 591, 28 A. B. R. 278; First Nat. Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102, rev'g 125 Fed. 169, 11 A. B. R. 79; In re Andre, 135 Fed. 736, 13 A. B. R. 132; In re Weinger, Bergman & Co., 126 Fed. 875, 11 A. B. R. 424.

9—Shea v. Lewis, 206 Fed. 877, 30 A. B. R. 436.

10—In re Green, 207 Fed. 693, 30 A. B. R. 464.

11—In re Auerbach, 202 Fed. 192, 29 A. B. R. 791.

### § 1170. — What constitutes an adverse claim.

A claim of paramount or other title is not essential to the character of an adverse claimant. One who has a substantial claim to a lien created by the bankrupt upon his property before the petition is filed is equally an adverse claimant with one who claims absolute title.<sup>12</sup> The fact that the bankrupt does not schedule or claim property as his own is not conclusive that one in constructive possession of the property is an adverse claimant, where the bankrupt is in actual possession and the mere possession of a deed to property does not constitute the holder thereof an adverse claimant where the property is still in the possession of the bankrupt, and the evidence shows that the record owner merely holds title as agent of the bankrupt in pursuance of a scheme to defraud creditors.<sup>13</sup>

One claiming money in the hands of a third party under an assignment from the bankrupt has been held an adverse claimant,<sup>14</sup> as has a pledgee of stock;<sup>15</sup> a surety on the bankrupt's bail bond;<sup>16</sup> a creditor claiming the right to an excess of the value of the security held by him over the amount of his claim;<sup>17</sup> a surety in whose hands money had been deposited to indemnify him for his liability on the bond,<sup>18</sup> one with whom property had been deposited to secure the release of an attachment;<sup>19</sup> a trustee for lien claimants;<sup>20</sup> and an officer holding property in replevin.<sup>21</sup>

12—*Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620, 9 A. B. R. 525, aff'g 106 Fed. 666, 6 A. B. R. 285; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102, rev'g 125 Fed. 169, 11 A. B. R. 79; *In re Rathman*, 183 Fed. 913, 25 A. B. R. 246.

13—*In re Logan*, 196 Fed. 678, 28 A. B. R. 543.

14—*Copeland v. Martin*, 182 Fed. 805, 25 A. B. R. 268.

15—*In re Bacon*, 196 Fed. 986, 28 A. B. R. 565.

16—*Sureties on bankrupt's bail bond with whom the bankrupt had deposited a sum of money as security against liability held adverse claimants even though the action in which the bond was given had been dismissed. In re Horgan*, 168 Fed. 444, 21 A. B. R. 31; and see *In re Horgan*, 158 Fed. 774, 19 A. B. R. 857.

17—*Fitch v. Richardson*, 147 Fed. 197, 16 A. B. R. 835.

18—*Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620, 9 A. B. R. 525, aff'g 106 Fed. 666, 6 A. B. R. 285.

19—*In re Squier*, 165 Fed. 515, 21 A. B. R. 346.

20—*Trustee for lien claimants asserting rights adverse to trustee in bankruptcy and who invoked aid of state court more than four months prior held adverse claimant. In re Heintz*, 201 Fed. 338, 29 A. B. R. 19.

21—*The district court has no jurisdiction by summary proceedings to compel an officer holding property in replevin taken by him prior to the institution of the bankruptcy proceedings in an action pending in a state court, to deliver same to a receiver appointed by it. In re Rudnick & Co.*, 160 Fed. 903, 20 A. B. R. 33, rev'g 158 Fed. 223, 18 A. B. R. 750.

So, a purchaser of property from the bankrupt shortly before bankruptcy without knowledge of his insolvency<sup>22</sup> a fraudulent or preferential transferee;<sup>23</sup> a bank claiming the right of set-off;<sup>24</sup> and an owner holding funds due a bankrupt contractor upon whom notice of lien has been filed<sup>25</sup> are generally held adverse claimants.

The wife of the bankrupt may be an adverse claimant,<sup>26</sup> and a summary order against the bankrupt to compel the delivery of property adversely claimed by his wife is improper, since it might act as undue compulsion upon the wife.<sup>27</sup>

Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien, which is annulled by the adjudication in bankruptcy, the person or officer so in possession holds as bailee for the trustee, and must deliver the property upon proper demand and may be required to do so by summary order issue from the bankruptcy court. He is not an adverse claimant, and his mere refusal to surrender the property does not make him such.<sup>28</sup>

A general assignee is not an adverse claimant,<sup>29</sup> and may be

22—In *re Davis Tailoring Co.*, 144 Fed. 285, 16 A. B. R. 486.

23—Suit by trustee to recover value of property fraudulently conveyed is not a proceeding in bankruptcy wherein a summary proceeding can be had. *McNulty v. Feingold*, 129 Fed. 1001, 12 A. B. R. 338; but see *In re Berkowitz*, 173 Fed. 1012, 22 A. B. R. 231, 233, holding that a corporation to which the bankrupt fraudulently transferred his property shortly before bankruptcy should be regarded as the agent of the bankrupt and may be summarily required to turn over the property.

Trustee cannot require a creditor who is not a party to the bankruptcy proceedings to litigate question of preference in a summary proceeding. *In re Keystone Press, Inc.*, 203 Fed. 710, 29 A. B. R. 715.

24—*In re Boston-Cerrillos Mines Corp.*, 206 Fed. 794, 30 A. B. R. 739; *First Nat. Bank v. Hopkins*, 199 Fed. 873, 29 A. B. R. 434.

25—*In re Cotton*, 209 Fed. 124, 31 A. B. R. 568.

26—Wife of bankrupt who claimed to have purchased certain stock in her own name with pin money held an adverse claimant. *In re Shea*, 211 Fed. 365, 31 A. B. R. 697.

The right of the bankrupt's wife to retain a policy of insurance or to claim a lien thereon, or upon its surrender value to the amount of advances made by her out of her own funds, cannot be considered in a summary proceeding against the bankrupt to show cause. *In re Loveland*, 200 Fed. 136, 29 A. B. R. 560.

27—*In re Loveland*, 200 Fed. 136, 29 A. B. R. 560.

28—*Staunton v. Wooden*, 179 Fed. 61, 24 A. B. R. 736.

29—*In re Hays*, 179 Fed. 222, 24 A. B. R. 691; but see *Morning Telegraph Pub. Co. v. Hutchinson Co.*, 146 Mich. 38, 17 A. B. R. 425, holding that a person holding property as a trustee for the benefit of creditors under a mortgage is an adverse claimant and is entitled to a hearing before he can be deprived of possession.

compelled to render his account to the bankruptcy court, and have there determined the questions of his compensation and disbursements in executing the trust.<sup>30</sup>

Officers of a bankrupt corporation are not adverse claimants as to property held in their capacity as officers,<sup>31</sup> or as to property obtained by them through the action of dummy directors under their control.<sup>32</sup> Partners absconding with partnership funds are not considered adverse claimants in partnership proceedings.<sup>33</sup>

### § 1171. — Possession obtained after bankruptcy.

The bankruptcy court has jurisdiction in a summary proceeding to order restored by a third person to the trustee, property, or its proceeds, which was in possession of the bankrupt at the time of the filing of the petition, and was subsequently seized under process from a state court,<sup>34</sup> or voluntarily delivered to a creditor or adverse claimant,<sup>35</sup> or seized from the sheriff after the arrest of bankrupt,<sup>36</sup> or taken from the possession of the receiver in bankruptcy, with or without his consent.<sup>37</sup> It is held,

30—*In re Hays*, 179 Fed. 222, 24 A. B. R. 691; *contra*, *In re Hersey*, 171 Fed. 998, 22 A. B. R. 856.

31—*In re Cantelo Mfg. Co.*, 201 Fed. 158, 29 A. B. R. 704.

32—*In re Kornit Mfg. Co.*, 192 Fed. 392, 27 A. B. R. 244.

33—*Musica v. Prentice*, 211 Fed. 326, 31 A. B. R. 686, *aff'g* 205 Fed. 413, 30 A. B. R. 555.

34—*In re Endl*, 99 Fed. 915, 3 A. B. R. 813.

Summary proceedings proper where property of the bankrupt was taken upon a void attachment and the money realized on the sale thereof was paid to the creditor on a default judgment entered after the commencement of the bankruptcy proceedings with the knowledge of the creditor. *In re Grassler & Reichwald*, 154 Fed. 478, 18 A. B. R. 694.

An order consolidating voluntary and involuntary proceedings "without prejudice to interested parties," does not deprive the court of jurisdiction to determine by summary proceedings claims to

property seized by an adverse claimant after the institution of the bankruptcy proceedings. *In re Briskman*, 132 Fed. 201, 13 A. B. R. 57.

35—*Knapp & Spencer Co. v. Drew*, 160 Fed. 413, 20 A. B. R. 355; *In re Denson*, 195 Fed. 854, 28 A. B. R. 158.

One to whom the bankrupt makes a preferential payment after bankruptcy has a mere colorable claim and is not an adverse claimant. *In re Leigh*, 208 Fed. 486, 31 A. B. R. 379; but see *Hinds v. Moore*, 134 Fed. 221, 14 A. B. R. 1, *rev'g* 129 Fed. 922, 12 A. B. R. 136, holding that the bankruptcy court has no jurisdiction to require a claimant to whom the referee voluntarily surrendered the property to show cause why he should not pay to the bankrupt's estate the value of such property.

36—*LeMaster v. Spencer*, 203 Fed. 210, 29 A. B. R. 264.

37—*In re Rose Shoe Mfg. Co.*, 168 Fed. 39, 21 A. B. R. 725; *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 14 A. B. R. 45; *In re Lipman*, 201 Fed. 169, 29 A. B. R. 139.



however, that where the receiver in bankruptcy has with the apparent consent of the bankrupt court vacated premises of which a third person is claiming possession, and such third person has thereupon entered the premises, the latter cannot be ousted by summary proceedings.<sup>38</sup>

The court may summarily proceed against a mere naked intermeddler either of its own motion, or upon complaint of the bankrupt or some other interested person,<sup>39</sup> and may summarily compel the assignee of the bankrupt's wages under a void assignment, who has given the latter's employer notice of the assignment, to withdraw the notice, and to prosecute the claim, if at all, in the bankruptcy court.<sup>40</sup>

"The law . . . gave the bankrupt the right to enjoy, pending discharge, certain privileges, immunities, and benefits, in the free exercise of which the statute imposes the duty of the court to protect him. Among them is the right to enjoy the benefit of a discharge, if the bankrupt complies with the provisions of the statute, and, in order that the practical good of such discharge shall not be taken from him, that he shall not be coerced, pending discharge, by any device of creditors, into the payment of a debt from which the discharge would free him, or which would operate upon his rights to any particular property, if the effect of such discharge would pass such property either to himself or the estate, as against a creditor who claimed it for himself. The jurisdiction of the court to protect the bankrupt in the enjoyment of such rights, whether ancillary or original, is abundant and its exercise is justified to conserve to the fullest extent the court's original jurisdiction."<sup>41</sup>

### § 1172. — Consent of adverse claimant.

Relying upon the rule that consent cannot confer jurisdiction where the subject matter of the controversy is not within the jurisdiction of the court, several courts have held that the failure of the adverse claimant to formally challenge the jurisdiction of the court, or his consent thereto, does not confer jurisdiction to summarily determine the merits of a controversy.<sup>42</sup> On the

38—In re Rothschild, 154 Fed. 194, 18 A. B. R. 682.

39—In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168.

40—In re Home Discount Co., 147

Fed. 538, 17 A. B. R. 168; but see In re Karns, 148 Fed. 143, 16 A. B. R. 841.

41—In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168.

42—In re Teschmacher & Mrazay, 127

other hand, the court, with the consent of the adverse claimant, has been held to have jurisdiction even as against the objection of the trustee,<sup>43</sup> and it is held that a voluntary appearance and submission of issues to the referee and the court is a waiver of the right to a plenary suit,<sup>44</sup> and that consent to the jurisdiction may be inferred from the fact that the claimant acted under an order without seeking to review it.<sup>45</sup>

In view of the provisions of section 23b, it would seem that, though consent is necessary to confer jurisdiction in the case of an adverse claim, yet, such consent having been given, a summary proceeding is proper.

Objection to summary proceedings cannot be considered as waived by a denial of the material allegations of the trustee's petition and the making of affirmative allegations after the objection to the jurisdiction has been overruled.<sup>46</sup>

### § 1173. — Ancillary jurisdiction.

Inasmuch as the process of the bankruptcy court is restricted to the territorial limits of the district, an order for the delivery of property to the trustee cannot be made against an adverse claimant residing outside of the district; the proper course being to institute ancillary proceedings in the district wherein such claimant resides.<sup>47</sup> "While a summary proceeding to collect property belonging to the estate of the bankrupt which is in the possession of a stranger who resides outside of the territorial limits of the court of original jurisdiction is ancillary in character, nevertheless it presents a completely distinct and separable controversy, and, therefore, one which must be determined by the court within whose jurisdiction the property is located and the respondent resides."<sup>48</sup> District courts have the power to determine adverse claims to property seized by them in the exercise of their ancillary jurisdiction.<sup>49</sup>

Fed. 728, 11 A. B. R. 547; In re Walsh Bros., 163 Fed. 352, 21 A. B. R. 14.

43—In re Hadden Rodee Co., 135 Fed. 886, 13 A. B. R. 604.

44—In re Howard Laundry Co., 203 Fed. 445, 30 A. B. R. 167.

45—In re Bacon, 159 Fed. 424, 20 A. B. R. 107.

46—In re Bacon, 210 Fed. 129, 31 A.

B. R. 777, aff'g 196 Fed. 896, 28 A. B. R. 565.

47—In re Boston-Cerrillos Mines Corp., 206 Fed. 794, 300 A. B. R. 739; In re Rathfon Bros., 200 Fed. 108, 29 A. B. R. 22.

48—In re Heintz, 201 Fed. 338, 29 A. B. R. 19.

49—Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 28 A. B. R. 4.

**§ 1174. — Jurisdiction of referee.**

Where property is in the possession of a bankrupt at the time of the bankruptcy proceedings, and passes as part of his estate into the possession of the trustee in bankruptcy, and a third person claims an interest therein, the referee may, by a summary proceeding, require such third person to appear in the bankruptcy court, present his claim, and adjudicate the rights of the parties in respect thereto.<sup>50</sup>

Where the property is in the possession of a third person the referee may make inquiry to ascertain whether an adverse claim to property in possession of the claimant exists. Where a claim is merely colorable, he may compel the delivery of the property to the trustee.<sup>51</sup> But unless he can find it merely colorable, he has no jurisdiction to proceed further. He cannot hear and determine its merits under a summary petition, if there is a real controversy as to the merits.<sup>52</sup> The trustee cannot enlarge the referee's jurisdiction merely by alleging that the claim under which the property is held has no merits or is fraudulent, or by calling it "merely colorable," when no other reasons appear for so describing it than its alleged want of merit or fraudulent character.<sup>53</sup>

**§ 1175. Compelling completion of contract by summary proceedings.**

The bankruptcy court has power to compel, by summary proceedings, the completion of a contract of purchase from one of its officers.<sup>54</sup> One who has purchased real property from the bankrupt a long time prior to bankruptcy and has been in possession ever since the purchase has a title superior to that of the trustee though no conveyance thereof has ever been made,

50—Knapp & Spencer v. Drew, 160 Fed. 413, 20 A. B. R. 355; In re Drayton, 135 Fed. 883, 13 A. B. R. 602; Mound Mines Co. v. Hawthorne, 173 Fed. 882, 23 A. B. R. 242; In re Jackson Brick & Tile Co., 189 Fed. 636, 26 A. B. R. 915; In re Epstein, 156 Fed. 42, 17 L. R. A. (N. S.) 465, 19 A. B. R. 89.

51—In re Knopf, 144 Fed. 245, 16 A. B. R. 432.

52—In re Tarbox, 185 Fed. 985, 26 A. B. R. 432; In re Hayden, 172 Fed.

623, 22 A. B. R. 764; In re Ellis Bros. Printing Co., 156 Fed. 430, 19 A. B. R. 472; In re Peacock, 178 Fed. 851, 24 A. B. R. 159; Spears v. Freuchton & B. R. Co., 213 Fed. 784, 31 A. B. R. 679. Referee has no jurisdiction of action to recover preference. In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

53—In re Tarbox, 185 Fed. 985, 26 A. B. R. 432.

54—Mason v. Wolkowich, 150 Fed. 699, 17 A. B. R. 709.

and may compel a conveyance from the trustee. Such proceeding is summary and a demurrer therein is improper.<sup>55</sup>

### § 1176. Determining title to land.

The question of title to land should be determined by a plenary suit in a proper court and not upon affidavits.<sup>56</sup>

### § 1177. Compelling surrender of property.

### § 1178. — In possession or control of bankrupt.

A referee<sup>57</sup> or a court of bankruptcy has jurisdiction and power to order a bankrupt to pay over to his trustee money, or other property, found to be in his possession or control, and properly belonging to his estate in bankruptcy, and, if the bankrupt fails to obey such order, he may be committed as for a contempt until he complies, upon motion of the trustee.<sup>58</sup> Thus, where the court of bankruptcy finds a transfer of property by a bankrupt in fraud of creditors, the property still remaining in bankrupt's hands, it must be turned over to the trustee,<sup>59</sup> but no such order can be made until the issue is squarely raised between the trustee and the bankrupt, as to whether the bankrupt has in his possession or under his control such money or property;<sup>60</sup> nor unless the testimony proves beyond a reasonable doubt that the same is in fact in his possession or under his control.<sup>61</sup> To sustain such order it must appear, first, that the

55—In re Snelling, 202 Fed. 259, 29 A. B. R. 818.

56—In re Bailey, 156 Fed. 691, 19 A. B. R. 470.

57—In re Miller, 105 Fed. 57; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

58—In re Schlesinger, 102 Fed. 117, 4 A. B. R. 361; Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 899, 101 Fed. 810, 4 A. B. R. 299; In re Purvine, 1 N. B. N. 326, 96 Fed. 192, 2 A. B. R. 787; In re Rosser, 1 N. B. N. 469, 2 A. B. R. 746, 96 Fed. 308, s. c. 101 Fed. 562; In re Oliver, 1 N. B. N. 329, 2 A. B. R. 783, 96 Fed. 95; In re Kuntz, 1 N. B. N. 256; In re Salkey, 11 N. B. R. 423, 516, Fed. Cas. No. 12253; In re Speyer, 6 N. B. R. 255, Fed. Cas. No. 13339.

59—In re Smith, 1 N. B. N. 533, 100 Fed. 795, 3 A. B. R. 95.

60—In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819; but see In re Frank, 182 Fed. 794, 25 A. B. R. 486.

61—In re Kreuger, 197 Fed. 124, 28 A. B. R. 890; In re McCormick, 2 N. B. N. R. 104, 3 A. B. R. 340, 97 Fed. 566; Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 545, 899, 101 Fed. 810, 4 A. B. R. 299; In re Tischler, 2 N. B. N. R. 549; In re Mayer, 2 N. B. N. R. 257, 3 A. B. R. 533, 98 Fed. 839; In re Bryant, 2 N. B. N. R. 1058.

Order is not to be made except upon convincing evidence. In re Lesaius, 163 Fed. 614, 21 A. B. R. 23.

Concealment of assets need only be shown by a preponderance. In re Gramer, 175 Fed. 879, 23 A. B. R. 637.

title to the property is in the trustee, and second, that the possession and control of it is in the bankrupt, or in one who holds for him or in his right.<sup>62</sup>

In the absence of concealment or fraud, the court can only order the delivery of property which the bankrupt is physically able to deliver, having the same in his possession or control,<sup>63</sup> and if the bankrupt absolutely denies having it and the evidence to the contrary is only inferential, and there is any reasonable doubt as to bankrupt's ability to comply with the order, it should not be made.<sup>64</sup> The fact that the bankrupt accounts falsely for the disposition of his money, or does not satisfactorily disclose the uses of it, or evades the exhibition of his conduct in the premises, may indicate that he has defrauded his creditors, but is not sufficient to justify and order to turn over assets under the penalties for contempt unless it is clearly shown that the property is in his possession.<sup>65</sup> The court may, however, render the order without definite proof that the assets are actually in the bankrupt's possession or subject to his control, if from the facts presented no other reasonable conclusion is deducible.<sup>66</sup>

The trustee need not prove by eyewitnesses that the bankrupt has the goods or money in his possession. Property traced to the recent possession or control of the bankrupt is presumed to continue in his possession or control, and in absence of satisfactory explanation for its disappearance an order compelling

The referee must be satisfied and reasonably sure that the property or proceeds thereof are in the possession or under the control of the bankrupt. *In re Krall*, 182 Fed. 191, 24 A. B. R. 941.

The evidence must be plain and convincing beyond a reasonable controversy, but need not be beyond a reasonable doubt. *In re Alphin & Lake Cotton Co.*, 134 Fed. 477, 14 A. B. R. 194.

A denial of a discharge on the ground of the bankrupt's complicity in a theft of his store is not conclusive that the bankrupt had the stolen property in his possession four years later. *In re Barton Bros.*, 149 Fed. 620, 18 A. B. R. 98.

Evidence sufficient to warrant order to turn over. *Kirsner v. Taliaferro*, 202 Fed. 51, 29 A. B. R. 832.

62—*In re Nisenson*, 182 Fed. 912, 24 A. B. R. 915.

63—*In re Soloway & Katz*, 196 Fed. 132, 28 A. B. R. 345; *Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412; *In re Reynolds*, 190 Fed. 967, 27 A. B. R. 200; *In re Ruos*, 164 Fed. 749, 21 A. B. R. 257; *In re Barton Bros.*, 149 Fed. 620, 18 A. B. R. 98; *In re Longbottom & Sons*, 142 Fed. 291, 15 A. B. R. 437; *In re Sax*, 141 Fed. 223, 15 A. B. R. 455.

64—*In re Thiessen*, 2 N. B. N. R. 625; *In re Friedman*, 1 N. B. N. 332, 2 A. B. R. 301; *In re Ogles*, 1 N. B. N. 400, 2 A. B. R. 514.

65—*In re Adler*, 129 Fed. 502, 12 A. B. R. 19.

66—*In re Goodman Shoe Co.*, 196 Fed. 566, 27 A. B. R. 697.

him to turn over the property is proper.<sup>67</sup> The presumption is one of fact varying in weight. The burden is upon the bankrupt to satisfactorily account for the non-production of the property, but in assuming such burden he is entitled to the benefit of a reasonable doubt.<sup>68</sup> The conclusion of the referee that the bankrupt had certain property under his control at the date of the filing of the petition and is concealing same is entitled to great weight.<sup>69</sup>

Where a bankrupt admits receiving a large sum of money just before his bankruptcy for which he fails to satisfactorily account, or there is an unexplained deficit in his stock, or in the proceeds of sales, he may be ordered to turn over to his trustee such goods or money, less reasonable cost of living;<sup>70</sup> but, if the difference has been used in paying creditors, or business expenses or in any other similar manner or is claimed to be due to a defective appraisal and defects are shown in such appraisal, the order will not be made.<sup>71</sup>

A bankrupt, whose funds are deposited with an agent, cannot excuse himself from delivering over the same to the trustee because so deposited, unless he shows as a matter of fact an inability to obtain possession.<sup>72</sup> So, the mere fact that property

67—In re Silverman, 206 Fed. 960, 30 A. B. R. 798; *Shea v. Lewis*, 206 Fed. 877, 30 A. B. R. 436; In re Rosenthal, 200 Fed. 190, 29 A. B. R. 515; In re Walder, 142 Fed. 784, 16 A. B. R. 41; In re Epstein, 15 A. B. R. 711; In re Leinweber, 128 Fed. 641, 12 A. B. R. 175.

When a sum of money or goods has been traced into the hands of the bankrupt he must account for the same. It may not be necessary to make such an account with mathematical nicety, but there must be some explanation satisfactory to the judge before whom the matter may come. A general statement that the money is lost or stolen or gambled away or lived up will not suffice. Some details must be given. In re Cantor, 26 A. B. R. 859.

68—In re Nisenson, 182 Fed. 912, 24 A. B. R. 915.

69—In re Cole, 135 Fed. 439, 14 A. B. R. 389.

70—In re Kuntz, 1 N. B. N. 256; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re McCormick, 2 N. B. N. 104, 3 A. B. R. 340, 97 Fed. 566; In re Rosser, 1 N. B. N. 469, 2 A. B. R. 746, 96 Fed. 308; In re Purvine, 1 N. B. N. 326, 96 Fed. 192, 2 A. B. R. 787; In re Tudor, 2 N. B. N. R. 168, 100 Fed. 796, 4 A. B. R. 78; In re Deuell, 100 Fed. 633; In re Schlesinger, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 Fed. 930, 102 Fed. 117; In re Peltasohn, 16 N. B. R. 265, Fed. Cas. No. 10912; *Ripon Knitting Works v. Schreiber*, 2 N. B. N. R. 545, 899, 101 Fed. 810, 2 A. B. R. 299; In re De Gottardi, 114 Fed. 328, 7 A. B. R. 723.

71—In re Tischler, 2 N. B. N. R. 549; In re Mayer, 2 N. B. N. R. 257, 3 A. B. R. 533, 98 Fed. 839.

72—In re Cole, 144 Fed. 392, 16 A. B. R. 302.

is in the possession of the bankrupt's husband will not, without a further showing, justify her refusal to turn over property.<sup>73</sup>

The summary jurisdiction of the court cannot be invoked to compel the bankrupt to deliver the property of a third person in his possession to the trustee for the benefit of the owner,<sup>74</sup> but the fact that the money sought to be obtained is carried in a bank account labelled with the bankrupt's name as "manager" is not conclusive that the ownership of the same is not in the bankrupt individually.<sup>75</sup> The bankrupt may be ordered to restore money which he has paid to himself after the filing of the petition in bankruptcy, as trustee of a corporation whose money he had improperly used,<sup>76</sup> and where third persons alleged to have an interest in a fund held by the bankrupt have not attempted to enforce any trust in their behalf, but have put in their claims against the bankrupt estate as general creditors, it is no answer to an order requiring the bankrupt to pay over the fund that such third persons have an interest therein.<sup>77</sup>

A bankrupt who, in good faith, has paid over money to some of his creditors after the commencement of the bankruptcy proceedings will not be compelled to account for the money so paid on the theory that he has constructive possession thereof.<sup>78</sup>

### § 1179. — In possession or control of third persons.

A summary proceeding is not appropriate for the recovery of property or the proceeds thereof, after the same has passed into the hands of the purchaser in good faith, prior to the filing of the petition. After the property has passed under such conditions, it amounts to a transfer, and can only be recovered in the manner prescribed by section 60.<sup>79</sup> The court has power, however, to make an order to show cause why property in the possession of a third person should not be delivered to the trustee<sup>80</sup> or, if no trustee has been appointed, to the receiver in bankruptcy,<sup>81</sup> but a summary order directing a party to sur-

73—In re Cole, 144 Fed. 392, 16 A. R. 302.

74—In re Eliowich, 148 Fed. 510, 17 A. B. R. 419.

75—In re Samuel Kurtz, 125 Fed. 992, 11 A. B. R. 129.

76—In re Longbottom & Sons, 142 Fed. 291, 15 A. B. R. 437.

77—Cummings v. Synnott, 184 Fed. 718, 25 A. B. R. 859.

78—In re Laplume Condensed Milk Co., 145 Fed. 1013, 16 A. B. R. 729.

79—In re Bailey, 144 Fed. 214, 16 A. B. R. 289.

80—In re Famous Clothing Co., 179 Fed. 1015, 24 A. B. R. 780.

81—In re Muncie Pulp Company, 139 Fed. 546, 14 A. B. R. 70, *certiorari* denied 202 U. S. 621, 50 L. ed. 1175.

render property alleged to belong to the bankrupt should not be made unless the property can be sufficiently identified to enable the marshal to take it into possession,<sup>82</sup> and unless the party is physically able to comply therewith,<sup>83</sup> and his possession and control of the property are shown beyond a reasonable doubt.<sup>84</sup> So, the fact that the court does not believe the statements of a witness as to what became of property of the bankrupt, is not sufficient basis for an order requiring him to turn over the property, where none of the property is actually traced into his possession.<sup>85</sup>

When property of the bankrupt estate is traced to the recent possession of a third person it is presumed that it remains in his possession or under his control until he satisfactorily accounts for its disposition or disappearance. The burden is upon him to satisfactorily so account for it, and he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate.<sup>86</sup> Any proceeding to compel the bankrupt to turn over property which was concealed by him or for him may be based upon an examination of the bankrupt's agent as to what disposition he made of the bankrupt's property. But until the property or its proceeds is traced through the hands of the bankrupt, and until he avoids responsibility by showing that his control over it had terminated, because it had reached the possession of his agent and had been converted or stolen, and was hence out of his own control, the agent cannot be compelled to account for the property, unless the property or its proceeds be specifically shown to be in his hands.<sup>87</sup>

A partner in a bankrupt firm may be compelled to turn over assets traced into his hands,<sup>88</sup> and in proceedings against a part-

82—In re Jackier, 179 Fed. 720, 24 A. B. R. 790.

83—Order directing agent to surrender property improper where it appeared that he had delivered the same to his principal who was in possession at the time of the order. In re Denson, 195 Fed. 854, 28 A. B. R. 158.

84—In re Feldser, 134 Fed. 307, 14 A. B. R. 216.

85—In re Rosenzweig, 206 Fed. 360, 30 A. B. R. 680.

86—In re Meier, 182 Fed. 799, 25 A. B. R. 272; In re Famous Clothing Co., 179 Fed. 1015, 24 A. B. R. 780; In re Alphin & Lake Cotton Co., 134 Fed. 477, 14 A. B. R. 194.

87—In re Fogelman, 188 Fed. 755, 26 A. B. R. 742.

88—In re Shaffer v. Stern, 185 Fed. 549, 26 A. B. R. 54.

Partner withdrawing his interest in firm shortly before bankruptcy of firm and in contemplation thereof required to



nership alone, the court may take such proceedings as are necessary to ascertain what assets of an objecting partner are available and to subject such as are available to the payment of partnership creditors.<sup>89</sup>

The wife of the bankrupt will not be ordered to turn over money saved by her from an allowance made for household expenses where the circumstances negative any trust relationship.<sup>90</sup> An order enjoining the wife of the bankrupt from disposing of property in her possession may be discontinued during the pendency of a rule to show cause where both the bankrupt and his wife file answers denying that the property belongs to him.<sup>91</sup>

The bankrupt court may order the return of property forcibly taken from its possession,<sup>92</sup> and where a creditor wrongfully receives payment of its claim from a receiver, the court has jurisdiction to order the amount received restored upon condition that it be shown that there was no existing indebtedness at the time of the payment, and to determine in a summary proceeding the issue of the existence of such indebtedness.<sup>93</sup> But the court cannot by a summary order compel a bank acting as depository of bankruptcy funds to pay over the funds deposited with it, especially where the bank is itself insolvent.<sup>94</sup>

### § 1180. — The application or petition.

If it is determined that the facts justify the institution of summary proceedings, then the trustee should demand of the bankrupt such money or property as it is thought he is withholding, and upon his refusal to turn over the same, a petition should be filed setting forth the claim, demand and refusal, and seeking an order against the bankrupt to show cause why he should not be ordered to pay the sum to the trustee, and in default of same to be punished for contempt.<sup>95</sup> The bankrupt is entitled to a distinct issue upon petition and answer and testi-

restore same to partnership trustee. In re Rosenthal, 200 Fed. 190, 29 A. B. R. 515.

89—Dickas v. Barnes, 140 Fed. 849, 5 L. R. A. (N. S.) 654, 15 A. B. R. 566.

90—In re Simon, 197 Fed. 102, 28 A. B. R. 616.

91—In re Latimer, 141 Fed. 665, 15 A. B. R. 461.

92—In re Landis, 151 Fed. 896, 18 A. B. R. 483.

93—In re Burkhalter & Co., 179 Fed. 403, 24 A. B. R. 553.

94—In re Bologh, 185 Fed. 825, 25 A. B. R. 726.

95—In re Kreuger, 197 Fed. 124, 28 A. B. R. 890.

mony taken thereunder,<sup>96</sup> and the petition should contain definite allegations so that the bankrupt may know what he is called upon to produce.<sup>97</sup> It should allege that the bankrupt has assets of the estate in his possession or under his control, and should describe or identify the assets, or so point out the source from which the petitioner claims they came, as to give the bankrupt fair notice of the charge.<sup>98</sup> It is held, however, that the fact that the petition is indefinite or uncertain in its averments or that no answer is filed or issue joined upon the petition does not deprive the referee of jurisdiction.<sup>99</sup>

A petition for an order to turn over which does not show that the respondent has possession is insufficient.<sup>1</sup> The petition for an order to compel an officer of the bankrupt to turn over property need not negative the fact that the officer holds the property adversely.<sup>2</sup>

### § 1181. — Demurrer.

A demurrer is improper in summary proceedings.<sup>3</sup>

A demurrer to the trustee's petition, if interposed, is waived by answering.<sup>4</sup>

Where a demurrer to a motion of the trustee for an order for the delivery of property is overruled, the parties are entitled to an opportunity to be heard upon the issue tendered by the motion.<sup>5</sup>

96—In re Lasch, 12 A. B. R. 158. But see In re Adler, 129 Fed. 502, 12 A. B. R. 19, holding that a formal petition to compel the bankrupt to turn over assets need not be resorted to unless the purpose is to bring to the notice of the court some outside matter that does not appear by the ordinary record, or some outside party who is not bound or ready to take notice of the bankruptcy proceedings, and that simple notice and rule to show cause, and oftentimes a mere affidavit, is all that is necessary to accomplish everything that can be accomplished by a formal petition.

97—In re Greer, 189 Fed. 511, 26 A. B. R. 811.

An order directing the bankrupt to deliver certain property, or pay its value to the trustee, cannot be based upon a peti-

tion of the receiver asking for a general inquiry as to the whereabouts of the bankrupt's property. In re Ruos, 164 Fed. 749, 21 A. B. R. 257.

98—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832.

99—In re Frank, 182 Fed. 794, 25 A. B. R. 486; In re Ruos, 164 Fed. 749, 21 A. B. R. 257.

1—In re Brockton Ideal Shoe Co., 202 Fed. 199, 29 A. B. R. 846.

2—In re Brockton Ideal Shoe Co., 202 Fed. 199, 29 A. B. R. 846.

3—In re Snelling, 202 Fed. 259, 29 A. B. R. 818.

4—In re Koplin, 179 Fed. 1013, 24 A. B. R. 534.

5—Ellis v. Krulewitch, 141 Fed. 954, 15 A. B. R. 615.

**§ 1182. — Notice of hearing.**

Unless the property is of an exceedingly perishable nature, notice and an opportunity to be heard ought to be given the bankrupt or person in whose possession the property is found.<sup>6</sup>

**§ 1183. — Reference.**

The subject of a direction to the bankrupt to turn over assets may be referred to a special master.<sup>7</sup>

**§ 1184. — Evidence and jury trials.**

It lies within the discretion of the referee to determine whether the testimony shall be heard orally, taken in long hand, or written out in the form of stenographer's minutes. If the bankrupt desires the testimony to be perpetuated, the obligation is on him to provide the means therefor especially where the trustee has no funds in his hands.<sup>8</sup> The testimony of the bankrupt, or the officers of a bankrupt corporation taken under section 7a or 21a is admissible, but that of other witnesses is not.<sup>9</sup>

A jury trial is proper to try issues of fact raised in summary proceedings.<sup>10</sup>

**§ 1185. — Findings of referee and order of court.**

The referee should not confine himself to a summary of the testimony and a statement of his belief therein, but should make definite findings of fact.<sup>11</sup> After all the evidence offered by both sides has been received, the referee makes up his findings. If he is of the opinion that the allegations of the trustee's petition have been sustained, in whole or in part, he so finds, and he thereupon orders the bankrupt by some certain date to turn over to the trustee the assets of the estate which he holds the bankrupt unlawfully retained and still has in his possession or control. The bankrupt may ask a review of these findings or he may not. If he does and the referee's order is confirmed, or if he

6—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832; In re Frank, 182 Fed. 794, 25 A. B. R. 486; In re Sunseri, 156 Fed. 103, 18 A. B. R. 231.

7—In re Herskovitz, 152 Fed. 316, 18 A. B. R. 247.

8—In re Goldstein, 155 Fed. 695, 19 A. B. R. 96.

9—Kirsner v. Taliaferro, 202 Fed. 51,

29 A. B. R. 832; In re Greer, 189 Fed. 511, 26 A. B. R. 811; In re Wiesen Bros., 135 Fed. 442, 14 A. B. R. 347; In re Alphin & Lake Cotton Co., 131 Fed. 824, 12 A. B. R. 653.

10—Bill v. Beckwith, 2 N. B. R. 82, Fed. Cas. No. 1406.

11—In re Turetz, 29 A. B. R. 752.

does not, the same procedure in substance follows. Before he can be treated in contempt, he must be notified to show cause why he should not be attached and committed for failing to comply with the order of the court. If he shows cause, the court is bound to hear any new evidence he may offer.<sup>12</sup> An order which leaves the question of the bankrupt's default and his consequent contempt to be determined without further action by the court is erroneous.<sup>13</sup> An order allowing the bankrupt additional time to comply with an order of the referee to turn over assets is in effect an affirmance of the order of the referee, and the court by striking out the provision in the referee's order, "that in default thereof let the above-named bankrupt be committed for contempt" does not adjudicate that the bankrupt should not be punished for contempt, but leaves such a motion to be brought on at a subsequent period, if the bankrupt did not avail himself of the opportunity to pay within the extended time.<sup>14</sup>

The order to turn over assets must be supported by the pleadings,<sup>15</sup> and should direct the bankrupt to turn over the money to the trustee.<sup>16</sup> It is not necessary to do more than describe the property generally in the order.<sup>17</sup> An order directing the bankrupt to turn over certain goods or pay to the trustee their estimated value is not erroneous.<sup>18</sup>

The court cannot make a summary order which is directly enforceable outside of its territorial jurisdiction.<sup>19</sup>

12—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832.

13—In re Ruos, 164 Fed. 749, 21 A. B. R. 257.

14—In re Herskowitz, 136 Fed. 950, 14 A. B. R. 86.

15—Where the petition alleges the concealment of money, an order requiring the delivery of specific property is not justified.

Lesaius v. Goodman, 165 Fed. 889, 21 A. B. R. 446, rev'g 163 Fed. 614, 21 A. B. R. 23.

16—In re Baum, 169 Fed. 410, 22 A. B. R. 295.

17—In re Lesaius, 163 Fed. 614, 21 A. B. R. 23.

An order directing the payment of "money" in a definite sum, by the bankrupt, is sufficiently specific. In re Kra-

mer & Muchnick, 209 Fed. 627, 31 A. B. R. 377.

An order which describes the goods to be turned over as such as he carried in his stores, namely, dry goods, notions, and ladies' ready made wear of the cost and wholesale price of \$4,166, held sufficiently definite. Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832.

An order directing the delivery of "merchandise" by the bankrupt, which does not point out or describe the articles, by kind or class, is insufficient. In re Kramer & Muchnick, 209 Fed. 627, 31 A. B. R. 377.

18—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832.

19—Staunton v. Wooden, 179 Fed. 61, 24 A. B. R. 736.

## CHAPTER XXVIII

### ARBITRATION AND COMPROMISE

§ 1186. Rights and duties of trustee

§ 1187. When compromise granted.

§ 1188. Compounding claims.

§ 1189. Plan of settlement not authorized.

§ 1190. Application for compromise or arbitration.

§ 1191. — In general.

§ 1192. — To whom addressed.

§ 1193. Selection of arbitrators.

§ 1194. Findings of arbitrators.

#### § 1186. Rights and duties of trustee.

Pursuant to the court's direction, the trustee may submit any controversy arising during the settlement of the estate to arbitration;<sup>1</sup> and, with the approval of the court, compromise any controversy upon such terms as he deems for the best interests of the estate.<sup>2</sup> Creditors representing the majority in number and amount, however, cannot compel him to compromise a claim, though where they have expressed their disapproval of the commencement of an action on the claim, the court may direct the delivery of a bond by the creditors opposing the compromise, saving the estate from costs, expenses, and counsel fees of litigation.<sup>3</sup> The bankrupt cannot maintain an action in a state court to restrain the trustee from carrying out a compromise.<sup>4</sup>

#### § 1187. When compromise granted.

Section 27 authorizes the compromise of claims of trustees against third persons to recover moneys due bankrupt or controversies between such trustees and persons holding or claiming adversely to them, as a claim by a trustee to an accounting by a preferential transferee and fraudulent grantee of bankrupt;<sup>5</sup> or

1—Section 26, Act of 1898; G. O. XXXIII.

2—Section 27, Act of 1898.

3—In re Meadows, Williams & Co., 181 Fed. 911, 25 A. B. R. 100.

4—In re Kranich, 174 Fed. 908, 23 A. B. R. 550.

5—Hicks v. Knost, 1 N. B. N. 336, 2 A. B. R. 153, 94 Fed. 625; citing In re Sievers, 1 A. B. R. 117, 1 N. B. N. 68,

of controversies between trustee and a stranger to the bankruptcy proceedings;<sup>6</sup> or at law or in equity, as distinguished from proceedings in bankruptcy, between a trustee as such and adverse claimants concerning the property acquired or claimed by the trustee.<sup>7</sup> Notwithstanding the fact that the creditors may by vote approve a proposed compromise submitted by a debtor of the estate, such action is not conclusive, for the court may for good cause disallow it.<sup>8</sup>

Any agreement of compromise with reference to payments or transfers held to be preferential, or any compromise with regard to claims against the estate which will increase the asset of and be a benefit to the estate will be approved, but if it is coupled with an agreement not to furnish evidence in a criminal prosecution against the bankrupt, or in any way stifle a prosecution that may be contemplated, the court will not approve the agreement, not interfere in any way with the disposition of money obtained from third parties as a result of the agreement.<sup>9</sup>

### § 1188. Compounding claims.

Whenever it may be deemed for the benefit of the estate to compound and settle any debts or other claims due or belonging to the bankrupt, the trustee or bankrupt or any creditor who has proved his debt may file his petition therefor addressed to the judge or referee and thereupon he will appoint a suitable time and place for the hearing thereof, notice of which must be given as the court may direct, presumably at least ten days, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustees.<sup>10</sup>

Under the act of 1867, it was held that an assignee could not be authorized to compound debts for the purpose of compromising the same under direction of a committee of creditors,

91 Fed. 366, and *Carter v. Hobbs*, 1 A. B. R. 215, 1 N. B. N. 191, 92 Fed. 594, with disapproval; and *Burnett v. Morris Mercantile Co.*, 1 A. B. R. 229, 91 Fed. 365, 1 N. B. N. 138; *Mitchell v. McClure*, 1 A. B. R. 53, 1 N. B. N. 138, 91 Fed. 621, and *In re Abraham*, 1 A. B. R. 266, 93 Fed. 767, 1 N. B. N. 281, with approval.

6—*Shutts, tr. v. Bank*, 2 N. B. N. R. 320, 3 A. B. R. 492, 98 Fed. 705.

7—*In re Abraham*, 2 A. B. R. 266, 93 Fed. 767, 1 N. B. N. 281.

8—*In re Heyman*, 108 Fed. 207, 5 A. B. R. 808.

9—*In re Rosenblatt*, 153 Fed. 335, 18 A. B. R. 663.

10—G. O. XXVIII.

where all creditors did not vote when such committee was appointed, but that each case must be presented separately and the facts making the compromise properly stated.<sup>11</sup>

If after a proposition of settlement has been made a trustee applies for instructions as to a suit the creditors wish brought, he must show that a better result is likely to be obtained by suit than by accepting the proposed settlement and that he will probably succeed, though he is not expected to demonstrate that he will certainly do so.<sup>12</sup>

### § 1189. Plan of settlement not authorized.

Where a plan for the settlement and distribution of the bankrupt's estate not within the provisions of the act is proposed, it is only justifiable if all known creditors consent; and is liable to be interfered with if other creditors appear within the year, for such creditors are entitled to their day in court and to their ratable share of the undistributed assets; and, on a motion by such creditors to set aside an order authorizing the execution of such plan, the distribution of the estate must be arrested until their claims can be liquidated or found invalid, but their merits are not to be passed upon on such motion but in the regular course of the proceedings.<sup>13</sup>

The court cannot compel a creditor to consent to have all the bankrupt estate transferred to a corporation and accept in settlement of his claim the unsecured obligations of the new corporation payable in the future.<sup>14</sup>

### § 1190. Application for compromise or arbitration.

#### § 1191. — In general.

Sections 26 and 27 afford an expeditious and inexpensive mode of adjusting, without litigation, many of the contested claims arising in the settlement of an estate. The application of the trustee for a compromise or to submit a controversy to the determination of arbitrators must clearly and distinctly set forth

11—In re Dibblee, 3 N. B. R. 17, 3 Ben. 354, Fed. Cas. No. 3885.

12—In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396.

13—In re Lockwood, 3 N. B. N. R. 57, 104 Fed. 794, 4 A. B. R. 731.

14—In re Cornell Co., 186 Fed. 859, 26 A. B. R. 252; In re Northampton Portland Cement Co., 185 Fed. 542, 25 A. B. R. 565.

the subject-matter of the controversy and the reasons why he thinks it proper and for the best interests of the estate to have the controversy so settled.<sup>15</sup> The court may hear testimony and arguments of counsel upon an application for submission to arbitration, and though there is no provision for notice to creditors of such hearings or proceedings, the better practice is to give notice. Creditors, however, must, by express provision of the act, have at least ten days' notice by mail of the proposed compromise of any controversy.<sup>16</sup>

### § 1192. — To whom addressed.

This application may be addressed to the court of bankruptcy or to the referee, since he is required generally to perform the duties of such court<sup>17</sup> and is comprehended within the definition of the term "court."<sup>18</sup>

Under the act of 1867 the application had to be made to a judge.<sup>19</sup>

### § 1193. Selection of arbitrators.

"Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator."<sup>20</sup> It is unlawful for the third arbitrator to be selected by the two contending parties.<sup>21</sup>

### § 1194. Findings of arbitrators.

"The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury."<sup>22</sup> Such finding when so filed is necessarily reviewable and liable to be set aside

15—G. O. XXXIII.

16—Section 58a (7), Act of 1898; In re Heyman, 108 Fed. 207, 5 A. B. R. 808.

17—Section 38a (4), Act of 1898.

18—Section 1 (7), Act of 1898.

19—In re Graves, 1 N. B. R. 237, Fed. Cas. No. 5709.

20—Section 26b, Act of 1898.

21—In re McLam, 97 Fed. 922, 3 A. B. R. 245.

22—Section 26c, Act of 1898.

Analogous provision of Act of 1867. "Sec. 17. . . . He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the



or adjudged upon by the court as a verdict would be. Consequently in a case where a few days before filing his petition a bankrupt gave a mortgage to one of his creditors which on being submitted to arbitrators was held not given with intent to hinder, delay or defraud creditors, such finding was held unwarranted and set aside as its necessary effect was to prefer the mortgagee and to hinder and delay others, and such must be presumed to have been his intent.<sup>23</sup>

When one becomes a party to a submission to arbitration he is bound by the decision in a collateral action.<sup>24</sup>

other party, as he thinks proper and most for the interest of the creditors.''

24—Johnson v. Worden, 13 N. B. R. 335.

23—In re McLam, 97 Fed. 922, 3 A. B. R. 245.

## CHAPTER XXIX

### COMPOSITIONS

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### § 1195. Statute strictly construed.

The provisions of the act as to compositions are to be strictly construed.<sup>1</sup>

### § 1196. Offer of composition.

### § 1197. — Procedure in general.

“A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.”<sup>2</sup>

1—In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808; In re Shields, 15 N. B. R. 532, 4 Dill. 588, Fed. Cas. No. 12784; Broadway Trust Co. v. Mannheim, 47 Misc. (N. Y.) 415, 14 A. B. R. 122.

2—Section 12a, Act of 1898 as amended June 25, 1910. The words “either before or after adjudication” were added by the Amendment of 1910. Act of 1867 contained no analogous provision to this, but by the amendment of June 22, 1874 (18 St. L. 182, par. 17) terms of composition might be offered either before or after adjudication, following largely the provision in the 126th section of the English Act of 1869, which, however, was open to serious objection.

The provisions of the two acts may be found in In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519. Under the amendment of 1874, a composition might be confirmed before an examination of the bankrupt, although a petition for a composition might be included in the petition for adjudication, or presented at any time before, in which event a meeting of the creditors was necessary for the examination of the debtor and the filing of a schedule of assets (In re Spades, 13 N. B. R. 72, 6 Biss. 448, Fed. Cas. No. 13196). If a resolution of composition was adopted, a reasonable time might be allowed to secure the additional signatures necessary to confirm it (Idem; In re Spillman, 13 N. B. R. 214, Fed. Cas. No.

The offer may be made to the referee, and the examination and filing of schedules referred to in the act as a condition precedent to an offer may be had before him,<sup>3</sup> but questions arising thereafter out of the application of the bankrupt for the confirmation of the composition must be heard by the court of bankruptcy and not by the referee.<sup>4</sup> Prior to the amendment of 1910 a composition could not be offered and accepted before adjudication,<sup>5</sup> but any one adjudged bankrupt could offer terms of composition.<sup>6</sup>

The calling of a special meeting of creditors to receive an offer of composition is not required, and a submission of such offer to the creditors at their first meeting after an examination of the bankrupt is competent and sufficient; such submission being within the terms of the notice prescribed, which states that the purpose of the meeting embraces the transaction of "such other business as may properly come before said meeting."<sup>7</sup>

Upon the filing of an application for the confirmation of a composition a time and place should be fixed for the hearing thereon and of any objections thereto and, unless waived, ten days' notice thereof given.<sup>8</sup> It should not be confirmed where there was no general notice to creditors of its terms and it had been offered by bankrupt at the first meeting to certain creditors whose claims had been allowed at that meeting and who accepted it, being at that time but not at the time of the hearing a majority in number and value of those whose claims had been allowed.<sup>9</sup>

### § 1198. — Petition for composition.

The bankrupt must make an offer of specific terms upon which he shall have back his estate. He must get the consent of half

13242); but the delay in obtaining them, unaccompanied by laches, would not defeat it (*In re Cavan*, 19 N. B. R. 303, Fed. Cas. No. 2528); and the creditors affixing signatures to the resolution need not have been present at the meeting, but their names must have been attached at or before the hearing (*In re Scott*, *supra*).

3—*In re Bloodworth-Stembridge Co.*, 178 Fed. 372, 24 A. B. R. 156.

4—Section 38 (a), Act of 1898; *In re Bloodworth-Stembridge Co.*, 178 Fed. 372, 24 A. B. R. 156.

5—*In re Back Bay Automobile Co.*,

158 Fed. 679, 19 A. B. R. 835, rev'g 19 A. B. R. 33.

6—*In re Weber Furniture Co.*, 13 N. B. R. 529; s. c. on appeal, 13 N. B. R. 559, Fed. Cas. No. 17330; *Pool v. McDonald*, 15 N. B. R. 560, Fed. Cas. No. 11268.

7—*In re Hilborn*, 104 Fed. 866; 4 A. B. R. 741.

8—Section 12c, Act of 1898; see *In re Spades*, 13 N. B. R. 72, 6 Biss. 448, Fed. Cas. No. 13196; *Smith v. Engle*, 14 N. B. R. 481.

9—*In re Rider*, 96 Fed. 808, 3 A. B. R. 178, 192.

the creditors who have filed claims. Then he may file a petition and have the remainder accept the terms, if he can induce the court to so order.<sup>10</sup> The petition should set forth the number of creditors to whom presented, the proposed percentage of payment, and conclude with a prayer for a meeting of creditors to consider its terms.<sup>11</sup> Under the act of 1867 it was held that on filing a petition for a composition, the court would call a meeting of creditors.<sup>12</sup>

### § 1199. — The statements or schedules.

The schedules the bankrupt is required to file are the same as those prescribed when filing a voluntary petition. If the bankrupt in composition understates a debt unintentionally,<sup>13</sup> or omits a claim which he believes, on the advice of counsel, to be worthless, or omits an asset from the statement without fraud and with knowledge of the creditors,<sup>14</sup> or makes a mistake without fraud in the statement of the amount due a creditor,<sup>15</sup> or states the value of his real estate as unknown,<sup>16</sup> such defects will not vitiate the composition. The statement of composition should conform to the schedule in bankruptcy,<sup>17</sup> and debtor's testimony under oath at a meeting of creditors may be considered as part of his statement.<sup>18</sup>

### § 1200. Composition meetings.

### § 1201. — Necessity of meeting.

A submission of an offer of composition may be made at the first meeting of creditors after the examination of the bankrupt.<sup>19</sup> Since the bankrupt's examination and the filing of his schedule must now precede the offer of composition, no necessity exists for a subsequent meeting of creditors, unless for conference, though Official Form 60 (§ 1815 *post*) evidently contemplates one after the offer of composition has been presented to

10—In re Ennis & Stoppani, 183 Fed. 859, 25 A. B. R. 383.

11—Form 60, § 1815 *post*.

12—In re Spades, 13 N. B. R. 72, 6 Biss. 448, Fed. Cas. No. 13196.

13—Beebe v. Pyle, 18 N. B. R. 162.

14—In re Reiman, 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675.

15—Ex parte Trafton, 14 N. B. R. 507, 2 Lowell, 505, Fed. Cas. No. 14133.

16—In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17377.

17—In re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6192.

18—In re Reiman, 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675.

19—In re Hilborn, 104 Fed. 866, 4 A. B. R. 741.

the creditors. The rules, forms and orders can not add to or subtract from the act and must yield when any inconsistency appears as here.<sup>20</sup> But, if upon presentation of such an offer to all the creditors collectively, or separately, a majority in number of those whose claims have been allowed and a majority in amount of such claims accept the offer, no reason would exist for the meeting. In such case as soon as the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the costs, have been properly deposited, an application for confirmation, alleging such facts, may be presented to the judge, by whom it must be "heard and decided," though he may refer the application or any issue arising thereon to the referee,<sup>21</sup> and set a time for a hearing thereon. But a composition cannot be confirmed until after it has been presented to all of the creditors of the bankrupt, whether they have proved their debts or not, and has been accepted in writing by the requisite majority in number and amount of those whose claims have been allowed.<sup>22</sup> It is not essential that proofs of claims shall be made before or at, the first meeting, but may be made at any time within a year after the adjudication.<sup>23</sup>

### § 1202. — Voting at meeting.<sup>23a</sup>

A submission of an offer of composition at the first meeting of creditors after the examination of the bankrupt is sufficient and is in law a submission to all the creditors<sup>24</sup> and they may pass a resolution as part of the proceedings that in their opinion such composition is desirable and in the interests of creditors.<sup>25</sup> It has been held that a creditor who was present at such meeting and filed his proof of claim, but was not present at the session when the vote was taken on the composition,<sup>26</sup> or failed to act thereon,<sup>27</sup> should be counted as voting against it, but such is not true under the present law. Only creditors present in per-

20—In re Slade, 1 N. B. N. 182, 1 A. B. R. 193.

21—G. O. XII (3).

22—In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808; In re Walker, 1 N. B. N. 510, 96 Fed. 550, 3 A. B. R. 35.

23—Section 57n, Act of 1898.

23a—Reference should also be had to

Chapter XIV relating to creditors' meetings generally.

24—Sections 12 and 56, Act of 1898.

25—In re Hilborn, 104 Fed. 866, 3 N. B. N. R. 62.

26—In re Richmond, 18 N. B. R. 362, Fed. Cas. No. 11798.

27—In re Lissberger, 18 N. B. R. 230, Fed. Cas. No. 6632a.

son or represented by proper proxy, or who have signified their acceptance or rejection in writing, should be counted. An objection to a claim and the right to vote thereon made for the first time at a composition meeting, has been held to be too late.<sup>28</sup>

Only those who prove and have their claims allowed<sup>29</sup> can vote at a composition meeting.<sup>30</sup> The fact that a creditor<sup>31</sup> has bought a debt to prevent a composition will not prevent him from voting on it, if he have no fraudulent motive.<sup>32</sup> In voting, a creditor to whom a number of claims have been assigned, will have but one vote.<sup>33</sup>

Creditors who have signed an acceptance of an offer of composition and procured the court to act thereon will not be permitted to withdraw their signatures; unless it appears that they were procured by fraud or misrepresentation.<sup>34</sup>

### § 1203. Rights of secured creditors.

Under the act of 1898, secured creditors may vote and their claims will be counted in computing the number and amount but only for the excess over the security,<sup>35</sup> but where one considers himself fully secured, but is not, he cannot be counted to make a majority.<sup>36</sup> A secured creditor taking no part in composition proceedings though present, is entitled to the agreed percentage on his unpaid balance after exhausting his security;<sup>37</sup> or may have his security valued and come in for the difference.<sup>38</sup> If a creditor holds a bond, mortgage or other security for his debt, where no present liability has arisen, and the value of the security is not capable of present determination, because the debt is subject solely to the contingency of a deficiency arising upon foreclosure, such deficiency being merely contingent and

28—In re Block, 18 N. B. R. 328, Fed. Cas. No. 1551.

29—See 56a, Act of 1898.

30—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7654; In re Mathers, 17 N. B. R. 225, Fed. Cas. No. 9274; In re Rider, 1 N. B. R. 483, 3 A. B. R. 178; In re Bruce, 19 N. B. R. 287, Fed. Cas. No. 2069.

31—In re Trafton, 14 N. B. R. 507, 2 Lowell, 509, Fed. Cas. No. 14133; see also section 1 (9), Act of 1898.

32—Ex parte Morris, 12 N. B. R. 170.

33—In re Messengill, 113 Fed. 366, 7 A. B. R. 699.

34—In re Levy, 110 Fed. 744, 6 A. B. R. 299.

35—Sections 56b, 57c, h, Act of 1898.

36—In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13140.

37—Paret v. Ticknor, 16 N. B. R. 315, 4 Dill. 111, Fed. Cas. No. 10711.

38—The "Home," 18 N. B. R. 557, Fed. Cas. No. 6657.

not provable, the holder of such security is neither a necessary nor a proper party to a composition.<sup>39</sup>

### § 1204. Rights of litigating creditors.

Attaching creditors have no right to participate in a composition meeting<sup>40</sup> unless they first relinquish their security.<sup>41</sup> Under the act of 1874, it was held that when the debtor filed a petition in bankruptcy and also for composition and was not adjudicated, and a creditor began suit before composition approved, the debtor was not entitled to restrain the creditor.<sup>42</sup>

### § 1205. Rights of minority creditors.

A creditor is not bound to accede to a composition,<sup>43</sup> nor is he legally or morally censurable because he refuses to unite with others, if his refusal proceeds from want of confidence in the debtor;<sup>44</sup> but a minority of creditors will not be permitted to defeat a proposed composition because, if defeated, some special benefit will accrue to them,<sup>45</sup> but they may examine the bankrupt before the composition is confirmed.<sup>46</sup> It must appear that wrong has been done such minority by the vote of the majority on the composition before the court will interfere;<sup>47</sup> and the determination that a proper proportion of the creditors have agreed to the composition cannot be impeached in a collateral action.<sup>48</sup>

### § 1206. Partnership compositions.

Partnerships may enter into compositions with their creditors, the same as individuals. When one partner proposes a composition, the majority in number and amount of creditors, whose acceptance in writing is required, may be composed of individual and partnership creditors, whose claims have been allowed,<sup>49</sup>

39—In re Kahn, 121 Fed. 412, 9 A. B. R. 107.

40—In re Shields, 15 N. B. R. 532, 5 Dill. 588, Fed. Cas. No. 12784.

41—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519; Section 57e, Act of 1898.

42—In re Tift, 18 N. B. R. 78, Fed. Cas. No. 14031.

43—In re Rider, 1 N. B. R. 483, 3 A. B. R. 178.

44—Bean v. Brookmire, 7 N. B. R. 568, 2 Dill. 108, Fed. Cas. No. 1170.

45—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

46—In re Little, 19 N. B. R. 234, Fed. Cas. No. 8392.

47—In re Wronkow, 18 N. B. R. 81, 15 Blatch. 38, Fed. Cas. No. 18105.

48—Smith v. Engle, 14 N. B. R. 481.

49—In re Spades, 13 N. B. R. 72, 6 Biss. 448, Fed. Cas. No. 13196. Contra, In re Ullman, 180 Fed. 944, 24 A. B. R. 755.



but a special partner would seem to have no right to take part in composition proceedings by a firm.<sup>50</sup> An individual member may properly propose a composition to his and firm creditors, and such composition will be valid if accepted by the requisite number.<sup>51</sup> A partner cannot have a composition set aside and his firm put into bankruptcy by setting up his own fraud in effecting the composition.<sup>52</sup>

The acceptance of a composition offered by a partner is not a bar to a claim against the estate of the other partner arising out of wrongful conversion for which all partners are liable jointly and severally as tort-feasors.<sup>53</sup>

### § 1207. Consideration.

### § 1208. — Nature.

A composition in money may be offered, and the money required may be acquired by the bankrupt by the use of his credit.<sup>54</sup> The consideration is not, however, limited to money but must be something equivalent thereto which may ultimately be convertible into money and extends to reasonably safe securities or promises to pay, such as a good business man would naturally accept in payment of merchandise sold.<sup>55</sup> A composition providing for deferred payments or promises to pay,<sup>56</sup> evidenced by time notes or other negotiable paper,<sup>57</sup> is not inconsistent with a statute requiring payment "in money," but a composition deed that provides for preferred payments evidenced by notes, "to be satisfactorily endorsed," is too indefinite and void.<sup>58</sup> The court cannot compel a creditor to consent to have all the bankrupt's estate transferred to a corporation and

50—In re Henry, 17 N. B. R. 463, 9 Ben. 449, Fed. Cas. No. 6730.

51—Pool v. McDonald, 15 N. B. R. 560, Fed. Cas. No. 11268.

52—In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, Fed. Cas. No. 5994.

53—In re Coe, 183 Fed. 745, 26 A. B. R. 352.

54—Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R. 493.

55—In re Rider, 1 N. B. R. 483, 96 Fed. 808, 3 A. B. R. 178.

56—In re Reiman, 11 N. B. R. 21, 7

Ben. 455, Fed. Cas. No. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675; In re Langdon, 13 N. B. R. 60, 2 Lowell, 387, Fed. Cas. No. 8058; In re Lewis, 14 N. B. R. 144, Fed. Cas. No. 8314.

57—In re McNab, 18 N. B. R. 388, Fed. Cas. No. 8906; In re Hurst, 13 N. B. R. 455, 1 Flip. 462, Fed. Cas. No. 6925.

58—In re Reiman, 11 N. B. R. 21, 7 Ben. 455, Fed. Cas. No. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675.

accept in settlement of his claim obligations of the new corporation, payable at a future date.<sup>59</sup>

Delay in paying notes occasioned by legal difficulties will not prejudice bankrupt's right as to creditors who have been paid;<sup>60</sup> and a composition will not be deemed uncertain because payment is not secured.<sup>61</sup> A proposed composition, payable in thirty days, on condition that bankrupt's property be surrendered and all suits discontinued, is not improper.<sup>62</sup>

Under the act of 1874, it was held that a composition which provided that the payment should be guaranteed by a satisfactory bond to a committee of creditors might be confirmed,<sup>63</sup> which would also probably now suffice.

A composition is illegal if part of the consideration therefor is the payment of one of the bankrupt's creditors in full.<sup>64</sup> A composition agreement whereby the bankrupt offers to pay his debts with worthless stock of a corporation of which he holds the majority of stock, the acceptance of which will impose a large personal liability, will not be confirmed against the objection of a creditor, although a large majority of the creditors have assented thereto.<sup>65</sup>

### § 1209. — Amount.

The amount of the consideration must be at least as much as the creditors could reasonably expect to receive if the estate was administered in bankruptcy;<sup>66</sup> and since it is to be presumed that the owner of a business can make more out of it than another who is a stranger, though possibly of greater business capacity, a bankrupt can afford to offer his creditors more than they could obtain by the administration of the estate in bankruptcy and yet have a margin left for himself.<sup>67</sup>

In accordance with the general

59—In re J. B. & J. M. Cornell, 186 Fed. 859, 26 A. B. R. 252.

60—In re Kohlsaas, 18 N. B. R. 570, Fed. Cas. No. 7918.

61—In re Wilson, 18 N. B. R. 300, Fed. Cas. No. 17785.

62—In re Cavan, 19 N. B. R. 303, Fed. Cas. No. 2528.

63—In re Lewis, 14 N. B. R. 144, Fed. Cas. No. 8314.

64—McCormick v. Solinsky, 152 Fed. 984, 18 A. B. R. 540.

65—In re Woodend, 133 Fed. 593, 12 A. B. R. 763.

66—In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808; In re Reiman, 11 N. B. R. 21, 7 Ben. 455, Fed. Cas. No. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675; In re Wells, 18 N. B. R. 525, Fed. Cas. No. 17377; In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13140; see In re Arrington Co., 113 Fed. 498, 8 A. B. R. 64.

67—In re Morris, 11 N. B. R. 443; In re Whipple, 11 N. B. R. 524, 2 Lowell, 404, Fed. Cas. No. 17513; see also In re Weber Furniture Co., 13 N. B. R. 529,

rule in composition proceedings, the consideration must be pro rata on all the debts scheduled by the bankrupt.<sup>68</sup>

### § 1210. — Deposit.

Before the application to confirm is made, an amount sufficient to cover costs, priority claims and expenses, and the percentage named on scheduled claims,<sup>69</sup> whether filed before or after the acceptance of the composition agreement,<sup>70</sup> must be deposited in a depository designated by the judge.<sup>71</sup> The cost of the proceeding and the deposit must be designated by the judge and not the referee, and must be subject to his order.<sup>72</sup> The deposit must provide for the payment of taxes legally due and owing,<sup>73</sup> but secured claims not liquidated need not be considered in fixing the amount thereof.<sup>74</sup>

The securities tendered in compliance with a composition agreement will not be impounded to await the outcome of a suit to establish a lien against the property of the bankrupt.<sup>75</sup>

The amendment of 1874 provided that "the composition should, subject to the priorities declared in the act, provide for a pro rata payment, etc." It was held under that provision that priority of payment out of the assets of the debtor was meant and, where there were no assets, there could be no priority and therefore, the means of making the composition being derived from other sources, debts having priority under the act stood no higher than the claims of general creditors.<sup>76</sup> In view of the change of phraseology, and that the law must be strictly construed,<sup>77</sup> the application to confirm can be made only under the circumstances stated in the act, including the deposit of the

Fed. Cas. No. 17330, s. c. on appeal, 13 N. B. R. 559, Fed. Cas. No. 17331.

68—In re Trafton, 14 N. B. R. 507, 2 Lowell, 505, Fed. Cas. No. 14133; Drake v. McQuade, 66 N. H. 303.

69—Section 12b, Act of 1898; In re Mayer, 2 N. B. N. R. 527; In re Harris, 117 Fed. 575, 9 A. B. R. 20; In re Fox, 6 A. B. R. 525; Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R. 493.

70—In re Harvey, 144 Fed. 901, 16 A. B. R. 345; and see In re Ennis & Stoppani, 183 Fed. 859, 25 A. B. R. 383.

71—In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 A. B. R. 156.

72—In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 A. B. R. 156.

73—In re Flynn, 134 Fed. 145, 13 A. B. R. 720.

74—In re Harvey, 144 Fed. 901, 16 A. B. R. 345.

75—York Mfg. Co. v. Merchants' Refrigerating Co., 168 Fed. 108, 21 A. B. R. 748.

76—In re Chamberlin, 17 N. B. R. 49, 9 Ben. 149, Fed. Cas. No. 2580.

77—In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808; In re Shields, 15 N. B. R. 532, 5 Dill. 588, Fed. Cas. No. 12784.

money necessary to pay debts having priority and the costs; and the position taken under the former act would not apply. A failure to make the deposit will prevent the pendency of such petition from being urged as an objection to a sale of the bankrupt's assets.<sup>78</sup>

### § 1211. Confirmation of compositions.

#### § 1212. — Time of application.

An application for confirmation of a composition may be made after, but not before, the deposit of the consideration.<sup>79</sup>

#### § 1213. — Hearing and objections.

Unless waived in writing at least ten days' notice must be given to creditors, by mail, of all hearings upon applications for confirmation of compositions;<sup>80</sup> and where objection is made to the confirmation, the creditor is required to appear on the day of the return of the order to show cause and within ten days thereafter, unless the time is enlarged by special order of the judge, file a specification in writing of the ground of his opposition.<sup>81</sup>

Objections as to regularity of a composition and as to what is for the best interest of the parties can be presented at the hearing of confirmation.<sup>82</sup> A "party in interest," being any one affected, is entitled to be heard so that any one having a provable claim, although it has not been proven and allowed,<sup>83</sup> or an assignee of a claim,<sup>84</sup> or a partially secured creditor;<sup>85</sup> but not one fully secured<sup>86</sup> should be heard.

The bankrupt is required to pay his own attorney for his services with respect to objections to the composition.<sup>87</sup>

78—In re Fisher & Co., 135 Fed. 223, 14 A. B. R. 366.

79—Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R. 493. See *ante* § 1210.

80—Section 58a, Act of 1898.

81—G. O. XXXII; City Nat. Bank of Dallas v. Doolittle, 107 Fed. 236, 5 A. B. R. 736. See also In re Seckler & Silverman, 197 Fed. 128, 28 A. B. R. 627.

82—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

83—In re Walker, 1 N. B. N. 510, 96 Fed. 550, 3 A. B. R. 35.

84—In re Comstock, 154 Fed. 747, 19 A. B. R. 65.

85—Sections 56b and 57e, h, Act of 1898.

86—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

87—In re Martin, 152 Fed. 582, 18 A. B. R. 250.

It is the duty of the court to examine objections of a minority fully as to requisite number,<sup>88</sup> and to investigate the facts independently of any conclusion or agreement the creditors may have made, and it may investigate whether objections are well founded, though the creditor has withdrawn his objection.<sup>89</sup>

### § 1214. — Power of referee.

The law expressly excepts from the duties of the referee all connection with bankrupt's application for approval of composition,<sup>90</sup> but such applications or any specified issue arising thereon may be referred to the referee to ascertain and report the facts,<sup>91</sup> and upon questions arising, the referee, when requested, should appoint a day for bringing the composition before the court, and to issue the required notices to creditors, suggesting in his report any legal questions arising upon the composition papers.<sup>92</sup> He has, however, power to conduct inquiries and adjourn meetings,<sup>93</sup> and examine disputed claims and report thereon;<sup>94</sup> but the court may re-open questions in regard to his ruling on all points.<sup>95</sup>

### § 1215. — When confirmed in general.

The court has no power to confirm or reject a composition except pursuant to section 12d of the law,<sup>96</sup> which provides that "The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden." If the papers presented to the judge

88—In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7648.

89—In re Waynesboro Drug Co., 157 Fed. 101, 19 A. B. R. 487; In re Levy, 172 Fed. 780, 22 A. B. R. 769.

90—Section 38a (4), Act of 1898; In re Sonnabend, 18 A. B. R. 117.

91—G. O. XII. (3).

92—In re Hilborn, 104 Fed. 866, 3 N. B. N. R. 62, 4 A. B. R. 741.

93—In re Proby, 17 N. B. R. 175, Fed. Cas. No. 11439.

94—But see In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 A. B. R. 156; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7654.

95—In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13229.

96—In re French, 181 Fed. 583, 25 A. B. R. 77; In re Rudnick, 1 N. B. N. 531, 2 A. B. R. 114, 93 Fed. 787.

on the hearing of the application to confirm show that, after his examination and the filing of his schedule of property and list of creditors, the bankrupt offered a composition which was presented to all his creditors; that a majority in number and amount of those whose claims have been allowed, agreed to accept such composition; that the consideration agreed to be paid and the money necessary to pay all debts which have priority and the costs of the proceedings have been deposited in the designated depository; and it does not appear on the face of the papers that the amount the creditors will receive by such composition is less than they would receive by the administration of the estate in bankruptcy or that there is any fraud or other valid grounds for refusing to confirm such composition, it should be confirmed, as of course, that is, if a *prima facie* case is made, unless the dissenting creditors have filed proper objections and support them by satisfactory evidence. The burden of proving the existence of valid grounds for refusing to confirm the composition is on the dissenting creditors<sup>97</sup> and the decision of the majority in number and amount accepting the composition will not be disturbed except on sufficient evidence unless manifest fraud, accident or mistake is shown.

A provision in the composition that an assignment by the bankrupt within four months of the filing of the petition shall be sanctioned does not invalidate the agreement,<sup>98</sup> nor can the fact that a creditor has through accident or mistake failed to file his claim against the bankrupt estate within the statutory period be urged as an objection to the confirmation.<sup>99</sup> Objections to the confirmation of the composition have been overruled where it was contended, for instance, that a corporation was not entitled to the privileges of composition;<sup>1</sup> that property in name of bankrupt's wife should have been included in the schedules;<sup>2</sup> that the estate could pay more than the composition;<sup>3</sup>

97—In *re Barde & Levitt*, 207 Fed. 654, 31 A. B. R. 161; *City Nat. Bank of Dallas v. Doolittle*, 107 Fed. 236, 5 A. B. R. 736; In *re Waynesboro Drug Co.*, 157 Fed. 101, 19 A. B. R. 487; In *re Hoxie*, 180 Fed. 508, 25 A. B. R. 32.

98—In *re Linderman*, 166 Fed. 593, 22 A. B. R. 131.

99—In *re French*, 181 Fed. 583, 25 A. B. R. 77.

1—In *re Weber Furn. Co.*, 13 N. B. R. 529, Fed. Cas. No. 17330.

2—In *re Welles*, 18 N. B. R. 525, Fed. Cas. No. 17377.

3—In *re Welles*, 18 N. B. R. 525, Fed. Cas. No. 17377; In *re Arrington Co.*, 113 Fed. 498, 8 A. B. R. 64.

that debtor paid more in composition than his estate would pay in bankruptcy;<sup>4</sup> or that he was excused from examination on account of illness.<sup>5</sup>

Objections to the confirmation of a composition have been sustained where the trustees were to leave the estate in the hands of the president of a corporation who was a defaulter and not trustworthy;<sup>6</sup> or where deferred payments were provided and the property was to be returned to bankrupt, he not being trustworthy;<sup>7</sup> or where the money deposited was not sufficient to pay the costs, or notice of the proceedings had not been given the creditors, although a majority of those who had notice and proved their claims had accepted.<sup>8</sup> The composition cannot be confirmed if the statement of assets and debts shows that the requisite proportion of creditors have not accepted it;<sup>9</sup> but it is too late to raise an objection to the right of a creditor to vote for the first time at the confirmation hearing.<sup>10</sup>

#### § 1216. — Best interests of creditors.

Scotland adopted the French cession, the Roman *cessio bonorum*, and, while her courts passed on the reasonableness of a composition, the tendency was to uphold it if fairly adopted. England introduced insolvent laws later and there the decision of the creditors was accepted, unless fraudulently procured, though, if grossly unreasonable, it was presumptively fraudulent.<sup>11</sup> While, in England, the court will closely scrutinize a composition and must be first satisfied that it is for the creditor's benefit;<sup>12</sup> here a composition will not be confirmed if it appears not to be for the interest of the creditors, no matter how small a proportion dissent.<sup>13</sup> How far the court should go into the merits of the composition to determine its advisability for the creditors as between themselves and reject it against the wish of the majority as not for the interest of the creditors is an

4—In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13140.

5—In re Wilson, 18 N. B. R. 300, Fed. Cas. No. 17785.

6—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

7—In re Bloch, 18 N. B. R. 328, Fed. Cas. No. 1551.

8—In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808.

9—In re Asten, 14 N. B. R. 7, 8 Ben. 350, Fed. Cas. No. 594.

10—In re Bloch, 18 N. B. R. 328, Fed. Cas. No. 1551.

11—In re Whipple, 11 N. B. R. 524, 2 Lowell, 404, Fed. Cas. No. 17513.

12—In re Burr, 9 Morrell, 133.

13—In re Whipple, 11 N. B. R. 524, 2 Low. 404, Fed. Cas. No. 17513; In re Reinheimer, 1 N. B. N. 361.

open question. The present act expressly requires the judge to be satisfied that the composition is for the best interests of the creditors, thus laying on the court the difficult burden of instructing parties as to their own interests, which practically will usually be discharged by adopting the creditors' view, in the absence of fraud or collusion and when the offered composition is equally or more advantageous pecuniarily to the creditors than the administration of the estate in bankruptcy would be;<sup>14</sup> but if the offered composition would not yield the creditors as much as the administration of the estate in bankruptcy, the composition should not be confirmed. A great variance between the probable value of the assets and the composition would justify the court in acting on its own motion, though an apparent discrepancy between the estimated value of the assets and the composition is not sufficient,<sup>15</sup> and it has been held, that a discrepancy of as much as 15 per cent would not warrant the court in overruling the discretion of the creditors.<sup>16</sup>

In determining whether the composition will yield the creditors more, or less, than the administration of the estate in bankruptcy, the costs of such administration, the fact that no one can ordinarily administer a man's affairs as well as himself, the delay caused thereby, and the fact that a forced sale brings less than a private sale must all be taken into consideration.

In ascertaining if the composition is for the best interests of the creditors the fact that there is no security for the payment of the composition notes should be considered;<sup>17</sup> or that the debtor proposes advance in per cent of composition;<sup>18</sup> or that the consideration which is offered is satisfactory to the requisite majority of creditors.<sup>19</sup> Either party may furnish evidence on

14—In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808; In re Morris, 11 N. B. R. 443; In re Weber Furniture Co., Fed. Cas. No. 17331; In re Kahn, 9 A. B. R. 107.

15—In re Reiman, 11 N. B. R. 21, 7 Ben. 455, Fed. Cas. No. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675; In re Whipple, 11 N. B. R. 524, 2 Lowell, 404, Fed. Cas. No. 17513; In re Weber Furn. Co., 13 N. B. R. 529, Fed. Cas. No. 17330; In re Reinheimer, 1 N. B. N. 361. See In re Criterion Watch

Case Mfg. Co., 8 A. B. R. 206; In re Waynesboro Drug Co., 157 Fed. 101, 19 A. B. R. 487.

16—In re Arrington Co., 113 Fed. 498, 8 A. B. R. 64; In re Weber Furniture Co., Fed. Cas. No. 17331; Adler v. Jones, 109 Fed. 967, 6 A. B. R. 245.

17—In re Wilson, 18 N. B. R. 300, Fed. Cas. No. 17785.

18—In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12519.

19—In re Purcell, 18 N. B. R. 447, Fed. Cas. No. 11470.



the question whether the composition is for the best interests of the creditors,<sup>20</sup> but the offer and its acceptance by the majority of the creditors indicate that it is for the interest of the creditors until attacked by the dissentients who may rely on the record and need not always produce extrinsic proof.<sup>21</sup> The approval of the majority of the creditors is *prima facie* evidence that the composition is for the best interests of the estate and the burden is upon those who attack the composition,<sup>22</sup> and unless specific errors can be pointed out on the confirmation of a composition, whether it is for the best interests of the creditors will not be inquired into by the appellate court.<sup>23</sup>

### § 1217. — Acts in bar of confirmation.

Guilt of any of the acts or failure to perform any of the duties which would be a bar to discharge are expressly made a bar also to the confirmation of a composition. Those acts are the concealment of property from the trustee, making a false oath or presentation or use in composition of a false claim,<sup>24</sup> and fraudulently, and in contemplation of bankruptcy, destroying, concealing, or failing to keep books of account.<sup>25</sup> If the bankrupt has been guilty of any of the acts or failed to perform any of the duties named the judge must reject the composition, even if satisfied that it would be for the best interest of the estate not to do so.<sup>26</sup> Violation by the bankrupt of a criminal law of the state will not prevent the confirmation of a composition.<sup>27</sup>

The fact that a discharge has been refused is not an absolute bar to composition.<sup>28</sup> The fact that a discharge was barred by failure to apply for it in time would seem not to be one of the acts barring a confirmation, if a discharge could have been obtained if applied for in time, since the purpose is to prevent

20—In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7654.

21—In re Weber Furn. Co., 13 N. B. R. 529, Fed. Cas. No. 17330.

22—In re Barde & Levitt, 207 Fed. 654, 31 A. B. R. 161; In re Hoxie, 180 Fed. 508, 25 A. B. R. 32; In re Waynesboro Drug Co., 157 Fed. 101, 19 A. B. R. 487.

23—In re Wronkow, 18 N. B. R. 81, 15 Blatch. 38, Fed. Cas. No. 18105.

24—See 29b, Act of 1898.

25—See 14b, Act of 1898; In re Wilson, 107 Fed. 83, 5 A. B. R. 849; In re Barde & Levitt, 207 Fed. 654, 31 A. B. R. 161; In re Olman, 134 Fed. 681, 13 A. B. R. 395.

26—In re Griffin, 180 Fed. 792, 25 A. B. R. 206; In re Comstock, 154 Fed. 747, 19 A. B. R. 65.

27—In re McLellan, 204 Fed. 482, 30 A. B. R. 325.

28—In re Odell, 16 N. B. R. 501, 9 Ben. 247, Fed. Cas. No. 10427.

a bankrupt obtaining at his creditor's hands a discharge which his conduct prohibited his getting otherwise. Until there is an authoritative decision on the latter point, it is safer to apply for the confirmation of a composition before the expiration of such period; but the filing of an application within the period would suffice, the hearing and decision being held after its expiration.

The evasiveness of an answer by the bankrupt will not alone warrant the rejection of a composition on the ground of false oath. The false oath must have been knowingly and corruptly made.<sup>29</sup>

### § 1218. — Bad faith.

Absolute good faith is required of the bankrupt and all those connected with a composition, and, if the bankrupt has made false statements about his debts, or assets, or other creditors, or anything which may have influenced the making of the composition, or creditors have used improper means to induce others to accept or refrain from opposing a composition, it will not be confirmed.<sup>30</sup> As the court has no power to confirm or reject a composition, except pursuant to this section, and no power to set one aside unless fraud was practiced in securing it and knowledge of such fraud has come to the petitioners since such confirmation,<sup>31</sup> any objections consistent with this section, except those based on after discovered fraud, should be presented on the hearing to confirm and not a hearing to set aside. Where there is a discrepancy between the composition and the apparent value of bankrupt's property and other evidence of fraud, the composition should not be rejected without notice to the parties interested and taking into account the relations and relative number of creditors favoring the composition;<sup>32</sup> nor should the composition be rejected if, without fraudulent intent, assets were omitted, or non-existent debts inserted in the schedule, such errors not requiring a change in the terms of the composition, especially if the creditors knew of them when they accepted the

29—In re Cohen, 149 Fed. 908, 18 A. B. R. 84.

30—In re Sawyer, 14 N. B. R. 241, 2 Lowell 475, Fed. Cas. No. 12395; In re Whitney, 14 N. B. R. 1, 2 Lowell 455, Fed. Cas. No. 17580; Bean v. Amsinck,

8 N. B. R. 228, 10 Blatch. 361, Fed. Cas. No. 1167; Bean v. Brookmire, 7 N. B. R. 568, 2 Dill. 108, Fed. Cas. No. 1170.

31—Section 13, Act of 1898.

32—In re Weber Furn. Co., 13 N. B. R. 529, Fed. Cas. No. 17330.

composition; <sup>33</sup> nor because bankrupt is related to some of the accepted creditors, <sup>34</sup> nor because an indorsee on a note of the bankrupt advises him to accept a composition and such acceptance will not serve to discharge the indorsee. <sup>35</sup>

Confirmation should be refused if lack of good faith appears; as the giving of money to one creditor to induce him to sign; <sup>36</sup> or the purchase of claims to be used in favor of a composition unless there is clear proof that the motive was proper; or improperly inducing the withdrawal of opposition; or expectation of an advantage from accepting without any positive promise, or giving one creditor a secret benefit or advantage <sup>37</sup> or secret preference; <sup>38</sup> or promise to settle, accepting creditors' claims at expense of others; <sup>39</sup> or agreeing through sympathy or friendship for the bankrupt to take that which would not be for the interest of all the creditors. <sup>40</sup>

That the attorney for the receiver in bankruptcy after the examination of the bankrupt and his offer of composition, secured powers of attorney from creditors, and, as their attorney, voted in favor of a composition is no ground for refusing to confirm the composition, no fraud being practiced. <sup>41</sup>

While the fact that the bankrupt made a preferential transfer should not prevent the confirmation of a composition yet a composition should not be confirmed where it clearly appears that there have been preferential transfers which may be recovered by the trustee, and that the estate in hand with such preferences recovered and added, will net the creditors a greater percentage than offered in the proposed composition. <sup>42</sup>

33—*In re Scott*, 15 N. B. R. 73, Fed. Cas. No. 21519; *In re Reiman*, 11 N. B. R. 21, 7 Ben. 455, Fed. Cas. No. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675.

34—*In re Rider*, 1 N. B. N. 483, 3 A. B. R. 178, 96 Fed. 808.

35—*In re Jacobson & Son Co.*, 196 Fed. 949, 28 A. B. R. 492.

36—*Daughlish v. Tennent*, L. R. 2 Q. B. 49.

37—*In re Sawyer*, 14 N. B. R. 241, 2 Lowell 475, Fed. Cas. No. 12395; *In re Morris*, 12 N. B. R. 170. See *In re Chaplin*, 115 Fed. 162, 8 A. B. R. 121.

38—*In re Jacobs*, 18 N. B. R. 48, Fed. Cas. No. 7159; *In re Knox*, 98 Fed. 585. See *Jacobs v. Siff*, 74 Misc. (N. Y.) 58, 27 A. B. R. 189.

39—*In re Vetterlein*, 6 N. B. R. 518, 5 Ben. 571, Fed. Cas. No. 16928.

40—*Ex parte Williams*, L. R. 10, Eq. 55.

41—*In re McLellan*, 204 Fed. 482, 30 A. B. R. 325.

42—*In re McLellan*, 204 Fed. 482, 30 A. B. R. 325.

### § 1219. — **Frauds and omissions.**

The court, on application to confirm should correct mistakes and expose and punish fraud and improper practices,<sup>43</sup> as where a creditor after receiving payment in full signs an agreement with other creditors to take seventy cents in the future; or where one creditor exacts an advantage not known or enjoyed by the others for uniting in the composition;<sup>44</sup> or where an agent in composition obtains the same by false representations;<sup>45</sup> or if a partner after composition, procures assignment of claims to a relative and then institutes proceedings to set aside the composition and put the firm in bankruptcy;<sup>46</sup> but a preferred creditor is liable for the amount of the advantage over others; and, if he pays, his original claim can be proved.<sup>47</sup>

A mis-statement of assets to warrant the refusal to confirm a composition must be materially false and have been intentionally made for the purpose of obtaining credit,<sup>48</sup> and credit must have been actually obtained by means of the untrue statement.<sup>49</sup>

### § 1220. — **Order or decree of confirmation.**

The confirmation need not be made at a meeting<sup>50</sup> and it is only necessary to record the decree containing the resolution.<sup>51</sup>

### § 1221. **Performance of composition.**

### § 1222. — **In general.**

A composition must be carried out according to its terms and can not be added to by demanding a discontinuance and surrender of property before the per cent is paid;<sup>52</sup> nor will the mere delivery of the notes provided for in it cancel the debt;<sup>53</sup> and if the debts are not paid according to the terms of the com-

43—In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13229.

44—Bean v. Brookmire, 7 N. B. R. 568, 2 Dill. 108, Fed. Cas. No. 1170.

45—Elfelt v. Snow, 6 N. B. R. 57, 2 Sawy. 94, Fed. Cas. No. 4342.

46—In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, Fed. Cas. No. 5994.

47—Brookmire v. Bean, 12 N. B. R. 217, 3 Dill. 136, Fed. Cas. No. 1942. See In re Chaplin, 115 Fed. 162, 8 A. B. R. 121.

48—In re Seligman, 163 Fed. 549, 20

A. B. R. 774; In re O'Callaghan, 199 Fed. 662, 29 A. B. R. 304.

49—In re O'Callaghan, 199 Fed. 662, 29 A. B. R. 304.

50—In re Spillman, 13 N. B. R. 214, Fed. Cas. No. 13242.

51—Smith v. Barnhard, 14 N. B. R. 41.

52—In re McKeon, 11 N. B. R. 182, 7 Ben. 513, Fed. Cas. No. 8858.

53—In re Reiman, 13 N. B. R. 128, 12 Blatch. 562, Fed. Cas. No. 11675. See also In re Hurst, 13 N. B. R. 455, 1 Flip. 462, Fed. Cas. No. 6925.

position they are payable in their original amount;<sup>54</sup> but the tender of money according to the terms of the composition is equivalent to payment.<sup>55</sup>

An agreement of the trustee to guarantee to a certain creditor a certain dividend cannot be enforced against him, the agreement being void as against public policy.<sup>56</sup>

### § 1223. — Distribution of consideration.

The act provides that the consideration shall be distributed as the judge shall direct.<sup>57</sup> As the amount is fixed by the composition and as it must be paid to all the creditors pro rata<sup>58</sup> this provision can only mean that, upon the confirmation of the composition, the judge shall direct or order the distribution of the deposit, including debts having priority and costs, to be made and, in case no trustee has been appointed, by whom it shall be made. In Official Form 63 (§ 1823, *post*) the clerk is ordered to do it but there is nothing in the act which would prevent the judge selecting some one else, or appointing a person specially for the purpose,<sup>59</sup> although in view of the small fees provided by the act such appointments might be deemed the perquisites of the clerk.

In pro-rating the consideration among creditors, the interest to be considered in making a distribution is that of the creditors at the time of acceptance<sup>60</sup> and of all of them because the fact that one might be specially benefited by the refusal to confirm the composition would not justify such refusal.<sup>61</sup>

### § 1224. — Proof of claims.

To be entitled to a share in the distribution of the consideration a creditor must have filed and proved his claim within the time and in the manner provided for by section 57n of the act.<sup>62</sup> A creditor whose claim has not been scheduled and who has not filed same until after the filing of a petition to confirm the com-

54—In re Leipziger, 18 N. B. R. 264;  
In re Hurst, 13 N. B. R. 455, 1 Flip. 462,  
Fed. Cas. No. 6925; In re Reiman, 13  
N. B. R. 128, 12 Blatch. 562, Fed. Cas.  
No. 11675, s. c. 11 N. B. R. 21, 7 Ben.  
455, Fed. Cas. No. 11673.

55—In re Hinsdale, 16 N. B. R. 550,  
9 Ben. 91, Fed. Cas. No. 6526.

56—Jacobs v. Siff, 74 Misc. (N. Y.)  
58, 27 A. B. R. 189.

57—Section 12e, Act of 1898.

58—In re Trafton, 14 N. B. R. 507.

59—Ex parte Hamlin, 16 N. B. R. 320,  
323, 2 Lowell 571, Fed. Cas. No. 5993.

60—In re Haskell, 11 N. B. R. 164,  
Fed. Cas. No. 6192.

61—In re Scott, 15 N. B. R. 73, Fed.  
Cas. No. 12519.

62—In re French, 181 Fed. 583, 25 A.  
B. R. 77.

position cannot share the deposit ratably with other creditors, but may be entitled to any surplus remaining after the paying of expenses and the dividends of the scheduled claims and those not scheduled but filed before the issue of the rule nisi.<sup>63</sup>

The bankrupt has the right to appear in opposition to the allowance of a claim,<sup>64</sup> and he may be heard to object to the allowance in composition of a claim offered for proof after the expiration of a year, though the same has not been scheduled.<sup>65</sup>

### § 1225. — Right of set-off.

The bankrupt in a composition stands, as to set-off, in the position of a trustee, if none has been appointed,<sup>66</sup> but a creditor who receives a composition payment from his bankrupt debtor, with knowledge of all the facts, is not entitled to have a set-off enforced which he neglected to assert when the composition was made.<sup>67</sup>

### § 1226. — Failure to perform.

The failure of the bankrupt to perform a composition according to its terms does not empower a creditor to disregard the proceedings and sue for his debt;<sup>68</sup> but if fraud was practiced in securing it, there seems to be no reason why it might not be set aside. An offer to compromise is not a defense to an involuntary petition.<sup>69</sup>

The court has no power to imprison a creditor for refusing to receive money on finality of a composition,<sup>70</sup> nor will such refusal in any way affect the validity of the proceedings.

### § 1227. Appointment of trustee.

Under the act of 1867 it was held that the bankruptcy act, in authorizing a composition before adjudication, contemplated

63—*In re Ennis & Stoppani*, 183 Fed. 859, 25 A. B. R. 383.

64—*In re French*, 181 Fed. 583, 25 A. B. R. 77.

65—*In re Lane*, 125 Fed. 772, 11 A. B. R. 136.

66—*Ex parte Howard Nat. Bank*, 16 N. B. R. 420, 2 Lowell 487, Fed. Cas. No. 6764.

67—*Hunt v. Holmes*, 16 N. B. R. 101, Fed. Cas. No. 6890.

68—*In re Bayly*, 19 N. B. R. 73, Fed. Cas. No. 1144. But see *In re Garton & Co.*, 148 Fed. 63, 17 A. B. R. 343; *Pubke v. Churchill*, 91 Mo. 81.

69—*Simonson v. Sinsheimer*, 95 Fed. 948, 3 A. B. R. 824, rev'g 1 N. B. N. 230, 92 Fed. 904, 1 A. B. R. 197.

70—*In re Hinsdale*, 16 N. B. R. 550, 6 Ben. 91, Fed. Cas. No. 6526.

that it be made without appointment of an assignee, and without requiring the debtor to surrender his assets,<sup>71</sup> which is practically the rule adopted under the present act.<sup>72</sup>

### § 1228. Effect of composition.

### § 1229. — Conclusiveness.

If the court had jurisdiction of the subject matter and the persons, and jurisdiction is shown to have attached, all the subsequent proceedings are presumed to be regular and its decision upon every question properly arising in the proceeding is binding on all courts till reversed on appeal. The order of confirmation is conclusive that the proper number of consents have been obtained; that proper and sufficient notice was given; that the consideration deposited is valid; that the papers are properly executed; that every act required by the law was duly and properly done;<sup>73</sup> and that the court had jurisdiction and the proceedings were regular,<sup>74</sup> and the order cannot be collaterally attacked.<sup>75</sup>

### § 1230. — Effect upon bankruptcy proceedings.

A composition does away with the effect of the bankruptcy proceedings.<sup>76</sup>

After the confirmation of the composition and the distribution of the consideration, the case is to be dismissed. Before dismissal the necessary orders should be made to authorize the proper disposition of any property held subject to the court's orders as money belonging to the estate held by the sheriff which, without a proper order of the court, would not be at bankrupt's disposal.<sup>77</sup> When the order of dismissal is made, all proceedings are then at an end, unless subsequent steps should be taken to set aside the composition,<sup>78</sup> and no claims can thereafter be filed.<sup>79</sup>

71—In re Van Auken, 14 N. B. R. 425, Fed. Cas. No. 16828.

72—In re Rung, 1 N. B. N. 406, 2 A. B. R. 620.

73—Smith v. Engle, 14 N. B. R. 481.

74—Section 21f, Act of 1898.

75—Abbott v. Anderson, 31 A. B. R. 877.

76—Gordon v. Mechanics' & Traders' Ins. Co., 120 La. Ann. 441, 22 A. B. R. 649.

77—In re Mickel, 19 N. B. R. 374, Fed. Cas. No. 9529.

78—Section 13, Act of 1898.

79—In re Cooper Bros., 166 Fed. 932, 20 A. B. R. 634.

The referee does not, however, lose his powers in the administration of the estate because of the pendency of a composition offer, and the pendency of a petition to set aside a composition does not operate to prohibit him from exercising his right independently of, or in conjunction with, such application to re-open the estate, and such re-opening is not an interference with the administration of the estate.<sup>80</sup>

### § 1231. — Effect on bankrupt's debts.

The order of confirmation serves as a discharge by operation of law<sup>81</sup> and no further discharge is required.<sup>82</sup>

The confirmation of a composition discharges a bankrupt from his debts other than those agreed to be paid by its terms and those not affected by a discharge.<sup>83</sup> Debts are released by the confirmation although they may be incorrectly stated in the schedules, unless such errors were substantial or intentional,<sup>84</sup> and the same is true of a claim which is not proven, the creditor failing or refusing to participate with the other creditors when the composition is offered,<sup>85</sup> but the claim of a creditor whose debt is not scheduled and who has no notice of the proceedings prior to the filing of the application for the confirmation of the composition agreement is not discharged.<sup>86</sup> The failure of a creditor to ascertain the amount allowed on his claim, where notice of the composition proceeding has been properly given, will estop him from asserting that his claim was in excess of the amount scheduled by the bankrupt.<sup>87</sup>

A composition includes and binds debts created by fraud,<sup>88</sup> and a debt so created is discharged by a composition in which the creditor participates.<sup>89</sup>

Holders of a note who take no part in composition proceedings

80—In re Sonnabend, 18 A. B. R. 117.

81—Mandell & Co. v. Levy, 47 Misc. (N. Y.) 147, 14 A. B. R. 549; In re Cooper Bros., 166 Fed. 932, 20 A. B. R. 634; In re Friend, 134 Fed. 778, 13 A. B. R. 595; In re Merriman, 18 N. B. R. 411, Fed. Cas. No. 9479.

82—In re Becket, 12 N. B. R. 201, 2 Woods 173, Fed. Cas. No. 1210.

83—Sections 14c, 17, Act of 1898.

84—In re Wilkens, 191 Fed. 94, 27

A. B. R. 235; In re Trafton, 14 N. B. R. 507, 2 Lowell 505, Fed. Cas. No. 14133.

85—Glover Grocery Co. v. Dorne, 116 Ga. 216, 8 A. B. R. 702.

86—Broadway Trust Co. v. Manheim, 47 Misc. (N. Y.) 415, 14 A. B. R. 122.

87—In re Wilkens, 191 Fed. 94, 27 A. B. R. 235.

88—In re Shafer, 17 N. B. R. 116, Fed. Cas. No. 12695.

89—Wells v. Lamprey, 16 N. B. R. 205.



of indorsers are not bound, and can recover from them, the maker not paying, where the note did not become due until after the bankruptcy of the indorsers.<sup>90</sup>

The acceptance of a composition is not considered as being a voluntary assent of the creditor to the satisfaction of the debt, so that if thereafter the bankrupt makes a new promise to pay the unpaid balance of the debt, such promise may be made the foundation of a new suit by the creditor.<sup>91</sup>

### § 1232. — Effect on secured creditors.

A secured creditor who accepts an offer of composition thereby loses his right to retain any securities held for the debt.<sup>92</sup>

### § 1233. — Effect on co-debtors and partners.

The present act expressly provides that the liability of a person who is a co-debtor with, or guarantor or in any manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt.<sup>93</sup> A composition is a substitute for a discharge and the bankrupt's discharge from his debts under a composition is a discharge by operation of law which does not release his partners, sureties or guarantors; though the usual rule is that a creditor releasing the principal debtor on a composition releases the surety.<sup>94</sup>

An order approving the composition of a partnership releases partners from individual liability for firm debts.<sup>95</sup>

### § 1234. — Effect on bankrupt's property.

The confirmation of the composition revests the title to the property in the bankrupt,<sup>96</sup> notwithstanding the trustee has not been discharged.<sup>97</sup> The creditors cease to have any interest

90—*Smith v. Krauskopf*, 18 N. B. R. 6.

91—*Cohen v. Lachenmaier*, 147 Wis. 649, 27 A. B. R. 416.

Promise to pay dischargeable debt not affected by composition. *Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R. 493.

92—*McDonald v. Taylor Co.*, 144 App. Div. (N. Y.) 329, 26 A. B. R. 635.

93—Section 16, Act of 1898.

94—See *Mason & Hamlin Organ Co. v. Bancroft*, 1 Abb. N. C. 415; *Ex parte Jacobs*, 44 L. J. 34; *Easton Furniture Mfg. Co. v. Caminez*, 146 App. Div. (N. Y.) 436, 27 A. B. R. 29. But see *In re Benedict*, 18 A. B. R. 604.

95—*Abbott v. Anderson*, 184 Ill. App. 598, 31 A. B. R. 877.

96—Section 70f, Act of 1898.

97—*Bracklee Co. v. O'Connor*, 67 Misc. (N. Y.) 599, 24 A. B. R. 499.

in it and any money on hand should be paid to the bankrupt,<sup>98</sup> who is at liberty to deal with it as he wishes if no fraud has been practiced.<sup>99</sup> If there is no provision for the disposition of property, the bankrupt retains the same subject to the summary order of the court,<sup>1</sup> and where the composition gives his property and books back to the bankrupt, the creditors will not be permitted to undo what they consented to.<sup>2</sup> The bankrupt is entitled to the benefit of any leases made by the trustee,<sup>3</sup> and his receiver has no claim on the rents and profits of his land, it being after acquired property under the composition.<sup>4</sup>

### § 1235. — Effect on liens and attachments.

After filing a petition a creditor cannot acquire a lien and this is not affected by composition proceedings.<sup>5</sup>

An attachment made within four months of the commencement of proceedings will be dissolved by a composition;<sup>6</sup> but not by a prematurely initiated composition;<sup>7</sup> nor can confirmation give validity to such illegal composition.<sup>8</sup>

### § 1236. — Subsequent litigation.

Creditors have a right to receive their quota under the composition and its payment to them cannot be suspended by injunction unless there is a lien upon the fund;<sup>9</sup> nor will an injunction be allowed because the debtor fails to plead the composition.<sup>10</sup> A creditor, seeking to liquidate his claim in a replevin suit in a state court, has no standing to ask that other creditors wait for their dividends under a composition until he can get judgment, when the bankruptcy court finds the evidence does not sustain the charge of fraud on which the replevin suit

98—In re August, 19 N. B. R. 161, Fed. Cas. No. 645.

99—In re Shaw, 9 N. B. R. 512, Fed. Cas. No. 12716.

1—In re Reiman, 11 N. B. R. 21, 7 Ben. 455, Fed. Cas. No. 11673.

2—In re Rodger, 18 N. B. R. 381, Fed. Cas. No. 11992.

3—Bracklee Co. v. O'Connor, 67 Misc. (N. Y.) 599, 24 A. B. R. 499.

4—Conover v. Dumahaut, 17 N. B. R. 558.

5—In re Tift, 19 N. B. R. 201, Fed. Cas. No. 14034.

6—Miller v. Mackenzie, 13 N. B. R. 496; Smith v. Engle, 14 N. B. R. 481.

7—In re Clapp, 14 N. B. R. 191, 2 Lowell 468, Fed. Cas. No. 2785.

8—In re Hyman, 18 N. B. R. 299, Fed. Cas. No. 6985.

9—In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7918.

10—In re Tooker, 14 N. B. R. 35, 8 Ben. 390, Fed. Cas. No. 14096.

is based;<sup>11</sup> but where a composition has been complied with, an injunction restraining a suit in a state court is proper.<sup>12</sup>

### § 1237. Composition must be pleaded.

The composition is a defense that may be waived and, if a suit is brought on a debt after confirmation, it must be pleaded or it is deemed to be waived and the court will not thereafter relieve the party from the result of his laches.<sup>13</sup> An order confirming a composition may be pleaded as a discharge, and under an allegation that a discharge was obtained, proof of an order confirming a composition is admissible.<sup>14</sup>

### § 1238. Effect of failure to confirm composition.

Whenever a composition is not confirmed, the estate shall be administered in bankruptcy.<sup>15</sup>

An order refusing to confirm a composition on the ground that it is not for the best interest of the estate is not *res adjudicata* as to the right to a subsequent discharge.<sup>16</sup>

### § 1239. Certified copy of order as evidence.

A certified copy of an order confirming a composition is evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the order was made,<sup>17</sup> and constitutes evidence of the revesting of the title of his property in the bankrupt, and, if recorded, will impart the same notice that a deed from the trustee to the bankrupt, if recorded, would impart.<sup>18</sup>

### § 1240. Appeal and review.

The act gives the effect of a discharge to an order confirming a composition and thus makes it the equivalent to an order

11—*In re Heinsfurter*, 1 N. B. N. 510, 97 Fed. 198, 3 A. B. R. 109, 113.

12—*In re Shafer*, 17 N. B. R. 116, Fed. Cas. No. 12695.

13—*In re Tooker*, 14 N. B. R. 35, 8 Ben. 390, Fed. Cas. No. 14096; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. ed. 994; *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, 121 App. Div. (N. Y.) 764, 19 A. B. R. 862.

14—*Broadway Trust Co. v. Manheim*, 47 Misc. (N. Y.) 415, 14 A. B. R. 122.

15—Section 12e, Act of 1898.

16—*In re McVoy Hardware Co.*, 200 Fed. 949, 29 A. B. R. 3221.

17—Section 21f, Act of 1898; *Mandell & Co. v. Levy*, 47 Misc. (N. Y.) 147, 14 A. B. R. 549.

18—Section 21g, Act of 1898; 2 *Lowell* 505, Fed. Cas. No. 14133; *Drake v. McQuade*, 66 N. H. 303.

granting a discharge, so either the bankrupt or a creditor, if aggrieved by the granting or refusing of an order confirming a composition, may appeal to the circuit court of appeals.<sup>19</sup>

### § 1241. Setting aside compositions.

### § 1242. — Comparison of acts.

Section 13a of the act of 1898, provides that "The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition."

There was no analogous provision in the act of 1867, but by the amendment of 1874<sup>20</sup> it was provided that "If it shall at any time appear to the court, on notice, satisfactory evidence and hearing, that a composition, under this section, cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may . . . set it aside." The difference in the provisions of the two acts is accordingly great. Under the former, if at any time the court found the composition could not proceed "without injustice or delay," it might be set aside. Under the act of 1898, a composition can only be set aside upon an application filed within six months after confirmation and for fraud in procuring it, of which the applicants—who need only be "parties in interest"—must have been ignorant at the time of the confirmation.<sup>21</sup>

19—Section 25a, Act of 1898; U. S. ex rel. *Adler v. Hammond*, 3 N. B. R. 58, 104 Fed. 862, rev'g 3 N. B. R. 15, 103 Fed. 444, 4 A. B. R. 583; see *City Nat. Bank of Dallas v. Doolittle*, 107 Fed. 236, 5 A. B. R. 736.

20—18 U. S. Stat. 184.

21—The difference in the two acts renders many of the decisions under the earlier act inapplicable to the present, as for instance, that the court might, two years after the final order, set aside a composition, though in that case it did not on account of laches (*In re Herman*,

17 N. B. R. 440, 8 Ben. 436, Fed. Cas. No. 6405); that it could be set aside if not of benefit to creditors as well as bankrupt (*In re Allen*, 17 N. B. R. 157, Fed. Cas. No. 210); that creditors who have not proved their debts can not take part (*In re Bryce*, 19 N. B. R. 287, Fed. Cas. No. 2069); and that creditors who accepted the compromise can not vote for assignee (*Ex parte Hamlin*, 16 N. B. R. 320, 2 Lowell 571, Fed. Cas. No. 5993; *In re Herman*, 17 N. B. R. 440, 9 Ben. 436, Fed. Cas. No. 6405).

The provisions for the setting aside of a composition and of a discharge<sup>22</sup> are alike, and decisions construing them should be considered together.

### § 1243. — Grounds for setting aside.

The court of bankruptcy has no power to set aside a composition except as given in section 13, which limits section 2 (9) of the act.<sup>23</sup>

The sole ground for setting aside a composition is fraud, and it must have been unknown to the applicants at the time of confirmation.<sup>24</sup> The want of knowledge must not only be actual but legal. If on proper inquiry they might have known or if facts existed which would have caused a reasonable man to make such inquiry they will be charged with knowledge. But, even if a creditor has relied on the general observance of the bankruptcy act, he will not be estopped from seeking to set aside a composition, unless it be clearly shown that he was in possession of the information as to which he was guilty of laches or that he deliberately ignored an opportunity to keep posted.<sup>25</sup>

A fraudulently procured composition will be set aside,<sup>26</sup> as where it was procured by fraudulent conduct of the trustee seeking to aid the bankrupt,<sup>27</sup> or by false assurances made by the bankrupt's attorneys that there was no haste and that the creditor would be included in the composition,<sup>28</sup> or by concealment of assets,<sup>29</sup> or by a false statement by the bankrupt which was relied upon by a creditor in accepting the terms of a composition.<sup>30</sup> As a general rule, it may be said that frauds which would have been a bar to the confirmation if discovered therefore may be urged as grounds for setting the composition aside where discovered after its confirmation.<sup>31</sup> However, the volun-

22—Section 15, Act of 1898.

23—In re Rudnick, 1 N. B. N. 531, 93 Fed. 787, 2 A. B. R. 114; City Nat. Bank of Dallas v. Doolittle, 107 Fed. 236, 5 A. B. R. 736.

24—In re Abrams & Rubins, 173 Fed. 430, 23 A. B. R. 25; In re Cooper Bros., 166 Fed. 932, 20 A. B. R. 634.

25—In re Ballance, 206 Fed. 505, 30 A. B. R. 689.

26—Elfelt v. Snow, 6 N. B. R. 57, 2 Sawy. 94, Fed. Cas. No. 4342.

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27—In re Wrisley Co. 133 Fed. 388, 13 A. B. R. 193.

28—In re Abrams & Rubins, 173 Fed. 430, 23 A. B. R. 25.

29—In re Kaplan, 29 A. B. R. 54.

30—In re Ballance, 206 Fed. 505, 30 A. B. R. 689.

False statement in schedules. In re Roukous, 128 Fed. 645, 12 A. B. R. 128.

31—In re Roukous, 128 Fed. 645, 12 A. B. R. 218.

tary payment in full of other debts after bankrupt's release by composition does not render fraudulent a promise to a creditor to induce him to sign composition "that no other creditor should receive better terms,"<sup>32</sup> nor is the failure of a creditor to get notice because his address was misstated in the schedule through mistake, sufficient grounds for setting aside the composition.<sup>33</sup>

A composition, though fraudulent, will not be set aside, where the creditors will not profit by setting it aside, as where a second petition in bankruptcy has been filed since its confirmation and the bankrupt is unable to meet the notes given to the creditors in payment of their claims.<sup>34</sup>

### § 1244. — Parties in interest.

The confirmation of the composition can only be set aside "upon the application of parties in interest."<sup>35</sup> A creditor who has assigned his claim cannot petition for the vacation of an order confirming a composition.<sup>36</sup>

### § 1245. — Limitations.

A composition can only be attacked in the bankruptcy court and there only within six months after the order of confirmation. After that, and elsewhere at all times, it is unimpeachable.<sup>37</sup>

### § 1246. — Petition to set aside.

The petition to set aside a composition need not set out in detail how and when the petitioner learned the facts relied upon. It is sufficient that it allege that the petitioner had no knowledge of the facts at the time the composition was confirmed.<sup>38</sup> Failure of a petition to make all creditors assenting to the composition parties is not fatal.<sup>39</sup>

A verification in the usual form for a bill of equity is suffi-

32—In re Sturgis, 16 N. B. R. 304, 8 Biss. 79, Fed. Cas. No. 13565.

33—In re Rudnick, 1 N. B. N. 276, 531, 2 A. B. R. 114, 93 Fed. 787.

34—In re Sacharoff & Kleiner, 163 Fed. 664, 20 A. B. R. 814.

35—Section 13, Act of 1898.

36—In re Wrisley Co., 133 Fed. 388, 13 A. B. R. 193.

37—Section 13a, Act of 1898; In re Eisenberg, 148 Fed. 325, 16 A. B. R. 776; In re Jersey Island Packing Co., 152 Fed. 839, 18 A. B. R. 417.

38—In re Roukous, 128 Fed. 645, 12 A. B. R. 128.

39—In re Wrisley Co., 133 Fed. 388, 13 A. B. R. 193.

cient,<sup>40</sup> but a verification by an agent who has no personal knowledge of the facts, upon information and belief, is insufficient.<sup>41</sup>

The commencement of an action at law by a creditor on his claim is not an abandonment of his petition to have a composition set aside.<sup>42</sup>

### § 1247. — Notice of hearing.

Though no provision is expressly made for notice of the hearing on the application to set a composition aside the better practice is to give notice to the parties interested,<sup>43</sup> especially to any creditor charged with being a party to the fraud.

### § 1248. — Restoration or deposit of consideration.

The restoration of the consideration received by the creditor, or an offer to restore the same is not a condition precedent to the setting aside of a composition.<sup>44</sup>

It is held, however, that if a note given to applicant under a composition falls due while his application to set such composition aside is pending, the amount thereof should be paid into court by the bankrupt;<sup>45</sup> but, if the applicant in such circumstances does not appear to receive payment after notice, he is entitled, upon subsequent refusal, to a summary order.

### § 1249. — Jury trial.

Section 13 provides that "if it shall be made to appear upon a trial," thus clearly distinguishing the mode to be adopted here from that in section 12, which provides (par. c) for a "hearing" and (par. d) that the "judge" should be satisfied. The question of fraud is to be tried by a jury.<sup>46</sup>

### § 1250. — Burden and quantum of proof.

The burden rests upon the creditor seeking to have a composition set aside, to show by proper averments and evidence, sufficient grounds why this should be done.<sup>47</sup>

40-41-42—In re Roukous, 128 Fed. 645, 12 A. B. R. 128.

43—Ex parte Hamlin, 16 N. B. R. 320, Fed. Cas. No. 5993; Re Dunn, 53 Fed. 341.

44—In re Roukous, 128 Fed. 645, 12 A. B. R. 128.

45—In re Reynolds, 16 N. B. R. 176, Fed. Cas. No. 11725.

46—But see In re Kaplan, 29 A. B. R. 54.

47—City Nat. Bank of Dallas v. Doolittle, 107 Fed. 236, 5 A. B. R. 736.

Clear proof of fraud is necessary to set aside a composition.<sup>48</sup>

**§ 1251. — Effect of setting aside.**

While a composition induced by fraud may be set aside, the property acquired by the bankrupt, in addition to his estate at the time the composition was confirmed, must be applied to the payment in full of claims of creditors for property sold to him on credit in good faith while such composition was in force, and the residue, if any, added to his estate in bankruptcy<sup>49</sup> to be applied to the payment of debts arising at the time of adjudication. Whenever a composition is set aside the court must reinstate the case<sup>50</sup> and the trustee, upon his appointment and qualification, is vested with the title to all of the bankrupt's property as of the date of the final decree setting aside the composition.<sup>51</sup> It has been held that where payments have been made under a composition which is afterwards set aside, such payments are not affected.<sup>52</sup>

**§ 1252. — Order setting aside as evidence.**

A certified copy of the order setting a composition aside, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings and of the fact that the order was made.<sup>53</sup>

48—Union Furniture Co. v. Walker-Cooley Furniture Co., 206 Fed. 217, 31 A. B. R. 73.

49—Section 64e, Act of 1898.

50—Section 2 (9), Act of 1898.

51—Section 70d, Act of 1898.

52—McCormick v. Solinsky, 152 Fed. 984, 18 A. B. R. 540; *Ex parte Hamlin*, 16 N. B. R. 320, 2 Lowell 571, Fed. Cas. No. 5993.

53—Section 21f, Act of 1898.



## CHAPTER XXX

### APPRAISAL AND SALE OF PROPERTY

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§ 1309. — In case of liens.

§ 1310. — Dower of bankrupt's wife.

§ 1311. — Leases.

### § 1253. Jurisdiction and power to sell.

#### § 1254. — Ancillary jurisdiction.

Where real property of the bankrupt is situated in another district, the bankruptcy court of that district has ancillary jurisdiction to make a sale thereof.<sup>1</sup> There exists no necessity for invoking ancillary jurisdiction, however, for the court of original jurisdiction has the power to order a sale in another state or district.<sup>2</sup>

#### § 1255. — State court has no power over sales.

The title to the bankrupt's property vests in the trustee as soon as the adjudication is made; any sale thereafter must be made by such trustee under the direction of the bankruptcy court. The state court has no jurisdiction to sell such property under such circumstances, but if it did make sale, the purchaser would take no title.<sup>3</sup> Where a federal court authorizes a sale, and the deposit of the proceeds, such decision will control in spite of the fact that the action of a state court in which insolvency proceedings were brought prior to the bankruptcy proceedings, permitting a sale, was reversed on appeal.<sup>4</sup>

1—In re Britannia Min. Co., 197 Fed. 459, 28 A. B. R. 651. Contra, In re Granite City Bank of Dell Rapids, 137 Fed. 818, 14 A. B. R. 404, aff'g 131 Fed. 1003, 12 A. B. R. 727.

2—Robertson v. Howard, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611.

3—In re Azule Nat. Seltzer Water Co., 2 N. B. N. R. 639; In re Lyon, 7 N. B. R. 182, Fed. Cas. No. 8644. But see In re Zehner, 193 Fed. 787, 27 A. B. R. 536.

4—In re Riker, 107 Fed. 96, 5 A. B. R. 720.

**§ 1256. — Power of referee.**

The petition for an order of sale may be presented to and granted by the referee.<sup>5</sup>

**§ 1257. Liquidation without sale.**

The trustee may, if to the interest of the estate, relieve the property from the lien by discharging the incumbrance, or he may agree with the creditors as to the value of the property,<sup>6</sup> or he may apply to have the lien ascertained and liquidated, or for an order directing the sale of the property held as security for any provable claim, as the most correct means of ascertaining its true value, and from the proceeds may pay the debts covered by the security.<sup>7</sup>

**§ 1258. Sale pending composition proceedings.**

A failure to make the deposit required by section.12b upon the filing of a petition for composition, will prevent the pendency of such petition from being urged as an objection to a sale of the bankrupt's assets.<sup>8</sup>

**§ 1259. Receiver's sale.**

See ante, section 220.

**§ 1260. What may be sold or assigned.****§ 1261. — In general.**

It may be stated as a general rule that any property passing to the trustee as an asset of the estate may be sold.<sup>9</sup> Property of the bankrupt which is unassignable cannot, however, be sold.<sup>10</sup>

**§ 1262. — Exempt property.**

Exempt property cannot be sold without the consent of the bankrupt<sup>11</sup> and the court will not, upon the petition of a cred-

5—In re Fisher & Co., 135 Fed. 223, 14 A. B. R. 366.

6—Reed v. Bullington, 11 N. B. R. 408.

7—In re Stewart, 1 N. B. R. 42, Fed. Cas. No. 13418.

8—In re Fisher & Co., 135 Fed. 223, 14 A. B. R. 366.

9—See Chapter XXI for a full discussion of what property passes to the trustee.

10—Snyder v. Bougher, 214 Pa. St. 453, 16 A. B. R. 792.

11—In re Jackson, 18 A. B. R. 216.

itor claiming a lien thereon, order the bankrupt to restore the same after it has been delivered to him by the trustee, in order that it may be sold for the benefit of creditors.<sup>12</sup>

For a full discussion and citation of authorities, see ante, section 1036.

### § 1263. — Good will.

The practice and good will of a bankrupt physician cannot be sold by his trustee.<sup>13</sup>

The good will of a bankrupt corporation becomes extinguished by the trustee's sale of all goods and chattels thereof and cannot thereafter be sold by the trustee.<sup>14</sup>

### § 1264. — Interest in real estate.

An interest such as a remainder in real property may be sold, subject to liens thereon.<sup>15</sup> The interest of a bankrupt as legatee under a will may be ordered sold though the extent thereof has not been determined.<sup>16</sup> While the court will not take possession of immoral places, to conduct a disreputable business there carried on, it will, under proper circumstances and at the proper time, take possession to sell bankrupt's interest therein.<sup>17</sup>

### § 1265. — Incumbered property.

A court of bankruptcy, as well as the referee, has power to order the sale of property upon which a lien is asserted and direct the money arising therefrom to be brought into court for distribution among those entitled to it<sup>18</sup> without first determining either the validity or amount of the lien.<sup>19</sup> Such sale should not be ordered unless it is satisfactorily shown that the interests of the general creditors will be thereby advanced,<sup>20</sup> and if the

12—In re Bender, 15 Ohio Fed. Dec. 253, 17 A. B. R. 895.

13—In re Myers, 208 Fed. 407, 31 A. B. R. 24.

14—In re Jaysee Corset Co., 201 Fed. 779, 29 A. B. R. 856.

15—In re Arden, 188 Fed. 475, 26 A. B. R. 684.

16—In re Crouse, 196 Fed. 907, 28 A. B. R. 540; In re Gutterson, 136 Fed. 698, 14 A. B. R. 495.

17—In re Pittner, 2 N. B. R. 915.

18—In re Salmons, 2 N. B. R. 19, Fed. Cas. No. 12268; In re Styer, 2 N. B. N. R. 205, 98 Fed. 290, 3 A. B. R. 424. Contra, In re Fite, 31 A. B. R. 308.

19—In re Littlefield, 155 Fed. 838, 19 A. B. R. 18.

20—In re Rose, 193 Fed. 815, 26 A. B. R. 752; In re Styer, 2 N. B. N. R. 205, 98 Fed. 290, 3 A. B. R. 424; In re Shaef-fer, 105 Fed. 352, 5 A. B. R. 248; In re Huggins, 179 Fed. 490, 29 L. R. A. (N. S.) 737, 24 A. B. R. 715.

validity of the liens is unquestioned and their amount is such that there is probably no excess of value in the property, it should be surrendered to the lien holders or others entitled thereto, unless some other reason appears for retaining control.<sup>21</sup>

See also, Sale free from liens, post, section 1270.

### § 1266. — Leases.

A lease should not be sold unless sufficient money is realized to pay the rentals due and to become due thereunder, or unless a bond conditioned upon the payments of such rents be given.<sup>22</sup>

### § 1267. — Liquor license.

Whether a liquor license held by the bankrupt may be sold depends upon whether the same is assignable.<sup>23</sup>

### § 1268. — Property in possession of adverse claimant.

A court will not summarily order the sale of property, real or personal, claimed by the trustee, even though the title be in dispute, if the estate be in the actual possession of a third person holding as owner and claiming absolute title to it, whether derived from the debtor before he was adjudged bankrupt or from another.<sup>24</sup>

### § 1269. — Trustee's right of action.

A trustee's right of action cannot ordinarily be assigned.<sup>24a</sup> While the right of a trustee in bankruptcy to bring suit to set aside a transfer made more than four months prior to bankruptcy in fraud of creditors may not alone be assigned, yet, the trustee has a transferable interest in the property so transferred, which he may transfer or convey and assign with it the right vested in him to maintain an action to set aside the transfer. Such transfer or assignment should only be authorized, how-

21—*In re Cogley*, 107 Fed. 73, 5 A. B. R. 731; *In re Huggins*, 179 Fed. 490, 29 L. R. A. (N. S.) 737, 24 A. B. R. 715.

22—*In re Gutman*, 197 Fed. 472, 28 A. B. R. 643.

23—*Snyder v. Bougher*, 214 Pa. St. 453, 16 A. B. R. 792. And see *In re Baumbblatt*, 153 Fed. 485, 18 A. B. R. 720.

24—*In re Mimms & Parham*, 193 Fed. 276, 27 A. B. R. 469; *Gifford v. Helms*, 19 N. B. R. 113, 98 U. S. (8 Otto) 248, 25 L. ed. 57; *Beach v. Macon Grocery Co.*, 116 Fed. 143.

24a—*Belding-Hall Mfg. Co. v. Mercer & Fendon Lumber Co.*, 175 Fed. 335, 23 A. B. R. 595.

ever, under extraordinary and peculiar circumstances making such course necessary to protect and serve the best interests of the estate.<sup>25</sup> A decision by a state court in an action by the trustee to set aside a transfer of the bankrupt's interest in an estate that the same was assignable and passed to the trustee is conclusive and cannot be attacked in a proceeding to enjoin the trustee from selling such interest as an asset of the estate.<sup>26</sup>

## § 1270. Sale free of liens.

### § 1271. — In general.

A court of bankruptcy, including the referee, has authority to direct a sale of property by the trustee in bankruptcy free and clear of all liens and incumbrances, in which event the liens are transferred to the proceeds<sup>27</sup> according to their priority;<sup>28</sup> or it may direct a sale of the property and require the trustee in bankruptcy to institute suit to determine the validity of a lien.<sup>29</sup> Such an order of sale is discretionary,<sup>30</sup> and will not be made where it is evident that there is no equity in the property, and

25—In re Downing, 192 Fed. 683, 27 A. B. R. 309, aff'd 201 Fed. 93, 29 A. B. R. 228.

26—In re Seavey, 195 Fed. 825, 27 A. B. R. 373.

27—In re Zehner, 193 Fed. 787, 27 A. B. R. 536; In re Roger Brown & Co., 196 Fed. 758, 28 A. B. R. 336; In re Prince & Walter, 131 Fed. 546, 12 A. B. R. 675; In re Vastbinder, 132 Fed. 718, 13 A. B. R. 148; In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 A. B. R. 585; In re Shoe & Leather Reporter, 129 Fed. 588, 12 A. B. R. 248; In re Gaskill, 130 Fed. 235, 12 A. B. R. 251; In re Moore, 146 Fed. 187, 17 A. B. R. 164; In re Stevens, 173 Fed. 842, 23 A. B. R. 239; In re United States Graphite Co., 161 Fed. 583, 20 A. B. R. 573; In re American Architects Tube Co., 184 Fed. 694, 25 A. B. R. 651; In re Worland, 1 A. B. R. 450, 92 Fed. 893; also see In re Pittelkow, 1 A. B. R. 472, 92 Fed. 903; Southern Loan & Trust Co. v. Benbow, 3 A. B. R. 9, 96 Fed. 514; In re Sanborn, 96 Fed. 551, 3 A. B. R. 54; In re Nat. Iron Co., 8 N. B. R. 422, Fed.

Cas. No. 10, 45; In re Kahley, 4 N. B. R. 124, Fed. Cas. No. 7593; In re Barrow, 1 N. B. R. 125, Fed. Cas. No. 1057; Foster v. Ames, 2 N. B. R. 147, Fed. Cas. No. 4965; Ex parte The City Bank of New Orleans, 3 How. 292, 11 L. ed. 603; Houston v. Bank, 6 How. 486, 12 L. ed. 790; Ray v. Norseworthy, 23 Wall. 128, 23 L. ed. 116; In re Salmons, 2 N. B. R. 19, Fed. Cas. No. 12268; Markson v. Heaney, 12 N. B. R. 484; In re Styer, 2 N. B. R. 205, 98 Fed. 290, 3 A. B. R. 424; In re Gerson, 4 A. B. R. 346, 102 Fed. 318; Forms 43, 44; In re Freedman, 31 A. B. R. 53, aff'g 29 A. B. R. 135.

28—McNair v. McIntyre, 113 Fed. 113, 7 A. B. R. 638; In re Riker, 107 Fed. 96, 5 A. B. R. 720.

29—In re Reed, 117 Fed. 358.

30—Equitable Trust Co. of New York v. Vanderbilt Realty Improvement Co., 140 N. Y. S. 1008, 31 A. B. R. 834.

Judicial discretion in ordering a sale free from liens will not be reviewed. In re Throckmorton, 196 Fed. 656, 28 A. B. R. 487.

the sale will prejudice lienors,<sup>31</sup> but only where the interests of the general creditors will be advanced thereby.<sup>32</sup> So, where the holder of bonds of the bankrupt secured by mortgage giving him the right to apply the bonds to the purchase of the mortgaged property upon a foreclosure sale has instituted suit to foreclose the mortgage in which the trustee, who disputes the holder's title, is made a party defendant, a sale free from liens should not be made, especially where it appears that the mortgaged property will not bring enough to pay the bonds.<sup>33</sup> The same rule with reference to the sale free of liens would apply to perishable property.<sup>34</sup>

A sale free of liens does not, however, affect a lien in the nature of a tax assessment against the property sold, but in this case the trustee should protect the purchaser by providing for the payment of the taxes.<sup>35</sup> Where more than four months before the petition was filed, the bankrupt executed a real estate mortgage to one creditor, a chattel mortgage on fixtures to the real estate to another and suffered judgments to be taken by a third, the bankruptcy court will direct a sale clear of all liens, and out of the proceeds pay off the incumbrances or liens according to the priority to which they would be entitled under the said law.<sup>36</sup>

A referee or court of bankruptcy may direct the trustee to sell free of incumbrances, personal property of the bankrupt in his possession, but covered by a chattel mortgage, on notice to the incumbrancers, and to approve the sale when made. It is within the fair exercise of his discretion to approve a sale found to be for the fair cash value of the property, though less than the amount of the mortgage debt.<sup>37</sup>

31—In re Alden, 15 Ohio Fed. Dec. 120, 16 A. B. R. 362; In re Holmes Lumber Co., 189 Fed. 178, 26 A. B. R. 119; In re Rose, 193 Fed. 815, 26 A. B. R. 752; In re Cogley, 107 Fed. 73, 5 A. B. R. 731. But see In re Keet, 128 Fed. 651, 11 A. B. R. 117; In re Foster, 181 Fed. 703, 25 A. B. R. 96.

32—In re Styer, 2 N. B. N. R. 205, 3 A. B. R. 425, 98 Fed. 290; In re Shaeffer, 105 Fed. 352; In re Waterlow Organ Co., 118 Fed. 904.

33—In re Fayetteville Wagon-Wood &

Lumber Co., 197 Fed. 180, 28 A. B. R. 307; In re Saxton Furnace Co., 136 Fed. 697, 14 A. B. R. 483.

34—In re San Gabriel Sanatorium Co., 2 N. B. N. R. 827, 102 Fed. 310, 4 A. B. R. 197.

35—In re Keller, 109 Fed. 131, 6 A. B. R. 334.

36—In re Worland, 92 Fed. 893, 1 A. B. R. 450.

37—In re Sanborn, 3 A. B. R. 54, 96 Fed. 551.

### § 1272. — Sale free from dower.

Property of the bankrupt may be sold free from his wife's inchoate right of dower, with her consent.<sup>38</sup> It is held that a trustee who has been ordered to sell real estate free of all liens, is not authorized to sell subject to an inchoate dower interest of the bankrupt's wife.<sup>39</sup>

### § 1273. — Order to sell.

A sale is not free from liens unless so provided by order,<sup>40</sup> and the trustee cannot sell free from liens without a judicial decision of the validity thereof, notwithstanding he denies their validity.<sup>41</sup> An order merely directing the sale of the property without mentioning liens, will be taken as directing a sale subject to liens,<sup>42</sup> but in case of a direction to sell free from first or superior liens, without mentioning inferior liens, the latter may also be divested and transferred to the proceeds, if such is the intention of the parties and the result is equitable.<sup>43</sup>

A certificate from the referee concerning an order to sell property discharged of liens should affirmatively show that notice has been given creditors and lienholders. A general statement that such notice has been given will not suffice.<sup>44</sup>

### § 1274. — Recovery of proceeds.

Where incumbered property has been sold free from liens without the consent of the lienor, the latter may proceed by suit in the state court to determine his right to recover the amount of the mortgage debt from the trustee.<sup>45</sup> An action in trover by a lienor to recover the proceeds of a sale free from liens is an affirmation of such sale.<sup>46</sup>

Where a mortgagee institutes summary proceedings to obtain

38—In re Acretelli, 173 Fed. 121, 21 A. B. R. 537; *Savage v. Savage*, 141 Fed. 346, 3 L. R. A. (N. S.) 923, 15 A. B. R. 599, certiorari denied 201 U. S. 646, 50 L. ed. 904.

39—In re Codori, 207 Fed. 784, 30 A. B. R. 453.

40—*Bassett v. Thackara*, 72 N. J. 81, 16 A. B. R. 786.

41—In re Saxton, 136 Fed. 697, 14 A. B. R. 483.

42—In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 A. B. R. 291.

43—*McKay v. Hamill*, 185 Fed. 11, 26 A. B. R. 164.

44—In re Saxton Furnace Co., 136 Fed. 697, 14 A. B. R. 483.

45—In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 A. B. R. 291.

46—In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 A. B. R. 291.



the proceeds of the sale of mortgaged property, the trustee has a right to be heard on the amount due under the mortgage. An answer which alleges that the mortgagee through its agent took from the bankrupt a trust deed of all its property, and that the agent exercised control over all financial affairs of the bankrupt until its adjudication, and that the mortgagee obtained a large amount of money from the bankrupt has been held sufficient to justify the introduction of evidence as to amount due the mortgagee.<sup>47</sup>

### § 1275. Procedure governing sales.

#### § 1276. — In general.

The provisions of the act of congress of March 3, 1893, c. 225, relating to sales of land by order of United States courts is inapplicable to sales by a trustee in bankruptcy which are controlled solely by the provisions of section 70b of the Bankruptcy Act and No. 18 of the General Orders in Bankruptcy,<sup>48</sup> and it is held that the trustee may sell realty at public auction without any order of the court, and after such notice and at such place as in his judgment seems best.<sup>49</sup>

A sale by a trustee in bankruptcy is, however, except where otherwise controlled by statute, subject to the general rules and principles of procedure obtaining in other judicial proceedings.<sup>50</sup> Official Form 42 (§ 1799, *post*) should be followed where a sale of real property is desired.<sup>51</sup> The referee is not bound by the prayer of the trustee in making the sale, but may conduct the same in such manner as he deems to the best interests of the estate.<sup>52</sup>

The court may bring a lienholder objecting to a sale before it by service of a rule to show cause why the petition of the trustee to sell the property should not be granted,<sup>53</sup> but the

47—In re Keystone Press, Inc., 203 Fed. 710, 29 A. B. R. 715.

48—Robertson v. Howard, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611; In re La France Copper Co., 205 Fed. 207, 30 A. B. R. 381; In re Britannia Min. Co., 203 Fed. 450, 29 A. B. R. 472, rev'g 197 Fed. 459, 28 A. B. R. 651; In re National Mining Exploration Co., 193 Fed. 232, 27 A. B. R. 92.

49—In re La France Copper Co., 205 Fed. 207, 30 A. B. R. 381.

50—Coal City House Furnishing Co. v. Hogue, 197 Fed. 1, 28 A. B. R. 258.

51—In re Nevada-Utah Mines & Smelters Corporation, 198 Fed. 497, 28 A. B. R. 409.

52—In re Freedman, 29 A. B. R. 135, aff'd 31 A. B. R. 53.

53—In re American Architects Tube Co., 184 Fed. 694, 25 A. B. R. 651.

validity of an incumbrance against property sought to be sold cannot be summarily determined upon petition of the trustee to sell.<sup>54</sup>

### § 1277. — Order of sale.

An order of court for the sale of property is not essential in the case of sales, at public auction<sup>55</sup> though in cases of private sales it is essential.<sup>56</sup> The better practice is, however, to procure such order in all cases, since it might in some contingencies protect the trustee.

Where an order is made, the form thereof is sufficient if it directs the sale of the right, title, etc., of the bankrupt, and it need not direct the sale of the right, title, etc., which the trustee acquired by the decree of bankruptcy.<sup>57</sup> An upset price need not be fixed in the order.<sup>58</sup> Where an order of sale is made after a lienholder has given notice of his alleged lien, the order should provide for the imposition of such lien on the proceeds of sale.<sup>59</sup>

Irregularity in the form of the order will not invalidate the sale.<sup>60</sup>

Order of sale as a condition precedent to a sale free of liens, see ante, section 1273.

### § 1278. — Notice of sale—Private sales.

A private sale made without an appraisal of the property and without the order or approval of the court vests no title in the buyer,<sup>61</sup> but a sale is none the less public because not conducted by an auctioneer, or because notice thereof is not posted on the premises as required by a rule of court.<sup>62</sup>

All sales are to be at public auction unless otherwise ordered by the court. For good reason shown a specified portion may be

54—In re Henderson, 206 Fed. 139, 30 A. B. R. 468.

55—In re La France Copper Co., 205 Fed. 207, 30 A. B. R. 371.

56—G. O. XVIII.

57—Smith v. Scholtz, 17 N. B. R. 520.

58—Schuler v. Hassinger, 177 Fed. 119, 24 A. B. R. 184.

59—In re Kohl-Hepp Brick Co., 176 Fed. 340, 23 A. B. R. 822.

60—In re Throckmorton, 196 Fed. 656, 28 A. B. R. 487.

61—In re Monsarrat, 25 A. B. R. 815.

62—See In re Nevada-Utah Mines & Smelters Corporation, 198 Fed. 497, 28 A. B. R. 409, s. c. 202 Fed. 126, 29 A. B. R. 754.

Where an advertisement was addressed only to "creditors, stockholders and other parties in interest," sale held private. In re Nevada-Utah Mines & Smelters Corp., 202 Fed. 126, 29 A. B. R. 754.

ordered sold at private sale, in which case an account of each article, the price brought and to whom sold must be kept and filed. Perishable property may be ordered sold immediately with or without notice.<sup>63</sup> Perishable property may consist of buildings rapidly deteriorating and in a dilapidated condition and requiring immediate expenditure of a large sum of money to prevent absolute loss.<sup>64</sup> It has been held that perishability in bankruptcy involves physical deterioration of the property itself, not mere depreciation in value, and hence a stock of hardware cannot be sold as perishable without notice, though becoming unseasonable.<sup>65</sup> On the other hand it has been held that a horse comes within this provision since he consumes food and thus reduces his value;<sup>66</sup> and salt which could be sold for immediate delivery, but otherwise would be unsalable;<sup>67</sup> and, in fact, Christmas toys and the like, would be considered, immediately before the holidays, or fireworks before the Fourth of July. In other words if a thing became unseasonable after the lapse of a few days, there would be no physical deterioration but a serious depreciation in value which would warrant a sale without the required notice. Objections to a private sale and a sale before appraisement, cannot be made for the first time before the district judge.<sup>68</sup>

At least ten days' notice by mail of all sales must be given creditors, unless waived in writing,<sup>69</sup> or the court orders it without notice.<sup>70</sup>

Notice to lienholders is essential in case of a sale free from liens,<sup>71</sup> and the record must disclose affirmatively that all cred-

63—G. O. XVIII; Official Forms 42, 45 and 46, §§ 1799, 1802, *post*; In re Beutel's Sons, 2 N. B. N. R. 1011, 7 A. B. R. 768; In re Hawkins, 125 Fed. 633, 11 A. B. R. 49; In re Milne Mfg. Co., 21 A. B. R. 468; In re Edes, 135 Fed. 595, 14 A. B. R. 382; In re Nevada-Utah Mines & Smelters Corp., 202 Fed. 126, 29 A. B. R. 753.

64—In re Milne Mfg. Co., 21 A. B. R. 468.

65—In re Beutel's Sons, 2 N. B. N. R. 1011, 7 A. B. R. 768.

66—In re Smith, 1 N. B. N. 180.

67—Anon., 1 N. B. N. 204.

68—In re Gutterson, 136 Fed. 698, 14 A. B. R. 495.

69—Section 58a (4), Act of 1898; In re Groves, 2 N. B. N. R. 30; In re Hunter, 18 N. B. R. 504, Fed. Cas. No. 6903.

Act of March 3, 1893, requiring 28 days' notice does not apply. In re National Mining Exploration Co., 193 Fed. 232, 27 A. B. R. 92.

70—G. O. XVIII.

71—In re Crowell, 199 Fed. 659, 29 A. B. R. 308.

Notice to trustee of bondholders is sufficient in case of sale of lands of bankrupt free from lien of the mortgage

itors whose liens were discharged have received notice of the application to sell.<sup>72</sup>

Notice to a creditor whose name and address appear in the bankrupt's schedule of liabilities is not notice to the assignee of the creditors whose proof of claim containing his address is duly filed.<sup>73</sup>

Where the time allowed by an order for the sale of property has expired, a sale cannot be had after expiration of the time fixed by the order without the giving of a new notice to creditors and lienors.<sup>74</sup>

Creditors attending sale and bidding on property are estopped to set up want of notice.<sup>75</sup> A sale of real property cannot be collaterally attacked for alleged error in the description of the property sold, contained in the published notice.<sup>76</sup>

No notice to stockholders of a bankrupt corporation of a proposed sale of its assets is necessary.<sup>77</sup>

### § 1279. — Appraisement.

Section 70b of the act provides that "All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court." Want of appraisal does not, however, necessarily invalidate a sale,<sup>78</sup> cannot be raised for the first time before the district judge,<sup>79</sup> and is no ground for collateral attack.<sup>80</sup>

The referee has general authority to appoint appraisers and his action is subject to revision by the court of bankruptcy. An appraiser is not disqualified because he is a stockholder and officer in a corporation in which a creditor is also interested.<sup>81</sup> While the appointment of appraisers is not void by reason of the fact that the referee permitted creditors to express their

securing their bonds. *Equitable Trust Co. of New York v. Vanderbilt Realty Improvement Co.*, 140 N. Y. S. 1008, 31 A. B. R. 835.

72—*In re Platteville Foundry & Machine Co.*, 147 Fed. 828, 17 A. B. R. 291.

73—*In re Monsarrat*, 25 A. B. R. 820.

74—*Allgair v. Fisher & Co.*, 143 Fed. 962, 16 A. B. R. 278.

75—*In re Caldwell*, 178 Fed. 377, 24 A. B. R. 495.

76—*Robertson v. Howard*, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611.

77—*In re Witherbee*, 202 Fed. 896, 30 A. B. R. 314.

78—*In re Monsarrat*, 25 A. B. R. 820.

79—Private sale. *In re Gutterson*, 136 Fed. 698, 14 A. B. R. 495.

80—*Robertson v. Howard*, 229 U. S. 254, 57 L. ed. 1174, 30 A. B. R. 611.

81—*In re Columbia Iron Works*, 142 Fed. 234, 14 A. B. R. 526.

preference, the better practice is for the referee to act independently of the creditors.<sup>82</sup>

The particularity with which an appraisement is to be made must depend somewhat upon circumstances. The appraisement, however, should be general, rather than special, only such particularity being given as will be sufficient to reasonably identify the property in character and quantity and give a fair idea of its value.<sup>83</sup> The prevailing cost to the trade should be adopted by the appraisers as the actual value, due allowance being made for any actual deterioration or depreciation in value.<sup>84</sup>

### § 1280. — Time of sale.

A sale of incumbered property should not be ordered until the trustee's appointment, so as not to interfere with the exercise of his election to redeem the property pledged, to sell it subject to the lien, or to release the equity of redemption at an agreed price.<sup>85</sup>

While the uniform practice is to make no order of sale until after adjudication, unless necessary to preserve the property, an order of sale made by a referee prior to the adjudication, while exercising the power of the district judge, will not be disturbed, when the sale was made by consent and no prejudice is shown.<sup>86</sup>

### § 1281. — Place of sale.

A sale of real property or any interest in land need not be made on the property itself, though situated in another district and state.<sup>87</sup>

### § 1282. — Sales in parcels and in bulk.

Assets should not be segregated and sold separately without an order of the court.<sup>88</sup>

82—In re Columbia Iron Works, 142 Fed. 234, 14 A. B. R. 526.

83—In re Gordon Supply & Mfg. Co., 133 Fed. 798, 13 A. B. R. 352.

84—In re Prager, 8 A. B. R. 356.

85—In re Grinnell, 9 N. B. R. 29, 7 Ben. 42, Fed. Cas. No. 5830; consult In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528.

86—In re Kelly Dry Goods Co., 102

Fed. 747, 4 A. B. R. 528; see In re Grinnell, 9 N. B. R. 29, 7 Ben. 42, Fed. Cas. No. 5830; but see March v. Heaton, 2 N. B. R. 66, 1 Lowell 278, Fed. Cas. No. 9061.

87—In re Britannia Min. Co., 203 Fed. 450, 29 A. B. R. 472, rev'g 197 Fed. 459, 28 A. B. R. 651.

88—In re Hinson Bros., 26 A. B. R. 754.

Where the property of the bankrupt is sold in bulk and it is impossible to determine the proportionate value of the particular part subject to a lien to the gross purchase price, the lien will not attach to the proceeds.<sup>89</sup> So, it is held, that a creditor holding a mortgage upon a part of the stock of goods sold loses his lien by his failure to object to a sale of the entire stock and ask for a separation.<sup>90</sup>

A sale of the bankrupt's interest in real estate may be had without partition,<sup>91</sup> and assuming that a sale of real estate by a trustee is to be assimilated to a sale under a decree in equity silent as to the manner of sale, it cannot be attacked collaterally and held void because not made in parcels.<sup>92</sup> The court will not determine in advance of sale whether a building placed upon leased property by the bankrupt is severable and should be sold separately. The trustee is only authorized to sell the bankrupt's rights in the property, the extent of which he cannot guarantee, nor the court pronounce upon.<sup>93</sup>

### § 1283. — Auctioneer.

The court may appoint persons other than the trustee to conduct the sale.<sup>94</sup>

The trustee may employ an auctioneer to conduct the sale, and need not be personally present thereat,<sup>95</sup> but the court may, in its discretion, disapprove the selection by the trustee. The appointment of an auctioneer by the court to conduct sales operates as a disapproval of any selection the trustee makes thereafter, as well as any previously made by him.<sup>96</sup>

### § 1284. — Bids and acceptance thereof.

The trustee in the absence of fraud or manifest inability of the bidder to comply with the terms of the sale, is bound to accept all

89—*Keyser v. Wessel*, 128 Fed. 281, 12 A. B. R. 126, aff'g 23 Fed. 188, 10 A. B. R. 586; and see *Vollmer v. McFadgen*, 161 Fed. 913, 20 A. B. R. 540, aff'g 165 Fed. 715, 19 A. B. R. 481.

90—*In re Caldwell*, 178 Fed. 377, 24 A. B. R. 495.

91—*Hobbs v. Frazier*, 56 Fla. 796, 22 A. B. R. 684.

92—*Smith v. Scholtz*, 17 N. B. R. 520.

93—*In re Gorwood*, 138 Fed. 844, 15 A. B. R. 107.

94—*Sturgis v. Corbin*, 141 Fed. 1, 15 A. B. R. 543.

95—*In re Nat. Mining Exploration Co.*, 193 Fed. 232, 27 A. B. R. 92.

96—*In re Benjamin*, 136 Fed. 175, 14 A. B. R. 481, aff'g 13 A. B. R. 18.

bids,<sup>97</sup> and a bidder whose bid, though higher than any other, has been refused is entitled to a review of an order affirming a sale to another bidder,<sup>98</sup> unless the order of sale expressly reserves the right of the referee to reject any bid.<sup>99</sup> The trustee cannot demand that a bidder disclose for whom he is acting, nor can one whose bid in a representative capacity has been refused, be thereafter refused the right to bid as an individual, nor can his right to bid be conditioned upon his making an upset bid greatly in excess of any other bids.<sup>1</sup>

The bankrupt has a right to bid at a trustee's sale.<sup>2</sup>

Where a prospective bidder and the trustee's solicitor agree that the bidder will let the solicitor have the property at a certain price without reference to the selling price, such agreement will not avoid the sale;<sup>3</sup> nor will a private agreement between the auctioneer and the ultimate purchaser that the bid of any other person is to be raised \$50 each time until a sign is given to stop, invalidate the sale.<sup>4</sup>

The trustee may demand immediate compliance after accepting the bid, and upon failure on the part of the bidder, may resell the property.<sup>5</sup>

Where the trustee is authorized to sell at a private sale, an offer or bid which is accompanied by a substantial payment in evidence of good faith cannot be withdrawn before the acceptance or rejection thereof by the trustee.<sup>6</sup>

## § 1285. Confirmation and setting aside of sale.

### § 1286. — Necessity of confirmation.

Section 70b of the act provides that, "real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

97—Coal City House Furnishing Co. v. Hogue, 197 Fed. 1, 28 A. B. R. 258.

98—Coal City House Furnishing Co. v. Hogue, 197 Fed. 1, 28 A. B. R. 258.

99—In re Chandler, 194 Fed. 944, 28 A. B. R. 89.

1—Coal City House Furnishing Co. v. Hogue, 197 Fed. 1, 28 A. B. R. 258.

2—In re Mitchell, 15 A. B. R. 735.

3—Citizens' Bank v. Ober, 13 N. B. R. 328, 1 Woods 80, Fed. Cas. No. 2731.

4—In re Ketterer Mfg. Co., 156 Fed. 719, 19 A. B. R. 638.

5—Coal City House Furnishing Co. v. Hogue, 197 Fed. 1, 28 A. B. R. 258.

6—In re Lane Lumber Co., 207 Fed. 762, 31 A. B. R. 148.

In judicial sales, that is, a sale of particular property specifically pointed out by the court and ordered during the pendency of proceedings concerning it, such as are sales by trustees, the court is the seller and the trustee its agent to get the highest bidder, the sale not being consummated nor any title passing until confirmation, the act of confirmation alone completing the passing of the title. In execution sales, that is, a sale of any property belonging to the judgment debtor that the sheriff may seize, the court has rendered its decision and is done with it, the sheriff being the real seller and the title passing at once to the highest bidder. In execution sales the purchaser immediately becomes vested with rights which can only be divested by showing that he himself or his agents have been guilty of fraud, whilst, in judicial sales, until confirmation, the so-called purchaser has no such rights, but is simply the preferred bidder awaiting the acceptance of his offer by the court.<sup>7</sup> The approval of a sale by the receiver upon terms offered by a prospective purchaser, renders the transaction a judicial sale as fully as if the sale had been ordered before any offer was made, and the offer subsequently made had been considered and approved.<sup>8</sup>

### § 1287. — Notice to creditors.

Creditors need not be notified of an application to confirm a sale.<sup>9</sup>

### § 1288. — Parties entitled to be heard.

The purchaser is entitled to be heard upon an application to set aside a sale, to the extent of showing that he has rights, and to point out why the discretion of the court should not be exercised.<sup>10</sup>

A stockholder of a bankrupt corporation cannot contest the validity of a sale of its assets.<sup>11</sup>

### § 1289. — Manner of making objections.

Objection to a sale must be made in a court of bankruptcy and not in a collateral action; and where fraud by the trustee is

7—In re Metallic Specialty Mfg. Co., 193 Fed. 300, 27 A. B. R. 408; In re Shea, 126 Fed. 153, 11 A. B. R. 207.

8—In re Jungman, 186 Fed. 302, 26 A. B. R. 401.

9—In re Nevada-Utah Mines & Smelt-

ers Corporation, 198 Fed. 497, 28 A. B. R. 409.

10—In re Kronrot, 183 Fed. 653, 25 A. B. R. 738.

11—In re Witherbee, 202 Fed. 896, 30 A. B. R. 314.



alleged, every fact relied on to establish it should be distinctly stated, and the whole should be verified by some one cognizant of the facts.<sup>12</sup>

**§ 1290. — Grounds for setting aside sale.**

No sale for less than seventy-five per cent of the appraised value ought to be confirmed,<sup>13</sup> unless good reasons are shown why a better price would not be obtainable on a resale, and the burden of proof rests upon the trustee, who brings such report to the court for confirmation, to make such showing, rather than upon the creditors to make good their objections thereto. In a case where the inadequacy of price is insignificant, the sale should not be set aside on that ground especially when the objecting party was present as a creditor at the sale,<sup>14</sup> but where there is a gross inadequacy of price or circumstances impeaching the fairness of the sale (by which is not meant a subsequent offer of a better price), the sale should be set aside.<sup>15</sup>

To warrant the setting aside of a sale for inadequacy of price the difference between what the property brought and its real value must be such as to be unconscionable, and as to create a presumption of fraud.<sup>16</sup> A sale will not be set aside because of a slightly higher bid made by the bankrupt than that accepted, where the bankrupt has failed to make a deposit or pay the amount of his bid, though given opportunity to do so.<sup>17</sup>

A sale for an inadequate price may nevertheless be allowed to stand if the purchaser pays the trustee the difference between the price paid and the actual value of the property with interest.

So, if the price paid is found to be inadequate, the purchaser may return the property and have back the purchase price with interest, upon condition that if the funds of the estate are

12—In re Peabody, 16 N. B. R. 243, Fed. Cas. Nos. 10866.

13—In determining the adequacy of the price, the sworn value of the property fixed by the appraisers controls. *Schuler v. Hassinger*, 177 Fed. 119, 24 A. B. R. 184.

14—In re Kronrot, 183 Fed. 653, 25 A. B. R. 738; In re Metallic Specialty Mfg. Co., 193 Fed. 300, 27 A. B. R. 408; In re Groves, 2 N. B. N. R. 30, 466; In re O'Fallon, Fed. Cas. No. 10445; In re Thompson, 1 N. B. N. 355, 2 A. B. R.

216; In re Brousfeld, 16 N. B. R. 481, Fed. Cas. No. 1703.

15—In re Ethier, 118 Fed. 107, 9 A. B. R. 160.

Advance of 4 per cent in bid held not to show gross inadequacy. *Sturgis v. Corbin*, 141 Fed. 1, 15 A. B. R. 543.

16—In re Shapiro, 154 Fed. 673, 19 A. B. R. 125; In re Nat. Mining Exploration Co., 193 Fed. 232, 27 A. B. R. 92.

17—In re Throckmorton, 149 Fed. 154, 17 A. B. R. 856.

sufficient to pay all claims and expenses of administration, the property is to be returned to the purchaser.<sup>18</sup>

The fact that the objecting creditor failed to bid because of an impression received by him from the trustee that a cash deposit would be required, is no ground for setting aside a sale even though the price received was less than seventy-five per cent of the appraised value,<sup>19</sup> nor is the fact that a claim marked "worthless" subsequently becomes valuable, ground for setting aside a sale thereof.<sup>20</sup>

That the successful bidder has not before confirmation paid to the trustee the balance due on the purchase price, is no bar to a confirmation.<sup>21</sup>

Neither the fact that the ultimate purchaser of the property is a syndicate organized by a former officer of the bankrupt<sup>22</sup> or a committee representing creditors in pursuance of a reorganization plan,<sup>23</sup> nor the fact that one of three trustees of the estate is a stockholder and director of the corporation to which the property is knocked down<sup>24</sup> will invalidate the sale. Nor will the fact that the bid of the person to whom the property was knocked down was made by a firm of lawyers which had, at various times, been employed by the bankrupt and his trustee avoid the sale where no retainer or permanent employment of the attorneys by the bankrupt or the trustee is shown.<sup>25</sup>

A sale will be set aside where the required notice is not given;<sup>26</sup> or where the trustee's solicitor bids at the sale;<sup>27</sup> or where the trustee purchases at his own sale;<sup>28</sup> or where it is made to an appraiser prior to the appraisal of the property, though the purchase is made through a third party and an adequate price is paid for the property,<sup>29</sup> or where property purchased from a trustee was held a few months later at a vastly

18—In re Monsarrat, 25 A. B. R. 820.

19—In re Kronrot, 183 Fed. 653, 25 A. B. R. 738.

20—Phelps v. McDonald, 16 N. B. R. 217.

21—In re Nat. Mining Exploration Co., 193 Fed. 232, 27 A. B. R. 92.

22—In re Pittsburg Dick Creek Min. Co., 197 Fed. 106, 28 A. B. R. 613.

23—Schuler v. Hassinger, 177 Fed. 119, 24 A. B. R. 184.

24—In re Nat. Mining Exploration Co., 193 Fed. 232, 27 A. B. R. 92.

25—In re Nat. Mining Exploration Co., 193 Fed. 232, 27 A. B. R. 92.

26—In re Kohl-Hepp Brick Co., 176 Fed. 340, 23 A. B. R. 822; In re Monsarrat, 25 A. B. R. 820; Ex parte Bryan, In re Major, 14 N. B. R. 71, 2 Hughes 273, Fed. Cas. No. 2061.

27—Bank v. Ober, 13 N. B. R. 328, 1 Woods 80, Fed. Cas. No. 2731.

28—In re Hawley, 117 Fed. 364, 9 A. B. R. 63.

29—In re Frazin & Oppenheim, 181 Fed. 307, 24 A. B. R. 598.

increased price, where there is evidence of a lack of good faith;<sup>30</sup> or where a sale is made by order of court in which it develops the court had no authority over the property.<sup>31</sup> Where before confirmation of a trustee's sale, it is alleged in opposition thereto that competition was stifled, it is not necessary to prove that the successful bidder was connected with the fraud.<sup>32</sup>

### § 1291. — Appeal and review.

A creditor has the right to call for an investigation into the conduct of the trustee in selling the property, even after the latter's account has been filed and approved.<sup>33</sup> A review of an order of the referee refusing to confirm a sale may be had before a resale of the property but the better practice is to defer the review until after the resale has taken place.<sup>34</sup>

### § 1292. Resale of property by trustee.

A purchaser refusing to complete his sale is liable for the loss upon a resale.<sup>35</sup> Where a person petitioning for a resale who has agreed to pay a stipulated price for the property upon a resale, and to pay the purchaser at the prior sale the cost of improvements placed upon the property, pays more than the agreed amount for the property, he will not be required to pay for the improvements and the taxes upon the property in addition thereto.<sup>36</sup>

### § 1293. Trustee to make conveyances.

The title to bankrupt's property vesting in the trustee by virtue of the adjudication, in case of a sale by him, he should transfer the same to the purchaser by such deed of conveyance as may be necessary to pass title under the laws of the state, the same as would be necessary in the case of any individual.<sup>37</sup> Though, of course, the trustee transfers only such title as he has,<sup>38</sup> and if it be real property, he has no authority to warrant

30—*In re Mott*, 1 N. B. R. 9, Fed. Cas. No. 9879.

31—*Davis v. R. R. Co.*, 13 N. B. R. 258, 1 Woods 661, Fed. Cas. No. 3648.

32—*In re Groves*, 2 N. B. R. 30.

33—*In re Peabody*, 16 N. B. R. 243, Fed. Cas. No. 10866.

34—*In re Metallic Specialty Mfg. Co.*, 193 Fed. 300, 27 A. B. R. 408.

35—*Snyder v. Bougher*, 214 Pa. St. 453, 16 A. B. R. 792.

36—*In re Wylie*, 153 Fed. 281, 18 A. B. R. 503, aff'g 148 Fed. 907, 17 A. B. R. 404.

37—Section 70c, Act of 1898.

38—*Bank v. Bank*, 11 N. B. R. 49.

the title, other than his title to the same and in the condition in which he received it. In the case of securities held by any creditor the trustee should be ordered to execute a proper transfer to said creditors of all the rights and claims which the bankrupt, or his creditors, may have in the same,<sup>39</sup> provided there is no equity in it for the estate. An indorsement by the trustee is not essential to pass title to a negotiable instrument sold by him before maturity where the same is indorsed by the original payee therein.<sup>40</sup>

If the trustee sells property but refuses to deliver possession, he is liable to an action at law, or if ordered by the court and declined would be guilty of contempt.<sup>41</sup>

#### § 1294. Bankrupt to execute necessary papers.

The court may compel the bankrupt to execute papers necessary to effectuate a sale of his membership in a stock exchange.<sup>42</sup>

#### § 1295. Rights, duties and liabilities of purchaser.

#### § 1296. — Performance of contract.

A purchaser refusing to carry out his contract may be compelled to do so by rule of attachment.<sup>43</sup>

#### § 1297. — Application of liens to purchase price.

The amount of a purchaser's lien or securities may be applied to the purchase price,<sup>44</sup> and the holder of bonds of the bankrupt corporation secured by mortgage, may, if the mortgage so provides, use the bonds in the purchase of the mortgaged property.<sup>45</sup>

#### § 1298. — Title of purchaser.

A trustee can transfer only such title as he may possess.<sup>46</sup> If he sells property encumbered, he conveys only the bankrupt's

39—In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

40—Wade v. Elliott, 11 Ga. App. 646, 28 A. B. R. 888.

41—Ives v. Tregent, 14 N. B. R. 60.

42—In re Hurlbutt, Hatch & Co., 135 Fed. 504, 13 A. B. R. 50.

43—In re Jungman, 186 Fed. 302, 26 A. B. R. 401.

44—In re Roger Brown & Co., 196 Fed. 758, 28 A. B. R. 336; Schuler v. Hassinger, 177 Fed. 119, 24 A. B. R. 184.

45—In re Saxton Furnace Co., 136 Fed. 697, 14 A. B. R. 483; In re Fayetteville Wagon-Wood & Lumber Co., 197 Fed. 180, 28 A. B. R. 307.

46—Hinchman v. Con. Arizona Smelting Co., 198 Fed. 907, 29 A. B. R. 893; In re Frazin & Oppenheim, 201 Fed. 86, 29 A. B. R. 214; Bank v. Bank, 11 N. B. R. 49.

Sale of trustee's right of action to set aside a fraudulent transfer is to be made without warranty or representation

interest subject to the incumbrance,<sup>47</sup> and with no higher or better interest than the bankrupt could have conveyed.<sup>48</sup> A purchaser at a sale by the trustee stands on the same footing with a purchaser at an execution sale and takes the estate of the bankrupt subject to all equities against it, whether he knows of them or not.<sup>49</sup> Where the trustee fails to reduce a note to possession but sells merely the right, title and interest of the bankrupt therein, the purchaser obtains no better title than the bankrupt had and where the note is in the possession of a receiver in supplementary proceedings, the purchaser is entitled to possession of the note or the proceeds thereof only upon payment of the judgment and expenses of the supplementary proceedings.<sup>50</sup> The purchasers under a sale will be left to establish their title whenever the occasion may arise.<sup>51</sup>

A purchaser of all the assets of the bankrupt cannot enforce performance by third persons of contracts with the bankrupt involving elements of personal trust and confidence in him.<sup>52</sup>

The purchaser of a claim against a third person obtains no right of action against an undisclosed principal who was not scheduled as a debtor.<sup>53</sup>

A sale of property which has been previously assigned by the bankrupt gives the purchaser all the rights of the trustee, and he may sue in the state courts to set aside the prior assignment.<sup>54</sup>

Where the good will of the bankrupt, a corporation, is sold, it may thereafter be enjoined from using its corporate name even though it has received a discharge.<sup>55</sup>

### § 1299. — Payment of taxes and water rents.

The purchaser, and not the estate, will ordinarily be held liable for taxes assessed after sale and before final delivery of

of any kind, and the purchaser takes only the trustee's interest and his right of action. In re Downing, 201 Fed. 93, 29 A. B. R. 228.

47—In re Cooper, 16 N. B. R. 178, Fed. Cas. No. 3190.

48—Ray v. Brigham, 12 N. B. R. 145.

49—Stedman v. Taylor, 17 N. B. R. 283.

50—Arnold v. Greene Gold-Silver Co., 68 Misc. (N. Y.) 449, 24 A. B. R. 846.

51—In re Alden, 16 N. B. R. 39, Fed. Cas. No. 151.

52—Contract obligating person to purchase all his beer from the bankrupt held not enforceable in the hands of a purchaser of the bankrupt's assets. Jetter Brewing Co. v. Scollan, 48 Misc. (N. Y.) 546, 15 A. B. R. 300.

53—Shesler v. Patton, 114 App. Div. (N. Y.) 846, 17 A. B. R. 372.

54—Bryan v. Madden, 109 App. Div. (N. Y.) 876, 15 A. B. R. 388, aff'g 38 Misc. (N. Y.) 638, 11 A. B. R. 763.

55—Myers Co. v. Tuttle, 188 Fed. 532, 26 A. B. R. 541.

the deed.<sup>56</sup> The purchaser of the property at a foreclosure sale who has full knowledge of the non-payment of taxes on the property is not entitled to reimbursement out of the bankrupt estate where the taxes are subsequently paid by a third party.<sup>57</sup> When the trustee transfers property subject to the payment of taxes then owing, the grantee or a purchaser from him is under obligation to pay the same, and cannot be subrogated to the rights of the municipality for a preferential payment thereof out of the estate.<sup>58</sup>

A purchaser of bankrupt's stock and good will who agreed to save estate harmless from claims for rent has been held liable for taxes and water rents due under the provisions of lease which required the bankrupt to pay as "additional rent" such taxes and water rents.<sup>59</sup>

### § 1300. — Recovery for deficiency.

A purchaser seeking to recover for a deficiency in the property purchased from the trustee has but one cause of action, and an allowance to him of part of his claim will bar any future allowances for the balance.<sup>60</sup>

### § 1301. — Resale by purchaser.

A bankrupt purchasing a claim from one who has purchased the same from the trustee in bankruptcy obtains no greater rights than his assignor. Hence where the trustee sells a claim against a third person which was only scheduled as a claim against such person and not against an undisclosed principal and the bankrupt after his discharge purchases the claim from the third person, he cannot sue the undisclosed principal.<sup>61</sup>

### § 1302. — Removal of fixtures—Indemnity.

The court has power to cancel a bond given by a claimant to indemnify the trustee against injury to the real estate caused by the removal of claimant's machinery therefrom though the bond was given to purchasers of real estate from the trustee instead of to the trustee.<sup>62</sup>

56—In re Crowell, 199 Fed. 659, 29 A. B. R. 308.

57—In re Brinker, 128 Fed. 634, 12 A. B. R. 122.

58—In re Hibbler Mach. Supply Co., 192 Fed. 741, 27 A. B. R. 612.

59—Ellis v. Rafferty, 199 Fed. 80, 29 A. B. R. 192.

60—In re Drumgoole, 140 Fed. 208, 15 A. B. R. 261.

61—Shesler v. Patton, 114 App. Div. (N. Y.) 846, 17 A. B. R. 372.

62—In re Regealed Ice Co., 199 Fed. 340, 29 A. B. R. 69.

### § 1303. Distribution of proceeds of sale.<sup>62a</sup>

### § 1304. — As between creditors.

Upon a sale of incumbered property, priority creditors without liens, cannot participate in the proceeds.<sup>63</sup>

A judgment creditor who has not perfected his lien by execution and levy is not entitled to the proceeds of such sale as against a junior creditor whose lien was perfected prior to the commencement of the proceedings.<sup>64</sup> If there are two mortgages, and the proceeds of a sale in bankruptcy are sufficient to pay off the first as well as costs and expenses, the senior mortgagee is entitled to be paid in full the same as he would in case of a sale by way of foreclosure.<sup>65</sup>

The holder of a lien upon property owned jointly by the bankrupt and another is entitled to have his debt paid in full from the proceeds of the bankrupt's interest in the property. In such case the other creditors are subrogated to the right of the bankrupt to demand contribution from the other owner.<sup>66</sup>

Although real estate stands in the name of a partner, if it be in fact firm property, the unsecured individual creditors of the partner have no claim on the proceeds.<sup>67</sup>

### § 1305. — Interest.

Where the security is more than sufficient to pay the secured creditor in full he is entitled to interest to the day of sale<sup>68</sup> and in some cases interest has been allowed to the date of the report or final decree of distribution.<sup>69</sup>

### § 1306. — Deduction of payments by bankrupt.

Where property held by the bankrupt under a conditional sale contract is sold, the right of the trustee to retain out of the pro-

62a—Distribution of proceeds of sale of exempt property, see *ante*, § 1036.

63—In re Rutland Perry Co., 205 Fed. 200, 30 A. B. R. 383, following In re Riehl, 200 Fed. 455, 29 A. B. R. 613, disapproving In re Williamsburg Knitting Mill, 190 Fed. 871, 27 A. B. R. 178.

64—In re Mebane, 3 N. B. R. 91, Fed. Cas. No. 9380.

65—In re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1068; In re Ship "Edith," 6 N. B. R. 449, 5 Ben. 432, Fed. Cas. No. 4282.

66—In re Straub, 158 Fed. 375, 19 A. B. R. 808.

67—In re Groetzinger, 127 Fed. 814, 11 A. B. R. 723, aff'g 110 Fed. 366, 6 A. B. R. 399.

68—In re Stevens, 173 Fed. 842, 23 A. B. R. 239; In re Fabacher, 193 Fed. 556, 27 A. B. R. 534.

69—In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3847; In re Allert, 173 Fed. 691, 23 A. B. R. 101.

ceeds a part of the purchase price paid is inferior to the right of the vendor to have the proceeds applied to the payment of the purchase price.<sup>70</sup>

### § 1307. — Expenses, fees and costs.

Where property is sold upon the petition of the trustee, under a lien or mortgage, only the actual costs of sale are chargeable upon such proceeds and not any portion of the costs in bankruptcy,<sup>71</sup> though the lienholders may waive their right to object to allowances for such costs.<sup>72</sup> However, reasonable expenses, fees and costs incident to the sale and for the protection of the property prior to the sale are chargeable,<sup>73</sup> though, where the mortgage stipulates for a sale without appraisal in the event of foreclosure, the fees of the appraiser and keeper put in charge of the premises should not be deducted,<sup>74</sup> and it is held that a lien creditor is entitled to have the property pledged to him undiminished by any expense of administration or operation of the business, unless such operation has been sought for or acquiesced in by him.<sup>75</sup>

Several courts have applied a very reasonable rule in this connection, holding that the proceeds may be applied to the costs and expenses of the sale in an amount not exceeding what the mortgagee would be required to pay had he foreclosed in the state court,<sup>76</sup> and that the referee may be allowed for services

70—*In re Goldman*, 174 Fed. 579, 23 A. B. R. 497.

71—*In re Howard*, 207 Fed. 402, 31 A. B. R. 251; *Varney v. Harlow*, 210 Fed. 824, 31 A. B. R. 339; *In re Stewart*, 193 Fed. 791, 27 A. B. R. 529; *In re Huggins*, 179 Fed. 490, 29 L. R. A. (N. S.) 737, 24 A. B. R. 715; *In re Holmes Lumber Co.*, 189 Fed. 178, 26 A. B. R. 119; *In re Clark Coal & Coke Co.*, 173 Fed. 658, 23 A. B. R. 273, rev'g in part 22 A. B. R. 843; *In re Allert*, 173 Fed. 691, 23 A. B. R. 101; *In re Williams' Estate*, 156 Fed. 934, 19 A. B. R. 389; *Mills v. Virginia-Carolina Lumber Co.*, 164 Fed. 168, 21 L. R. A. (N. S.) 901, 20 A. B. R. 750, modf'g, 151 Fed. 642, 18 A. B. R. 218; *In re Blue Ridge R. R. Co.*, 13 N. B. R. 315, 2

*Hughes* 224, Fed. Cas. No. 1570; contra, *In re Frank Meis*, 18 A. B. R. 104.

72—*In re Torchia*, 188 Fed. 207, 26 A. B. R. 579; *In re Baughman*, 163 Fed. 669, 20 A. B. R. 811.

73—*In re Chambersburg Silk Mfg. Co.*, 190 Fed. 411, 26 A. B. R. 107; but see *In re Vulcan Foundry & Machine Co.*, 180 Fed. 671, 24 A. B. R. 825.

74—*In re Stewart*, 193 Fed. 791, 27 A. B. R. 529.

75—*In re Clark Coal & Coke Co.*, 173 Fed. 658, 23 A. B. R. 273, rev'g in part 22 A. B. R. 843; but see *In re Prince v. Walter*, 131 Fed. 546, 12 A. B. R. 675.

76—*In re Zehner*, 193 Fed. 787, 27 A. B. R. 536.



rendered which the mortgagor would necessarily have incurred had he foreclosed in such court.<sup>77</sup>

Where the mortgaged property is pursued into a foreign jurisdiction and extricated by the receiver and trustee in bankruptcy from a perilous position there, the mortgagee may be charged a reasonable amount for the expenses of the officers of the bankruptcy court.<sup>78</sup>

The mortgagor is entitled to a reasonable attorney's fee out of the proceeds, but is not necessarily entitled to the fee stipulated for in the mortgage.<sup>79</sup>

### § 1308. Effect of sale.

### § 1309. — In case of liens.

A sale of incumbered land by the trustee subject to the incumbrance does not divest the land of the incumbrance.<sup>80</sup> It will be taken for granted that the trustee sells such subject thereto, although the lien creditor, or creditors, must be notified before the sale takes place;<sup>81</sup> and the purchaser will be estopped from denying the validity of the lien.<sup>82</sup>

### § 1310. — Dower of bankrupt's wife.

The sale of a bankrupt's real estate by his trustee does not bar his wife's right of dower therein,<sup>83</sup> unless she consents to a sale, free from her right of dower,<sup>84</sup> though in some states her right to dower extends only to the proceeds remaining after the payment of the incumbrances on the property.<sup>85</sup> It has been ques-

77—*In re Stewart*, 193 Fed. 791, 27 A. B. R. 529.

78—*Matter of Hicks*, 27 A. B. R. 168.

79—*In re Fabacher*, 193 Fed. 556, 27 A. B. R. 534.

80—*Wicks v. Perkins*, 13 N. B. R. 280, 1 Woods 383, Fed. Cas. No. 17615; *In re Gerry*, 112 Fed. 957, 7 A. B. R. 459.

81—*Meeks v. Whatley*, 10 N. B. R. 498; *In re McGilton*, 7 N. B. R. 294, 3 Biss. 144, Fed. Cas. No. 8798.

82—*Bucknam v. Dunn*, 16 N. B. R. 470, 2 Hask. 215, Fed. Cas. No. 2096.

83—*In re Shaeffer*, 105 Fed. 352, 5 A. B. R. 248.

84—*In re Acretelli*, 173 Fed. 121, 21 A. B. R. 537; *Savage v. Savage*, 141 Fed. 346, 3 L. R. A. (N. S.) 923, 15 A. B. R. 599.

85—*In re Hays*, 181 Fed. 674, 24 A. B. R. 669.

In Ohio, upon a sale of mortgaged premises, the wife of the bankrupt, though she has joined in the mortgage, is entitled to the value of her contingent right of dower, computed upon the full value of the property, to be paid out of the surplus, if any, after the mortgage lien is satisfied. *In re Strauch*, 208 Fed. 842, 31 A. B. R. 36.

tioned by several courts whether the rule has not been changed, by the amendment of 1910 to section 47a (2).<sup>86</sup>

### § 1311. — Leases.

The sale of a lease by the lessee's trustee is not a breach of a covenant in the lease imposing forfeiture if the lessee assigns the lease or the lessee's interest is sold under execution or other legal process.<sup>87</sup>

86—Where under the state law, a judgment creditor may sell real estate discharged of the inchoate right of dower, the trustee has by virtue of § 47a (2) as amended in 1910 the same power, and a sale free of liens will extinguish such inchoate right of dower. *In re Codori*, 207 Fed. 784, 30 A. B. R. 453..

In states where a lien creditor can issue execution and by a sale of the

real property divest the wife of rights of dower, the right of the trustee to real property is superior to that of wife claiming dower, and wife's dower is divested by sale of real property, though without her consent. *In re Freedman*, 29 A. B. R. 135, *aff'd* 31 A. B. R. 53.

87—*Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950, 20 A. B. R. 18.

## CHAPTER XXXI

### EXPENSES OF PROCEEDINGS

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#### § 1312. Accountants.

Expert accountants who at the instance of certain creditors make an investigation of the bankrupt's books for the purpose of ascertaining whether any assets are being concealed will not be allowed their fees.<sup>1</sup>

<sup>1</sup>—In re Marks, 22 A. B. R. 54.

### § 1313. Appraiser's fees.

Expenses and compensation of a receiver and his appraisers will not be allowed where it appears that they acted fraudulently and that a receivership was unnecessary.<sup>2</sup> The receiver has been allowed an appraiser's fee paid by him though the trustee was dissatisfied with appraisement and ordered a second one.<sup>3</sup>

In some districts appraisers are not allowed more than \$5 per day, and it is held that only in extraordinary cases should an allowance be made for more than two or three days.<sup>4</sup>

### § 1314. Attorney's fees.

#### § 1315. — In general.

When services of counsel are really required they will be allowed, but should be confined to such services during the bankruptcy proceedings, excluding previous consultations or advice, as well as all unnecessary attendance during the proceedings,<sup>5</sup> though they do not include services of counsel rendered in the matter of the bankrupt's application for a discharge.<sup>6</sup>

It has been held that only "one reasonable attorney's fee" is allowable, which should be divided between the attorneys of the petitioning creditors, the bankrupt, and possibly the trustee.<sup>7</sup> While such construction is in harmony with the policy to minimize the expenses, the correct reading of the provision in 64b(3), would seem to refer the word "one" to the words "irrespective of the number of attorneys employed," rather than to take it to mean that only one fee absolutely is to be allowed. The result in the cases cited favors this view, since to divide the one fee will give but little to each, unless that one fee be made correspondingly large. The provision might reasonably be construed to mean that, notwithstanding the petitioning creditors may have many attorneys and the bankrupt likewise, only one

2—In re Desrochers, 183 Fed. 991, 25 A. B. R. 703.

3—In re Kyte, 158 Fed. 121, 19 A. B. R. 768.

4—In re Fidler & Son, 172 Fed. 632, 23 A. B. R. 16.

5—Randolph v. Scriggs, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1; In re Standard Fullers Earth Co., 186 Fed. 578, 26 A. B. R. 562; In re Kross, 1 N.

B. N. 566, 3 A. B. R. 187, 96 Fed. 816; see generally In re Carr, 117 Fed. 572, 9 A. B. R. 58.

6—In re Brundin, 112 Fed. 306, 7 A. B. R. 296; contra, In re Christianson, 175 Fed. 867, 23 A. B. R. 710.

7—In re McCracken & McLeod, 129 Fed. 621, 12 A. B. R. 95; In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333.

fee is to be allowed to bankrupt's attorneys, and one fee to the creditor's attorneys.<sup>8</sup> By this means the ordinary meaning of the language is preserved and the result will be more reasonable. The same rule should be applied where two or more attorneys are employed by the receiver.<sup>9</sup>

### § 1316. — Reasonableness.

It will be observed that section 64b(3) provides for the allowance of an attorney's fee in three cases, (1) to the petitioning creditors in involuntary cases; (2) to the bankrupt in involuntary cases while performing the duties prescribed; and (3) to the bankrupt in voluntary cases in the court's discretion, but in each it is required that the fee must be reasonable. The amount depends upon the services rendered and their value, to be determined on evidence or the court's knowledge<sup>10</sup> of the facts in each case, the reasonableness applying to the counsel as well as to the estate.<sup>11</sup> If an attorney has a choice of two courses which lead to the same result he will be allowed a reasonable sum for the least services actually necessary by the less expensive course.<sup>12</sup>

Whether any fee at all is to be allowed the attorney of a voluntary bankrupt rests in the sound discretion of the court, and, in determining reasonableness, the character and condition of the estate, the orders necessary for its protection and the time and attention of the attorney required are to be considered, so that there can be no fixed fee.<sup>13</sup>

The judge will not disturb an allowance by the referee, where there is no evidence that it was unjust, excessive or exorbitant, especially if the referee gave creditors time to file such evidence; and, if distribution has been made and the attorney paid the allowance, the right to object will be waived.<sup>14</sup> But if the fee

8—In re Eschwege, 8 A. B. R. 282; In re Coney Island Lumber Co., 199 Fed. 197, 29 A. B. R. 91.

9—In re Falkenburg, 206 Fed. 835, 30 A. B. R. 718.

10—In re Curtis, 100 Fed. 784, 4 A. B. R. 17.

11—In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 Fed. 950; In re Curtis, 100 Fed. 784, 4 A. B. R. 17; In re O'Connell, 2 N. B. N. R. 237, 98 Fed. 83, 3 A. B. R. 422.

12—In re Goodwin, 2 N. B. N. R. 445.

13—In re Sully, 13 A. B. R. 783; In re Ellett Elec. Co., 196 Fed. 400, 28 A. B. R. 453; In re Burrus, 97 Fed. 926, 3 A. B. R. 296; In re Kross, 1 N. B. N. 566, 3 A. B. R. 187, 96 Fed. 816; In re Beck, 1 N. B. N. 564, 1 A. B. R. 535, 92 Fed. 889; In re Carr, 117 Fed. 572, 9 A. B. R. 58.

14—In re Tebo, 101 Fed. 419, 4 A. B. R. 235.

asked for be exorbitant, even though it be recommended by the referee, no fee will be allowed.<sup>15</sup> In involuntary cases, the petitioning creditors and the bankrupt are entitled of right to such fee, only its reasonableness is to be determined by the court;<sup>16</sup> such determination in neither case to be arbitrary but in the exercise of legal judgment and judicial discretion and subject to review by the appellate court.<sup>17</sup>

The referee has power to determine the reasonableness of attorney's fees allowed by the trustee to the bankrupt.<sup>18</sup>

### § 1317. — For services actually rendered.

The provision is for the professional services actually rendered and hence it must be shown that the services for which the allowance is asked were actually rendered, and that they were necessary and proper,<sup>19</sup> and unless it is so shown, no allowance will be made.<sup>20</sup>

### § 1318. — Attorney for bankrupt in voluntary cases.

The question of allowance in this case rests in the sound discretion of the court,<sup>21</sup> to be exercised with due regard to the spirit of the statute.<sup>22</sup> The amount of fee is to be determined by the character and condition of the case, the orders necessary for its protection and the time and care required of the attorney.<sup>23</sup> It should be for services necessary to enable the bankrupt to bring his case properly before the court, secure an adjudication and reference, surrender his estate and perform his duties for the benefit of creditors, and is not necessarily restricted to services beneficial to the estate, rendered primarily in its

15—In re Carr, 116 Fed. 556, 8 A. B. R. 635.

16—In re Curtis, 100 Fed. 784, 4 A. B. R. 17.

17—In re Curtis, 100 Fed. 784, 4 A. B. R. 17.

18—In re Ferreri, 188 Fed. 675, 26 A. B. R. 658.

19—In re Terrill, 103 Fed. 781, 4 A. B. R. 625.

20—In re Woodard, 1 N. B. N. 430, 2 A. B. R. 692, 95 Fed. 955.

21—In re Morris, 125 Fed. 841, 11 A. B. R. 145; In re Beck, 1 N. B. N. 564, 1 A. B. R. 535, 92 Fed. 889; In re

Tebó, 101 Fed. 419, 4 A. B. R. 235; In re Burrus, 97 Fed. 926, 3 A. B. R. 296.

22—In re Wong, 30 A. B. R. 125.

23—In re Lang, 127 Fed. 755, 11 A. B. R. 794; In re Burrus, 97 Fed. 926, 3 A. B. R. 296.

Twenty-five dollars held sufficient for securing stay of attachment proceedings. In re Duran Merc. Co., 199 Fed. 961, 29 A. B. R. 450.

Twenty-five dollars allowed for attending bankrupt several days before referee it appearing that attendance was largely unnecessary. In re Duran Merc. Co., 199 Fed. 961, 29 A. B. R. 450.

interest.<sup>24</sup> The statute presupposes the payment of fees for services rendered by counsel in the ordinary course of the proceedings, and section 64b, cl. 3, contemplates the allowance of additional fees for extraordinary services.<sup>25</sup> The bankrupt is not entitled to be reimbursed money paid to his attorney before the filing of the petition as a fee for professional services and in preparing the petition and schedules,<sup>26</sup> though if the fee has not been paid, the attorney will be entitled to an allowance therefor,<sup>27</sup> but in so far as these services are mainly clerical no considerable compensation is allowed.<sup>28</sup>

No allowance will be made for an unsuccessful application for a discharge,<sup>29</sup> and in one case an attorney's fee was disallowed though the application was successful.<sup>30</sup>

An allowance may be made for services rendered prior to and in contemplation of bankruptcy whereby taxes are reduced, since the estate benefits thereby.<sup>31</sup>

The bankrupt's attorney may be allowed the amount of filing fees paid by him on behalf of bankrupt in voluntary proceedings though an involuntary petition has previously been filed.<sup>32</sup>

### § 1319. — Attorney for bankrupt in involuntary cases.

A fee is allowed the attorney for services to the bankrupt in involuntary cases while performing the duties prescribed by the

24—In re Christianson, 175 Fed. 867, 23 A. B. R. 710; In re Hitchcock, 17 A. B. R. 664; In re Kross, 1 N. B. N. 566, 96 Fed. 816, 3 A. B. R. 187; In re Averill, 1 N. B. N. 544; In re Chasnoff, 3 N. B. N. R. 1; see also in re Mayer, 101 Fed. 695, 4 A. B. R. 238; In re Brundin, 112 Fed. 306; 7 A. B. R. 296, contra, In re Beck, 1 N. B. N. 564; 1 A. B. R. 535, 92 Fed. 889, followed In re Stotts, 1 N. B. N. 326, 93 Fed. 438, 1 A. B. R. 641; see also In re Gies, 12 N. B. R. 179, Fed. Cas. No. 5407; In re Heirschberg, 1 N. B. R. 195, 2 Ben. 466, Fed. Cas. No. 6329, 6530; In re Handell, 15 N. B. R. 72, Fed. Cas. No. 6017; In re Evans, 3 N. B. R. 62, Fed. Cas. No. 4552; In re Rosenfeld, Fed. Cas. No. 12057; In re Jaycox, 7 N. B. R. 140, Fed. Cas. No. 7239; In re Bigelow, Fed. Cas. No. 1397; In re Montgomery, 3 N. B. R. 35, 3 Ben. 364, Fed. Cas. No. 9726; Lid-

don & Bro. v. Smith, 135 Fed. 43, 14 A. B. R. 204; In re Frank Meis, 18 A. B. R. 104.

25—In re Smith, 108 Fed. 39, 5 A. B. R. 559.

26—In re Matthews, 3 A. B. R. 265, 97 Fed. 772.

27—In re Terrill, 103 Fed. 781, 4 A. B. R. 625; In re Kross, 1 N. B. N. 566, 96 Fed. 816, 3 A. B. R. 187.

28—In re Wong, 30 A. B. R. 125.

Fifty dollars allowed for preparing and filing schedules. In re Duran Merc. Co., 199 Fed. 961, 29 A. B. R. 450.

29—In re Keeler, 207 Fed. 118, 31 A. B. R. 51; In re Wong, 30 A. B. R. 125.

30—In re Duran Merc. Co., 199 Fed. 961, 29 A. B. R. 450.

31—In re Duran Merc. Co., 199 Fed. 961, 29 A. B. R. 450.

32—In re Carpenter, 25 A. B. R. 161.

act, but if he has not performed them but has been actively engaged in trying to defeat and delay the proceedings, no allowance will be made.<sup>33</sup> The basis of compensation is not payment for all services which the bankrupt may request of his attorney, but for the services to the bankrupt in involuntary cases, while performing the duties prescribed upon the bankrupt by statute.<sup>34</sup>

Attorneys for the bankrupt have been allowed compensation in preparing the petition for adjudication, attendance at court, attendance upon the first meeting of creditors, assisting the bankrupt in the preparation of his schedules,<sup>35</sup> preparing and filing the bankrupt's petition for a discharge and attendance in court on hearing of same,<sup>36</sup> successfully resisting several of the charges made in the creditor's petition,<sup>37</sup> and advising in the matter of continuance of business pending the adjudication.<sup>38</sup> But they have been refused compensation for advice on the question of bringing proceedings,<sup>39</sup> for services in preparing the bankrupt's admission of inability to pay debts, and attending the hearing for adjudication, for services in proceedings contesting the title of adverse claimants to property alleged to belong to the estate,<sup>40</sup> for attending a sale of assets,<sup>41</sup> for contesting a receiver's claim for fees,<sup>42</sup> and for services in connection with the bankrupt's application for a discharge,<sup>43</sup> or objections to a composition.<sup>44</sup>

It has been held that while contingencies may arise where the attendance of the bankrupt's attorney, at the first meeting of creditors, and at sessions of the court, may be reasonably

33—*Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1; *Pratt v. Bothe*, 130 Fed. 670, 12 A. B. R. 529; *In re Woodard*, 1 N. B. N. 430, 2 A. B. R. 955, 95 Fed. 955.

34—*In re Payne*, 151 Fed. 1018, 18 A. B. R. 192.

Reasonable compensation for such services as fall within the terms of the statute. *In re Lane Lumber Co.*, 206 Fed. 780, 30 A. B. R. 749.

35—*In re Stratmeyer*, 14 A. B. R. 120; *In re Hart & Co. Ltd.*, 16 A. B. R. 725.

36—*In re Stratmeyer*, 14 A. B. R. 120.

37—*In re Perlhefter v. Shatz*, 25 A. B. R. 586.

38—*In re Hart & Co. Ltd.*, 16 A. B. R. 725.

39—*In re Hart & Co. Ltd.*, 16 A. B. R. 725.

40—*In re Stratmeyer*, 14 A. B. R. 120.

41—*In re Hammel*, 211 Fed. 238, 31 A. B. R. 672.

42—*In re Lane Lumber Co.*, 206 Fed. 780, 30 A. B. R. 749.

43—*In re Hammel*, 211 Fed. 238, 31 A. B. R. 672; *In re Brundin*, 112 Fed. 306, 7 A. B. R. 296; but see *In re Kross*, 96 Fed. 816, 3 A. B. R. 187.

44—*In re Martin*, 152 Fed. 582, 18 A. B. R. 250.



required, there is no presumption of such need, and ordinarily attorney's fees for such services are not chargeable against the estate.<sup>45</sup>

The fact that the bankrupt is guilty of a contempt will not prevent an allowance for services rendered prior to such contempt, such services being confined, in any event, to the preparation of schedules, attendance at examinations and other duties in aid of the estate and its administration, but will not include services in defending bankrupt against charges of fraud and concealment of assets and other matters involving personal liability. The amount of fee will be governed by the extent of the services,<sup>46</sup> and in matters of difficulty the allowance will be correspondingly increased.<sup>47</sup>

In estimating the compensation which should be allowed an attorney for assisting in the preparation of schedules, respect must be had to the nature of the work, which is largely clerical.<sup>48</sup>

In case a partnership is adjudged a bankrupt but one allowance can be made to it for counsel fees, although each bankrupt appears by a different attorney.<sup>49</sup>

Where the petition in an involuntary proceeding is dismissed, the alleged bankrupt is entitled to costs;<sup>50</sup> but he is not entitled, in addition, to counsel fees, unless an application "to take charge of and hold" his property prior to the adjudication has been granted and bond given.<sup>51</sup>

45—In re Hammel, 211 Fed. 238, 31 A. B. R. 672; In re Lane Lumber Co., 206 Fed. 780, 30 A. B. R. 749.

Attorney for involuntary bankrupt not allowed fee for contesting petition or for attending first meeting where it does not affirmatively appear that presence was of any aid to bankrupt in performing duties prescribed. In re Levy Outfitting Co., 29 A. B. R. 8.

46—In re Mayer, 101 Fed. 695, 4 A. B. R. 238; In re Michel, 1 N. B. N. 265, 1 A. B. R. 665, 95 Fed. 803; In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 Fed. 950; see In re Sav. Fund Soc., 11 N. B. R. 303, 2 Hughes, 239, Fed. Cas. No. 11398.

Twenty dollars held ample. In re Talton, 137 Fed. 178, 14 A. B. R. 617.

47—In re Anderson, 103 Fed. 854, 4 A. B. R. 640; In re Hitchcock, 17 A. B. R. 664.

48—In all but extraordinary cases the allowance should not exceed \$100. In re Lane Lumber Co., 206 Fed. 789, 30 A. B. R. 749.

49—In re Eschwege, 8 A. B. R. 282.

50—G. O. XXXIV.

51—Section 3e, Act of 1898; In re Ghiglione, 1 N. B. N. 351, 1 A. B. R. 580, 93 Fed. 186; see also Dundore v. Coats, 6 N. B. R. 304, Fed. Cas. No. 4142; In re Sheehan, 8 N. B. R. 353, Fed. Cas. No. 12738.

### § 1320. — Attorney representing bankrupt and creditors.

The interests of the creditors and the bankrupt can in no sense be considered compatible, and therefore, under no condition should an attorney be permitted to represent the bankrupt and at the same time any of the creditors or the trustee. Irrespective of the fact that to represent both is to represent adverse interests, and is a violation of the ethics of the profession, and is opposed to public policy, the result is bound to affect injuriously the interests of the creditors. The bankrupt is required to make a disclosure of his assets, and if his attorney, as the representative of the creditors, is permitted either to have a voice in the selection of the trustee or the attorney to represent him, he may to a greater or less extent influence the efforts to obtain a disclosure of the assets of the estate, or to set aside conveyances made or liens created against the bankrupt. Accordingly a fee should not be allowed an attorney for representing both interests.<sup>52</sup>

### § 1321. — Attorney for petitioning creditors.

The attorney for petitioning creditors is entitled to a reasonable fee as of right and its allowance or disallowance is not a matter of discretion with the court, but the amount is to be determined not arbitrarily, but in the exercise of legal judgment and judicial discretion,<sup>53</sup> which may be reviewed by the appellate court.<sup>54</sup>

The policy of the present act being to minimize the expense of administering estates the courts must so construe it.<sup>55</sup> The

52—See generally *Keyes v. McKirrow*, 180 Mass. 261, 9 A. B. R. 422; *In re Wooten*, 118 Fed. 670, 9 A. B. R. 247; *In re Kimball*, 100 Fed. 777, 2 N. B. N. R. 46, 4 A. B. R. 144; *In re Cobb*, 7 A. B. R. 104.

53—*In re Berkowitz*, 22 A. B. R. 231; *In re Carr*, 117 Fed. 572, 9 A. B. R. 58.

Fifty dollars held ample. *In re Talton*, 137 Fed. 178, 14 A. B. R. 617.

Two hundred dollars held adequate. *In re Coney Island Lumber Co.*, 199 Fed. 197, 29 A. B. R. 91.

Allowance of \$25 held sufficient where attorney did nothing but prepare schedules. *In re Fullick*, 201 Fed. 463, 28 A. B. R. 634.

One thousand dollars for services rendered the petitioning creditors held not excessive. *Frank v. Dickey*, 139 Fed. 744, 15 A. B. R. 155.

54—*In re Curtis*, 100 Fed. 784, 4 A. B. R. 17; see also *In re Waite*, 2 N. B. R. 146; *In re N. Y. Mail S. S. Co.*, 3 N. B. R. 155, 185, 7 Blatch. 178, Fed. Cas. No. 10208; s. c. 2 N. B. R. 170, Fed. Cas. No. 10211; *In re Mitteldorp*, 3 N. B. R. 1, Chan. 288, Fed. Cas. No. 9675; *In re Andrews & Jones*, 11 N. B. R. 59, Fed. Cas. No. 370; *In re Comstock*, 9 N. B. R. 88, Fed. Cas. No. 3075.

55—*In re Harrison Mercantile Co.*, 1 N. B. N. 382, 2 A. B. R. 419, 95 Fed. 123; *In re Silverman*, 2 N. B. N. R. 18,

fees of attorneys for the petitioning creditors are to be determined by the condition of the estate, by the results effected, and the assets saved.<sup>56</sup> No fees can be allowed them for services caused by their own negligence or inadvertence.<sup>57</sup> To entitle an attorney to an allowance for services rendered the petitioning creditors a contract of employment must exist,<sup>58</sup> and the services must have been rendered prior to the appointment of a trustee.<sup>59</sup> The fact that an attorney calls attention to a defect in the petition by demurring thereto, and thereby is instrumental in curing the defect does not render him an attorney for the petitioning creditors in the absence of a contract of employment.<sup>60</sup>

An attorney filing a second petition which is never acted upon because of the sufficiency of the first petition after being amended, is not entitled to an allowance as an attorney for petitioning creditors.<sup>61</sup>

One who acts as attorney for the receiver of the bankrupt estate may on that ground be refused an allowance as attorney for the petitioning creditors,<sup>62</sup> and vice versa,<sup>63</sup> since the two positions are inconsistent. It has been held, however, that the amount allowed an attorney for services rendered the receiver or trustee should not be considered in fixing the amount to be allowed him for services rendered the petitioning creditors.<sup>64</sup>

After the appointment of a trustee, no allowance to petitioning creditors can be made for attorney's fees on examinations of the bankrupt, such services being either for the trustee or the individual creditors.<sup>65</sup>

3 A. B. R. 227, 97 Fed. 325; *In re Woodard*, 1 N. B. N. 430, 2 A. B. R. 642, 95 Fed. 955.

56—*In re Levy Outfitting Co.*, 29 A. B. R. 8.

57—Claim for services in arguing in opposition to motion to quash, growing out of error of the clerk of court in fixing the return day, in effecting amendments to petition necessitated by the oversights, and in arguing motion due to neglect in filing replication, disallowed. *In re Levy Outfitting Co.*, 29 A. B. R. 8.

58—*Frank v. Dickey*, 139 Fed. 744, 15 A. B. R. 155.

59—*In re Felson*, 139 Fed. 275, 15 A. B. R. 185.

60—*Frank v. Dickey*, 139 Fed. 744, 15 A. B. R. 155.

61—*Frank v. Dickey*, 139 Fed. 744, 15 A. B. R. 155; *contra*, *In re Southern Steel Co.*, 169 Fed. 702, 22 A. B. R. 476.

62—*In re Southern Steel Co.*, 169 Fed. 702, 22 A. B. R. 476.

63—*In re Hill Co.*, 159 Fed. 73, 20 A. B. R. 73.

64—*Frank v. Dickey*, 139 Fed. 744, 15 A. B. R. 155.

65—*In re Silverman*, 2 N. B. N. R. 18, 3 A. B. R. 227, 97 Fed. 325.

**§ 1322. — Attorney for other than petitioning creditors.**

No allowance can be made from the estate of a bankrupt in voluntary proceedings, for the fees of the creditors' attorneys.<sup>66</sup>

Whenever it is for the interest of the estate that rights should be litigated or any steps taken to preserve or recover property belonging to it, and the trustee either arbitrarily or through caprice declines to employ counsel for such purpose, the creditors may apply to the referee for authority to employ counsel to conduct such litigation and his compensation will be paid out of the estate,<sup>67</sup> or where a trustee refuses to move to set aside a sale because of the stifling of competition and certain attorneys successfully resist the confirmation of such sale, thereby saving a large sum to the estate, they should be paid from the estate.<sup>68</sup>

Services by the attorneys for a creditor which aid in rejecting claims, setting aside priorities,<sup>69</sup> securing the appointment of a proper trustee,<sup>70</sup> and opposing a discharge,<sup>71</sup> are not allowable. Nor can an allowance be made to a creditor whose claim is unsuccessfully attacked.<sup>72</sup>

A creditor has been held entitled to an allowance of an attorney's fee for filing his petition for leave to foreclose his mortgage and for representation under the trustee's petition to sell the property free from liens.<sup>73</sup>

The allowances should be made to the creditors for their expenses in employing counsel, and not to the attorneys themselves.<sup>74</sup>

66—In re Smith, 108 Fed. 39, 5 A. B. R. 559.

67—Section 64b (2) of Act of February 5, 1903.

68—In re Groves, 2 N. B. N. R. 466; but see In re Archenbrow, 8 N. B. R. 429, Fed. Cas. No. 503; In re Eidom, 3 N. B. R. 39, Fed. Cas. No. 4315; In re Robinson, 3 N. B. R. 17, Fed. Cas. No. 11943; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4948; Freeland v. Holoman, 9 N. B. R. 331, Fed. Cas. No. 5081.

69—In re Roadarmour, 177 Fed. 379, 24 A. B. R. 49; In re Medina Quarry Co., 191 Fed. 815, 27 A. B. R. 466, rev'g 182 Fed. 508, 25 A. B. R. 405; but see In re Little River Lumber Co., 101 Fed. 558, 3 A. B. R. 682.

70—In re Medina Quarry Co., 191 Fed. 815, 27 A. B. R. 466, rev'g 182 Fed. 508, 25 A. B. R. 405.

71—In re Keller, 207 Fed. 118, 31 A. B. R. 51; In re Kyte, 189 Fed. 531, 26 A. B. R. 507.

72—In re Coventry Evans Furniture Co., 171 Fed. 673, 22 A. B. R. 623.

73—In re Holmes Lumber Co., 189 Fed. 178, 26 A. B. R. 119; and see In re Ferrerri, 188 Fed. 675, 26 A. B. R. 658; but see In re Allert, 173 Fed. 691, 23 A. B. R. 101.

74—In re Medina Quarry Co., 191 Fed. 815, 27 A. B. R. 466, rev'g 182 Fed. 508, 25 A. B. R. 405.

**§ 1323. — Attorney for trustee.**

The fee for the trustee's attorney is not embraced in the section 64b(3) allowing "one reasonable fee," etc., but, whenever it becomes necessary for an officer to have legal assistance, the cost is one of the expenses of administration.<sup>75</sup> A trustee may employ legal assistance when necessary, and a court will not give him any direction in advance as to such employment, but he must decide in the first instance as to the necessity therefor.<sup>76</sup>

Fees to a reasonable amount may be allowed him as part of the costs of administration<sup>77</sup> by the referee ex parte,<sup>78</sup> for his actual disbursements and compensation for services rendered in the necessary preservation of the estate,<sup>79</sup> and, as a general rule, no allowance will be made for services rendered prior to his appointment.<sup>80</sup> An attorney cannot be deprived of his right to compensation as attorney for the trustee, after the services have been performed, on the ground that he has previously acted for the bankrupt,<sup>81</sup> or for the petitioning creditors.<sup>82</sup>

In the absence of a rule requiring the trustee's selection of an attorney to be approved by the court, it is no objection to the allowance of the claim of the attorney for services that the same were rendered before his selection was approved.<sup>83</sup>

No allowance will be made to the trustee's attorney if he was appointed as a result of an agreement with the trustee that if the

75—Page v. Rogers, 149 Fed. 194, 17 A. B. R. 854.

76—In re Abram, 3 N. B. N. R. 28, 4 A. B. R. 575, 103 Fed. 272; but see In re Smith, 1 A. B. R. 37, 1 N. B. N. 136; In re Little River Lumber Co., 101 Fed. 558, 3 A. B. R. 682.

77—In re Knosher & Co., 197 Fed. 136, 28 A. B. R. 747; In re Stotts, 1 N. B. N. 326, 93 Fed. 438, 1 A. B. R. 641; In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333; In re Davenport, 3 N. B. R. 18, Fed. Cas. No. 3587; In re Colwell, 15 N. B. R. 93; In re Pegues, 3 N. B. R. 80; In re Tully, 3 N. B. R. 19, Fed. Cas. No. 3587; In re Noyes, 6 N. B. R. 277.

78—In re Stotts, 1 N. B. N. 326, 93 Fed. 438, 1 A. B. R. 641.

79—In re Eagle Steam Laundry Co.,

184 Fed. 949, 25 A. B. R. 868; In re Byerly, 128 Fed. 637, 12 A. B. R. 186.

Attorney for trustee allowed a fee for collection of insurance partly due the trustee and partly due the lienholders. In re Holmes Lumber Co., 189 Fed. 178, 26 A. B. R. 119.

80—In re N. Y. Mail S. S. Co., 2 N. B. R. 137, Fed. Cas. No. 10210.

81—In re Dimm & Co., 146 Fed. 402, 17 A. B. R. 119.

82—Fee for trustee's attorney allowed though attorney also represented petitioning creditors where interest of such creditors was not averse to any class of creditors. In re Smith, 29 A. B. R. 628.

83—In re Smith, 203 Fed. 369, 29 A. B. R. 628.

attorney procured the trustee's appointment, the attorney should be retained.<sup>84</sup>

The allowance of an attorney's fee is within the sound discretion of the court,<sup>85</sup> which should be exercised in accord with the spirit of the act, and hence, where there was no onerous duty, the referee's refusal to allow a fee to the trustee's attorney on the ground that he had received a fee as attorney for bankrupt will be sustained.<sup>86</sup> The claim of trustee's attorney for a fee for services rendered on an examination undertaken at his suggestion in the hope of discovering concealed assets but without resulting benefit to the estate will not be allowable where there is evident lack of good faith of either attorney or trustee.<sup>87</sup> But an attorney selected by the creditors to represent the trustee, who traces and recovers concealed assets, will be allowed a reasonable fee by the court, where the creditors refuse to pay it.<sup>88</sup> In voluntary cases the estate should bear a fair allowance for attorney's fees incident to the trustee's opposing, though unsuccessfully, an application for a discharge.<sup>89</sup>

The question as to allowance of attorney's fees, like other contested questions, may be certified by the referee to the judge for his decision at the instance of interested parties.<sup>90</sup> The fact that an allowance to the trustee's attorney is in a lump sum, without a detail of items, is not ground for reversal thereof.<sup>91</sup>

The court of bankruptcy has jurisdiction to pass on the reasonableness of a contingent fee retained by an attorney under an agreement with the trustee for conducting a suit, and, if found excessive, to require the excess to be refunded,<sup>92</sup> and, where the trustee obtained authority to employ an attorney on a contingent fee but suppressed facts, knowledge of which would have prevented the giving of such authority, the contract may be set aside and reasonable compensation awarded.<sup>93</sup> The same per-

84—In re Smith, 203 Fed. 369, 29 A. B. R. 628.

85—In re Covington, 132 Fed. 884, 13 A. B. R. 150.

86—In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 Fed. 950.

87—In re Rozinsky, 101 Fed. 229, 2 N. B. N. R. 787, 3 A. B. R. 830.

88—In re Evans, 117 Fed. 574, 8 A. B. R. 730, note.

89—In re Keller, 207 Fed. 118, 31 A. B. R. 51.

90—In re Warshing, 5 N. B. R. 350, Fed. Cas. No. 17209.

91—In re Smith, 203 Fed. 369, 29 A. B. R. 628.

92—In re Brinker, 19 N. B. R. 195, Fed. Cas. No. 1882.

93—Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9938.

centage of the recovery in a case in which a very large recovery is had as in the case where the recovery is small is not always warranted. The amount recovered is only to be considered as showing the responsibility involved and the success accomplished.<sup>94</sup>

A trustee will not be allowed an attorney's fee for the performance of ordinary duties which he should as trustee have performed,<sup>95</sup> but where he is a lawyer and performs legal services himself he may be allowed extra compensation therefor.<sup>96</sup>

A creditor whose claim is disallowed cannot be held liable for counsel fees of the attorney of the trustee.<sup>97</sup>

### § 1324. — Attorney for receiver.

A receiver is entitled to the assistance of counsel, and to a reasonable allowance therefor,<sup>98</sup> to be paid out of the estate to the extent that the attorney acted directly in behalf of the estate, or it has been benefited by what he has done,<sup>99</sup> but he is not entitled to an allowance for services performed by counsel for the petitioning creditors.<sup>1</sup>

No claim for services as attorney for the receiver is chargeable per se against the estate, predicated alone upon the fact of employment and service rendered,<sup>2</sup> and expenses and compensation of the receiver and his attorneys will be disallowed where it appears that they acted fraudulently and that the receivership was unnecessary.<sup>3</sup>

The attorney for the receiver should not be allowed any fees for services rendered in obtaining the receiver's appointment, or other matters preliminary to the appointment, since such services are rendered in the interest of the moving creditors and should be collected from the estate in the hands of the trustee.<sup>4</sup>

94—*In re Fiske & Co.*, 209 Fed. 982, 31 A. B. R. 736.

95—*In re Averill*, 1 N. B. N. 544; *In re Smith*, 2 A. B. R. 648.

96—*In re Mitchell*, 1 N. B. N. 264, 1 A. B. R. 687, citing *Perkin's Appeal*, 108 Pa. St. 319; and *Lowrie's Appeal*, 1 Grant 373; *In re Welge*, 1 Fed. 216; contra, *In re Felson*, 139 Fed. 275, 15 A. B. R. 185; *In re McKenna*, 137 Fed. 611, 15 A. B. R. 4; and see *In re Meldour*, 17 Fed. Cas. No. 958.

97—*In re Rome*, 162 Fed. 971, 19 A. B. R. 820.

98—*In re Oppenheimer*, 146 Fed. 140, 17 A. B. R. 59.

99—*In re Ketterer Mfg. Co.*, 156 Fed. 719, 19 A. B. R. 646.

1—*In re Oppenheimer*, 146 Fed. 140, 17 A. B. R. 59.

2—*In re Hill Co.*, 159 Fed. 73, 20 A. B. R. 73.

3—*In re Desrochers*, 183 Fed. 991, 25 A. B. R. 703.

4—*In re Falkenburg*, 206 Fed. 835, 30 A. B. R. 718.

Where an order appointing a receiver is vacated because the receiver entered into an agreement with several attorneys to divide fees, actual proper disbursements made by the receiver or the attorneys will be allowed, but no compensation will be allowed to any of them.<sup>5</sup>

The allowance to a receiver is entirely within the discretion of the court, unaffected by the report of the referee.<sup>6</sup> The number of attorneys should not enter into the allowance of attorney's fees.<sup>7</sup>

### § 1325. — Attorney for general assignee.

The attorneys for an assignee under a voluntary general assignment, in possession prior to the bankruptcy proceedings, should not be allowed any compensation out of the estate,<sup>8</sup> except upon a showing of absolute necessity for such employment which resulted in benefit to the estate.<sup>9</sup> Nor should a trustee in a chattel deed of trust executed by an insolvent for the benefit of creditors, be allowed compensation for his services in executing his trust.<sup>10</sup>

### § 1326. — Procedure to obtain allowance.

A claim for an attorney's fee under section 64b (3) must be presented to the court of original jurisdiction.<sup>11</sup> The reasonableness of the fee is to be determined by the court or referee and may be done *ex parte*.<sup>12</sup> Action thereon may be suspended for a reasonable time to get testimony as to the amount allowable, but if it is then impossible to secure such testimony, the referee should decide the question on the evidence before him.<sup>13</sup> Proceedings to test the propriety of payments to an attorney for

5—In re Oshwitz v. Feldstein, 183 Fed. 990, 25 A. B. R. 594.

6—In re Borgeson Co., 151 Fed. 780, 18 A. B. R. 178.

7—In re Falkenburg, 206 Fed. 835, 30 A. B. R. 718.

8—Randolph v. Scruggs, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1; In re Rogers, 116 Fed. 435; but see In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333.

Attorney for general assignee not entitled to allowance under 63b (3) or 60d. In re Marble Products Co., 199 Fed. 668, 29 A. B. R. 384.

9—Randolph v. Scruggs, 190 U. S. 533, 47 L. ed. 1165, 10 A. B. R. 1; In re Busey, 6 A. B. R. 603.

10—Abbott v. Summers, 116 Fed. 687.

11—Musica v. Prentice, 211 Fed. 326, 31 A. B. R. 687, *aff'g* 205 Fed. 413, 30 A. B. R. 555.

12—In re Stotts, 93 Fed. 438, 1 N. B. N. 326.

13—In re Dreeben, 101 Fed. 110, 4 A. B. R. 146.



all services, namely those rendered before the payment as well as those services to be rendered in the bankruptcy proceeding itself, should be taken in the form of a motion to fix the allowance, and for an order directing the return of the balance, unless an issue is raised.<sup>14</sup>

A fee to the attorney for the bankrupt or petitioning creditors should not be allowed except upon notice to the parties interested, and upon petition and recommendation of the bankrupt or the petitioning creditors,<sup>15</sup> but it is held that attorneys for the trustee or receiver may present their claims direct.<sup>16</sup> Under the act as it existed prior to the amendment of 1910 no notice of the application of a receiver's attorney for compensation was necessary.<sup>17</sup>

The trustee is the only party who can object to the disallowance of attorney's fees to his attorney. The attorney has no standing to object.<sup>18</sup>

### § 1327. Auctioneer's fees.

Priority of auctioneer's fees, see post, section 1364.

### § 1328. Bankrupt's living expenses.

While the law makes no provision for the expenses of the bankrupt or his livelihood between the adjudication and his discharge, under the equity powers of the court there appears no reason why a reasonable allowance might not be made out of the estate for the actual necessities of the bankrupt, and if there are exemptions to be subsequently set apart to him, why he should not be required to reimburse the estate therefrom, but this allowance would not include indulgence in vices or extravagant habits of living or unnecessary expenditures.<sup>19</sup>

14—In re Shiebler & Co., 163 Fed. 545, 20 A. B. R. 777.

15—In re Young, 142 Fed. 891, 16 A. B. R. 106.

Creditors not entitled to notice of hearing of petition for allowance of attorney's fees in absence of rule. In re Wong, 30 A. B. R. 125.

16—In re Smith, 203 Fed. 369, 29 A.

B. R. 628; In re McKenna, 137 Fed. 611, 15 A. B. R. 4.

17—In re Borgeson Co., 151 Fed. 780, 18 A. B. R. 178.

18—In re Byerly, 128 Fed. 637, 12 A. B. R. 186.

19—In re Tudor, 2 N. B. N. R. 168, 100 Fed. 796, 4 A. B. R. 78.

### § 1329. Broker's commissions.

The allowance of a commission to a broker for negotiating a sale of the property is within the discretion of the court.<sup>20</sup>

### § 1330. Compensation and expenses of officers of the court.

The compensation of referees,<sup>21</sup> trustees,<sup>22</sup> clerks, marshals,<sup>23</sup> receivers,<sup>24</sup> and stenographers<sup>25</sup> is fixed by law and is in full for their services, but does not include certain expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts. No additional compensation can be granted, though the services are valuable and worth more than the commissions fixed by the act.<sup>26</sup> Fees not required to be paid before filing the petition may be ordered by the judge at any time paid out of the estate, or, after notice and proof that bankrupt can pay them, the judge may require him to do so.<sup>27</sup>

The judge may order the commissions paid immediately after they are earned.<sup>28</sup> Notice of an application by a receiver for compensation must specify the amount asked.<sup>29</sup>

A notice of hearing for fixing the allowances to a receiver which as to each allowance specifies exactly the amount asked is not insufficient in failing to request an additional allowance as provided in section 48e.<sup>30</sup>

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring witnesses, or perpetuating testimony, the clerk, marshal or referee may require from the person desiring the service indemnity for such expense, and money advanced for such purpose must be repaid as part of the costs of administering the estate.<sup>31</sup> The cost of preserving the estate subsequent to filing the petition, the cost of administration, including witness fees and mileage according to the laws of

20—Gold v. South Side Trust Co., 179 Fed. 210, 24 A. B. R. 578.

21—Section 40, Act of 1898; see *ante* Chapter X.

22—Section 48, Act of 1898; see *ante*, Chapter XIX.

23—Section 52, Act of 1898; see *ante*, Chapter III.

24—Section 48 as amended June 25, 1910; see *ante*, Chapter VII.

25—Section 38, Act of 1898.

26—Act of 1898, § 72, as amended June 25, 1910; In re Meadows, 199 Fed. 304, 29 A. B. R. 165.

27—G. O. XXXV.

28—G. O. XXXV (4) as amended, December 11, 1905.

29—In re Falkenburg, 206 Fed. 835, 30 A. B. R. 718.

30—In re Cash-Papworth, 210 Fed. 24, 31 A. B. R. 709.

31—G. O. X.

the United States, and one reasonable attorney's fees, are debts entitled to priority of payment.<sup>32</sup>

### § 1331. Costs of obtaining composition.

Costs and disbursements in connection with an application to confirm a composition are not recoverable from the estate.<sup>33</sup>

### § 1332. Expense of contest of claims.

Claims must be established at the expense of claimants, and no allowance of costs to the attorney of a creditor whose claim is unsuccessfully contested will be made out of the estate.<sup>34</sup> However, it is held, that a creditor who contests the validity of the claim of another is liable, upon the decision being adverse to him, for the taxable costs and disbursements of the creditor whose claim was contested, and the fees, costs and expenses of the referee.<sup>35</sup> A creditor proving a claim is in no sense a witness nor entitled to fees.<sup>36</sup> A party seeking re-examination of an allowed claim is required to indemnify the claimant for traveling expenses incurred by him in coming to the hearing.<sup>37</sup>

Attorneys for creditors successfully defending claims against the estate are not entitled to compensation out of the estate where the trustee had not refused to act,<sup>38</sup> but where one of the creditors successfully objects to the allowance of a claim filed by another creditor, after the trustee declines to interfere, thereby saving a considerable sum for distribution among the creditors generally, his attorney contesting such claim may be allowed a fee to be paid out of the estate.<sup>39</sup>

Where a contest over a claim was carried on for the sole purpose of controlling the election of the trustee, costs of the contest will not be allowed.<sup>40</sup>

32—Section 64b, Act of 1898; see *post*, Chapter XXXII.

33—In *re* Fogarty, 187 Fed. 773, 26 A. B. R. 568.

34—In *re* Stewart, 178 Fed. 463, 24 A. B. R. 474; In *re* Coventry Evans Furniture Co., 171 Fed. 673, 22 A. B. R. 623.

35—In *re* Canton Iron & Steel Co., 197 Fed. 767, 28 A. B. R. 791; In *re* Troy Woolen Co., 8 N. B. R. 412, Fed. Cas. No. 14203.

36—In *re* Paddock, 6 N. B. R. 396, Fed. Cas. No. 10658.

37—In *re* Elk Val. Coal Min. Co., 210 Fed. 386, 31 A. B. R. 545.

38—In *re* Roadarmour, 177 Fed. 379, 24 A. B. R. 49.

39—In *re* Little River Lumber Co., 101 Fed. 558, 3 A. B. R. 682.

40—In *re* Worth, 130 Fed. 927, 12 A. B. R. 566.

### § 1333. Expense of continuing business.

Employees of the bankrupt who continue the business of the bankrupt without authority from the court will not be allowed compensation for services after the adjudication as part of the expenses of administration.<sup>41</sup> The continuing of the business of the bankrupt by his employees for the remainder of one day after the filing of the petition has been held not to constitute the carrying on of the business of the bankrupt entitling them to compensation within the meaning section 2 (5).<sup>42</sup>

The compensation of trustees, marshals, and receivers for carrying on the business of the bankrupt is treated elsewhere.<sup>43</sup>

### § 1334. Expense of procuring or preventing a discharge.

The question as to whether an allowance may be made out of the estate in the matter of bankrupt's application for a discharge is one on which the courts do not agree, though the better opinion would seem not to favor such allowance.<sup>44</sup> However, moneys advanced by the bankrupt to pay for notices of a hearing upon application for a discharge should be repaid him out of the estate.<sup>45</sup>

The power to award costs against an objecting creditor who fails to substantiate his specifications of objections in opposition to a discharge is discretionary, and where it appears that the objections are made in good faith, the court may refuse to tax costs against such creditor,<sup>46</sup> but if the objections are frivolous and vexatious, the costs may be taxed against the objecting creditor.<sup>47</sup> A creditor may prosecute his objections to a discharge in forma pauperis,<sup>48</sup> though, in some districts, the person interested in preventing a discharge is required to deposit with

41—In re Nat. Mercantile Agency, 11 A. B. R. 451.

42—In re Knosher & Co., 197 Fed. 136, 28 A. B. R. 747.

43—Compensation of trustees, see, ante § 707; compensation of marshals and receivers, see ante § 227.

44—In re Brundin, 112 Fed. 306, 7 A. B. R. 296; Bragassa v. St. Louis Cycle Co., 107 Fed. 77, 5 A. B. R. 700; contra, In re Christianson, 175 Fed. 867, 23 A. B.

R. 710; and see In re Hatcher, 145 Fed. 658, 16 A. B. R. 722.

45—In re Hatcher, 145 Fed. 658, 16 A. B. R. 722.

46—In re Miers, 193 Fed. 288, 27 A. B. R. 870; In re Gillardon, 187 Fed. 289, 26 A. B. R. 103.

47—In re Wolpert, 1 N. B. N. 238, 1 A. B. R. 436.

48—In re Guilbert, 154 Fed. 676, 18 A. B. R. 830.

the referee a sum sufficient to guarantee that the expenses of the reference will be paid.<sup>49</sup>

Creditors' expenses in opposing the bankrupt's discharge, though successful, should not be paid out of the estate,<sup>50</sup> though it is held that such expenses should be borne by all the creditors who are benefited thereby, if the opposition is successful, and, if unsuccessful, may in the discretion of the court, be paid out of the estate.<sup>51</sup>

### § 1335. Costs upon dismissal of petition for adjudication.

If a petition in involuntary bankruptcy is dismissed the debtor may recover costs against the petitioners.<sup>52</sup>

Liability of petitioners for damages, etc., upon dismissal of petition, see Chapter IX.

### § 1336. Costs in obtaining exemptions.

Services rendered in having the bankrupt's exemption allowed will not be fixed by the court.<sup>53</sup>

### § 1337. Costs to petitioning creditors.

In involuntary cases, where the debtor resists the adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, similar costs as are allowed to a party recovering in a suit in equity.<sup>54</sup>

### § 1338. Expenses of creditors in recovering assets.

The reasonable expenses of one or more creditors in recovering property for the benefit of the estate may be allowed.<sup>55</sup>

Priority of claims of this nature, see post, section 1359.

### § 1339. Filing fees.

The subject of fees payable to the clerk upon filing the petition or other papers is elsewhere treated.<sup>56</sup>

49—Rule 41, Eastern District of New York; In re Fritz, 173 Fed. 560, 23 A. B. R. 84.

50—In re Kyte, 189 Fed. 531, 26 A. B. R. 507.

51—In re Fritz, 173 Fed. 560, 23 A. B. R. 84.

52—G. O. XXXIV.

Brandenburg—62

53—In re Castleberry, 143 Fed. 1021, 16 A. B. R. 430.

54—G. O. XXXIV.

55—See 64b (2) as amended February 5, 1903; In re Medina Quarry Co., 191 Fed. 815, 27 A. B. R. 466, rev'g 182 Fed. 508, 25 A. B. R. 405.

56—See ante, § 34.

**§ 1340. Rent.**

Rent after the leased property is in the hands of the court may be allowed as part of the necessary costs and expenses of administration.<sup>57</sup> Where the landlord has failed to make a claim for use and occupation of the premises as an expense of administration, he cannot thereafter maintain an action against the trustee for damages for such use, though it be alleged that the action sounds in tort, it being in reality an attempt to collect rent.<sup>58</sup> A landlord's claim for use of premises used by the receiver or trustee is not for rent under his lease with the bankrupt but for quantum meruit. The courts, however, in several instances have adopted the rent fixed by the lease as a fair measure of the reasonable value of such use.<sup>59</sup>

**§ 1341. Stenographers.**

Right of referee to employ stenographic help, see ante, section 366.

**§ 1342. Witness fees.**

Priority of witness fees is elsewhere treated.<sup>60</sup>

**§ 1343. Funds available for payment of expense.**

Proceeds of exempt property cannot be used in payment of commissions,<sup>61</sup> nor can commissions be allowed out of property which comes into the possession of the trustee through the fraud of the bankrupt and is adjudged to be returned to the real owner.<sup>62</sup> Commissions should not ordinarily be paid out of the proceeds of incumbered property which are insufficient to pay off the incumbrance. The bankruptcy act in so far as it authorizes payment of commissions of the referee and trustee from the proceeds of the sale of incumbered property only applies to cases in which the court rightfully exercised its jurisdiction to sell free from liens, or where the lien holder consents to such sale.<sup>63</sup>

57—See *post*, § 1366.

58—In *re* Empire Const. Co., 157 Fed. 495, 19 A. B. R. 704; see In *re* Grignard Lithographic Co., 155 Fed. 699, 19 A. B. R. 101.

59—In *re* Adams Cloak, Suit & Fur House, 199 Fed. 337, 28 A. B. R. 923, and cases cited. See also *post*, § 1366.

60—See *post*, § 1367.

61—In *re* Yeager, 182 Fed. 951, 25 A. B. R. 51.

62—Gillespie v. Piles & Co., 178 Fed. 886, 24 A. B. R. 502.

63—In *re* Holmes Lumber Co., 189 Fed. 178, 26 A. B. R. 119; In *re* Huggins, 179 Fed. 490, 29 L. R. A. (N. S.) 737, 24 A. B. R. 715.

Payment of costs and expenses of administration out of incumbered property, see also, post, section 1348.

In partnership cases, "the expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine."<sup>64</sup>

Where there are assets of the firm and of one or more individual members, the joint estate and the individual estates must each pay its proportion of the expenses of administration.<sup>65</sup> Except in the matter of expense, it is of no consequence whether there are two proceedings or only one by or against partners, for the rights of creditors and others are the same.<sup>66</sup>

### § 1344. Report and approval of expenses—Notice.

Section 62a of the act provides, that "the actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."<sup>67</sup> This section clearly makes it the duty of the officers to render itemized accounts under oath and that the court shall examine and approve or disapprove the same; in other words, that, upon an accounting by a trustee, while creditors have a right to examine and object to such account and be heard thereon, it is the duty of the referee to examine the items in detail.<sup>68</sup> Exceptions should be promptly filed if a receiver's account is objected to and after the questions thus raised are determined by the ref-

64—Section 5c, Act of 1898.

65—In re Smith, 13 N. B. R. 500, Fed. Cas. No. 12987; Atkinson v. Kellogg, 10 N. B. R. 535, Fed. Cas. No. 613.

66—In re Morse, 13 N. B. R. 376, Fed. Cas. No. 9854.

67—Section 62, Act of 1898; Analogous provision of Act of 1867. "Section 28. . . . If at any time, there shall not be in his (assignee's) hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. . . .

"Section 47. . . . The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the section in classes of cases to be named in their rules and orders."

68—In re Baginsky, Michel & Co., 1 N. B. N. 360, 2 A. B. R. 243; In re Carr, 116 Fed. 556, 8 A. B. R. 635.

eree, any party in interest can bring the matter to the attention of the court; but, after an account has been approved by the referee without objection, and a further period of acquiescence has elapsed, good reasons should appear for permitting objections to be made.<sup>69</sup>

The marshal is required to make a verified return;<sup>70</sup> as is also the referee.<sup>71</sup> The expenses of the clerk in sending out notices should be charged as an expense, not as a fee, and should be itemized.<sup>72</sup>

Except in the case of receivers or marshals seeking an allowance for caring for or preserving the estate pending the qualification of a trustee<sup>73</sup> and in the case of trustees, marshals or receivers, seeking compensation for continuing the business of the bankrupt<sup>74</sup> no notice is required when costs of administration are to be settled and allowed.<sup>75</sup>

69—*In re Reliance Storage and Warehouse Co.*, 100 Fed. 619, 4 A. B. R. 49;  
*In re Tebo*, 101 Fed. 419, 4 A. B. R. 235.

70—G. O. XIX.

71—G. O. XXVI.

72—*In re Dunn Hardware & Furniture Co.*, 134 Fed. 997, 14 A. B. R. 186.

73—Section 48d, Act of 1898 as amended June 25, 1910.

74—Section 48e, Act of 1898 as amended June 25, 1910.

75—*In re Stotts*, 1 N. B. N. 326, 1 A. B. R. 641, 93 Fed. 438, and see *In re Borgeson*, 151 Fed. 780, 18 A. B. R. 178.



## CHAPTER XXXII

### DEBTS ENTITLED TO PRIORITY

- § 1345. Jurisdiction to determine priorities.
- § 1346. Order of priority.
- § 1347. — In general.
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- § 1396. — Claims based on ultra vires contracts.
- § 1397. — Claims of United States.
- § 1398. — Unrecorded liens.
- § 1399. — Claims of unpaid vendor.
- § 1400. — Claims of bankrupt's wife.
- § 1401. — Claims against community property.
- § 1402. Waiver of priority.
- § 1403. Marshalling of assets.
- § 1404. Priority in proceeds of property fraudulently transferred.
- § 1405. Procedure to obtain priority.

### § 1345. Jurisdiction to determine priorities.

The court of bankruptcy, which includes the referee,<sup>1</sup> has jurisdiction to determine claims of priority to property and money constituting part of the estate of the bankrupt, but it will not undertake to determine priorities to a fund which is not a part of the estate for distribution.<sup>2</sup>

### § 1346. Order of priority.

#### § 1347. — In general.

The order of priority, (1) taxes, (2) cost of preserving the estate, (3) costs of administration, (4) wages, and (5) liens in their order, prescribed (subdivisions a and b section 64), is that usually followed in equity. That all bankrupt's property in the control of the court should be distributed according to this order is but reasonable and in accord with the course adopted in railroad receiverships, which go even farther and give priority over the mortgages to receiver's certificates issued for operating expenses and betterments. Taxes are prior in lien to all other liens except judicial costs,<sup>3</sup> which costs usually

1—Act of 1898, § 1 (7).

2—In re Girard Glazed Kid Co., 136 Fed. 511, 14 A. B. R. 485.

3—In re Prince & Walter, 131 Fed. 546, 12 A. B. R. 675; State of Georgia

v. Railroad, 3 Woods, 434; Central Trust Co. v. R. R., 110 N. Y. 250.

Taxes have priority over expenses of administration. In re Weiss, 159 Fed. 295, 20 A. B. R. 247.

include reasonable allowance to counsel<sup>4</sup> as well as the actual and necessary cost of preserving the estate subsequent to the filing of the petition,<sup>5</sup> and are paid even before exemptions are set aside. Wages are almost universally given like priority over statutory and contractual liens,<sup>6</sup> but have been held not entitled to priority over the expenses and allowances to the receiver in bankruptcy and his attorney.<sup>7</sup>

The order of distribution prescribed by the bankruptcy act should be observed though the provisions of the state law prescribe a different order.<sup>8</sup>

The debts entitled to priority are to be paid in full and in the order set forth in section 64 of the statute, and this is true although such payment may exhaust the fund and leave nothing for the satisfaction of subsequently enumerated priority claims. Any liens not enumerated in this section, follow in the order provided by the state law, and it has been held that although there may be specific liens on the estate sufficient in the aggregate to exhaust the entire assets, their payment must be postponed to the payment of wages or the cost and expenses of administration.<sup>9</sup> Furthermore, where there are only sufficient funds to pay priority claims, the trustee will not be permitted to expend the estate in litigation concerning the right of general creditors.<sup>10</sup>

### § 1348. — In case of incumbered property.

The first two subdivisions (a and b) of section 64 direct the order of distribution of the bankrupt's property. Notwithstanding it has been held that it is applicable only after the assets have been marshaled and the liens discharged<sup>11</sup> and that it

4—In re Gardner, 2 N. B. N. R. 806, 103 Fed. 922, 4 A. B. R. 420.

5—State of New Jersey v. Lovell, 138 App. Div. (N. Y.) 513, 24 A. B. R. 562.

6—In re Byrne, 2 N. B. N. R. 247, 97 Fed. 762, 3 A. B. R. 268; In re Kerby-Denis Co., 1 N. B. N. 399, 95 Fed. 116, 2 A. B. R. 402, aff'g 1 N. B. N. 337, 94 Fed. 818, 2 A. B. R. 218.

7—In re Krause, 155 Fed. 702, 19 A. B. R. 93.

8—In re Lewis, 99 Fed. 935, 4 A. B. R. 51; In re McDavid Lumber Co., 190 Fed. 97, 27 A. B. R. 39.

9—In re Tebo, 101 Fed. 419, 4 A. B. R. 235; see also In re Byrne, 2 N. B. N. R. 246, 97 Fed. 762, 3 A. B. R. 268.

10—In re Sawyer, 16 N. B. R. 460, 2 Low. 551, Fed. Cas. No. 12396.

11—In re Vulcan Foundry & Machine Co., 180 Fed. 671, 24 A. B. R. 825; In re Proudfoot, 173 Fed. 733, 23 A. B. R. 106; In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689; In re Freeman, 190 Fed. 48, 27 A. B. R. 16; In re Prince & Walter, 131 Fed. 546, 12 A. B. R. 675; In re Anders Push Button Tel. Co., 136 Fed. 995, 13 A. B. R. 643; In re Bourlier

does not affect liens which come within other provisions of the statute,<sup>12</sup> the better opinion is that it applies to all of the bankrupt's property which may come under the control of the bankruptcy court and is administered in the bankruptcy proceedings.<sup>13</sup> The law provides for a full and complete settlement of the bankrupt's affairs as of the date of the filing of the petition. To do this it is not sufficient to consider only the unsecured creditors and the property which remains after the liens are satisfied, but it is necessary to see that the liens are satisfied in their proper order and that the balance of the bankrupt's property is distributed among his other creditors in their order. That the act recognizes this fact is shown in the requirement that all the bankrupt's property, whether encumbered or not, and all his creditors, secured as well as unsecured, must be included in his schedules;<sup>14</sup> that the trustee is to examine into the securities and take proper steps to save any excess over the amount secured;<sup>15</sup> and that the court of bankruptcy may sell the property free of liens, transferring the liens to the proceeds, or subject to liens, or direct the trustee to appear in any proceeding to enforce the liens, whichever course will best subserve the interest of the bankrupt estate and also preserve the valid rights of the lienors;<sup>16</sup> at the same time the act recognizes as valid various liens.<sup>17</sup> To illustrate, suppose the bankrupt owned a recently improved residence lot, worth, with improvements, \$16,000, on which there were taxes due, a vendor's lien for part of the purchase money of the lot, a mortgage for money borrowed to improve the property, a judgment subsequent to said mortgage which was a lien on the property, and labor and mechanics'

Cornice & Roofing Co., 133 Fed. 958, 13 A. B. R. 585; *In re Kerby-Denis Co.*, 1 N. B. N. 399, 95 Fed. 116, 2 A. B. R. 402, *aff'g* 1 N. B. N. 337, 94 Fed. 818, 2 A. B. R. 218.

12—*In re Yoke Vitrified Brick Co.*, 180 Fed. 235, 25 A. B. R. 18; *In re Frick*, 1 N. B. N. 214, 1 A. B. R. 719; *In re Sunseri*, 3 N. B. N. R. 61.

13—See *In re Cramond*, 145 Fed. 966, 17 A. B. R. 22; *In re Chambersburg Silk Mfg. Co.*, 190 Fed. 411, 26 A. B. R. 107; *In re Allison Lumber Co.*, 137 Fed. 643, 14 A. B. R. 78; *In re Prince & Walter*, 131 Fed. 546, 12 A. B. R. 675.

14—Section 7 (8), Act of 1898.

15—*In re Coffin*, 1 N. B. N. 507, 2 A. B. R. 344; *Heath v. Shaffer*, 1 N. B. N. 399, 93 Fed. 647, 2 A. B. R. 98; *In re Holloway*, 1 N. B. N. 264, 93 Fed. 638, 1 A. B. R. 659; *In re N. Y. Kerosene Oil Co.*, 3 N. B. R. 31, Fed. Cas. No. 7726; *In re Metzger*, 2 N. B. R. 114, Fed. Cas. No. 9510.

16—*In re San Gabriel Sanatorium Co.*, 2 N. B. N. R. 827, 102 Fed. 310, 4 A. B. R. 197.

17—Section 67, Act of 1898.

liens, which by the law of the state took precedence of all other liens, while the bankrupt claimed his homestead exemption, which the state law limited in value, out of the property, and that, if sold free of liens, the property would sell for enough to pay all these claims and leave something for the other creditors. Clearly it would be the trustee's duty under the act to apply to the court to order such a sale and of the court to grant it, thus bringing the proceeds into the bankruptcy court, to be administered in the bankruptcy proceedings.<sup>18</sup>

Whether the incumbered property is brought in voluntarily or involuntarily would seem to make no difference, as the same reasons exist in either case for subjecting the security to the prior payments. No injustice is thereby done the secured creditor since it would not be brought into the bankruptcy proceedings unless there were other claims which the state or federal laws gave priority over such lien, or it was believed that something could thereby be obtained over and above the secured debt.<sup>19</sup> Unless it forms practically all the bankrupt's property, in which case it would only bear the costs and expenses of realizing on it in the best and most economical manner, it only bears its proportion of the costs. Similarly it has been held that, where incumbered property was disposed of through the bankruptcy proceedings, the amount paid the secured creditors was a dividend.<sup>20</sup> If there is nothing apparently in the property over the security and it is not brought into the bankruptcy proceedings, no service is rendered the secured creditor, no benefit accrues to him from the proceedings, and no reason exists for charging him with any part of the expenses. There is no inequality, or lack of uniformity, in this; the one benefits and pays; the other receives nothing and is required to give nothing. The state insolvency or assignment laws are not to be compared with the bankrupt law in this respect, because the state constitutions prohibit laws impairing the obligations of contracts which the United States constitution does not. A law, however, is not to be construed as impairing the obligations of contracts unless susceptible of no other construction. The year allowed

18—In re Worland, 1 N. B. N. 316,  
92 Fed. 893, 1 A. B. R. 450.

bert, 2 N. B. R. 138, Fed. Cas. No. 8026.

20—In re Barber, 1 N. B. N. 559, 97

19—In re Pittelkow, 1 N. B. N. 234,  
92 Fed. 901, 1 A. B. R. 472; In re Lam-

Fed. 547, 3 A. B. R. 307.

in many states after a sale under a mortgage for the mortgagor to redeem, during which he retains possession, receives the rents and profits and may neglect and waste the property, is a practical illustration of where the contract does not result according to its terms. This is sustained as relating to the remedy. This very year of redemption has been used as a reason for bringing incumbered property into bankruptcy.<sup>21</sup>

In many cases claims, though subsequent in point of time, are prior liens, as a labor claim over a prior mortgage or lien;<sup>22</sup> a mechanic's lien over a mortgage;<sup>23</sup> or a labor claim over a landlord's lien.<sup>24</sup>

If there is a fund to be distributed among creditors, and some take subordinate to a lien, and there are others not affected by the lien, those who are not affected by the lien are paid first, and the lien creditor is postponed to them.<sup>25</sup>

## § 1349. Taxes.

### § 1350. — Right to priority.

Taxes legally due and owing by the bankrupt to a state, county, district or municipality, are first in order of priority, and the courts will not favor any evasion of the law by giving a too liberal construction to its words. The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody will not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself.<sup>26</sup>

21—*In re Barber*, 97 Fed. 547, 1 N. B. N. 559, 3 A. B. R. 307.

22—*In re Erie Lumber Co.*, 150 Fed. 817, 17 A. B. R. 689; *In re McDavid Lumber Co.*, 190 Fed. 97, 27 A. B. R. 39; *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. 436; *Fidelity Ins. Trust & T. D. Co. v. Iron Co.*, 81 Fed. 439, 453; *contra*, *In re Frank Meis*, 18 A. B. R. 104.

23—*Central Trust Co. v. Wabash R. R.*, 30 Fed. 332; *Carew v. Stubbs*, 155 Mass. 459; *Allen v. Oxnard*, 152 Pa. 621; *Lookout Lumber Co. v. Hotel*, 109 N. C. 658; *Erdman v. Moore & Co.*, 58 N. J. L.

445; *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 224; *Carriger v. Mackey*, 15 Ind. App. 392.

24—*In re Byrne*, 2 N. B. N. R. 247, 97 Fed. 762, 3 A. B. R. 266.

25—*Simmons v. Greer*, 174 Fed. 654, 23 A. B. R. 443, *aff'd* 164 Fed. 300, 21 A. B. R. 34.

26—*In re Conhaim*, 2 N. B. N. R. 521, 100 Fed. 268, 4 A. B. R. 58; *In re Frick*, 1 N. B. N. 214, 1 A. B. R. 719; *In re Sims*, 118 Fed. 356, 9 A. B. R. 162; *In re Baker*, 1 A. B. R. 526; *In re Tilden*, 91 Fed. 500, 1 A. B. R. 300.

To be entitled to priority, the tax must be due and owing at the time the petition in bankruptcy is filed.<sup>27</sup> A tax may, however, be legally due and owing at the time of the filing of the petition, though not payable until after the adjudication.<sup>28</sup> Taxes that are due and owing should be paid before the secured creditors.<sup>29</sup>

The taxes of the state where the property of a bankrupt corporation is situated have no priority over those of the state of its organization, as under the present act all taxes whether those of the United States, or of a state, county, district or municipality are given an equal right of priority.<sup>30</sup>

The amount, as well as the legality, of the tax may be inquired into, and if the tax is found to be excessive the same is not entitled to priority, even though the time allowed by the local law for the review thereof has expired.<sup>31</sup> Taxes are not deprived of their right to priority by the fact that under the state law they are not debts enforceable by suit against the owner,<sup>32</sup> nor can laches in collecting them affect their priority.<sup>33</sup> It is immaterial that the property upon which the tax was levied never passed into the hands of the trustee.<sup>34</sup> So, the fact that the county treasurer upon being satisfied that no one will bid in property on a tax sale strikes the same off to the county does not extinguish the debt nor deprive the county of its right to priority, nor can the trustee in bankruptcy by relinquishing the property to the mortgagee, with or without the consent of the court in a proceeding to which the county was not a party, destroy such right to priority.<sup>35</sup>

Where there are two funds, one available to general creditors, and the other to secured creditors, taxes should be paid out of

27—*First National Bank v. Aultman, Miller & Co.*, 14 Ohio Fed. Dec. 188, 12 A. B. R. 12; but see *In re Prince & Walter*, 131 Fed. 546, 12 A. B. R. 675; *In re Industrial Cold Storage & Ice Co.*, 163 Fed. 390, 20 A. B. R. 904.

28—*New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604; *In re Flynn*, 134 Fed. 145, 13 A. B. R. 720.

29—*In re Hilberg*, 6 A. B. R. 714.

30—*New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604.

31—*In re Selwyn Importing Co.*, 18 A. B. R. 190.

32—*Hecox v. County of Teller*, 198 Fed. 634, 28 A. B. R. 525.

33—*In re Weissman*, 178 Fed. 115, 24 A. B. R. 150.

34—*City of Chattanooga v. Hill*, 139 Fed. 600, 15 A. B. R. 195; *City of Waco v. Bryan*, 127 Fed. 79, 11 A. B. R. 481.

35—*Hecox v. County of Teller*, 198 Fed. 634, 28 A. B. R. 525.

the fund available to the general creditors.<sup>36</sup> It is held, however, that taxes assessed against property of the estate which has been taken from the estate by a mortgage foreclosure should be postponed to the expenses of administration under the general rule of marshaling assets, since the taxes are still a lien against the mortgaged property and the remedy against such property ought to be first exhausted.<sup>37</sup>

A claim for taxes will not be paid as a priority claim out of bankrupt's estate, where he merely holds property under a lease in which he agreed to pay all taxes against the leased property.<sup>38</sup>

A trustee should not pay taxes where such payment would operate to the advantage of a third party against another, they being in any event secure.<sup>39</sup>

In the case of taxes due a state, county or municipality, the claim therefor should be proved like that of any other creditor.

Penalties for non-payment of taxes are included in the amount of the tax,<sup>40</sup> and interest may be allowed on them up to the time of payment.<sup>41</sup>

### § 1351. — What are taxes.

The supreme court has defined a tax to be a pecuniary burden laid upon individuals or property for the purpose of supporting the government.<sup>42</sup> The word tax is used in an unrestricted sense and includes all obligations imposed by the state and general governments, under their respective taxing and police powers, for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of its character as a tax.<sup>43</sup>

The mere fact that it is called a tax is not conclusive.<sup>44</sup> Nor is the decision of a state court that a given tax is or is not a tax

36—In re Barr Pumping Engine Co., 11 A. B. R. 312.

37—In re Oxley, 204 Fed. 826, 30 A. B. R. 406.

38—In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 856.

39—In re Brinker, 128 Fed. 634, 12 A. B. R. 122; In re Veitch, 101 Fed. 251, 4 A. B. R. 112; Foster v. Inglee, 13 N. B. N. 239, Fed. Cas. No. 4973.

40—In re Prince & Walter, 131 Fed. 546, 12 A. B. R. 675; In re Scheidt Bros., 177 Fed. 599, 23 A. B. R. 778.

41—In re Schuyler & Co., 21 A. B. R. 428; In re Kallak, 147 Fed. 276, 17 A. B. R. 414; contra, In re Fisher & Co., 148 Fed. 907, 17 A. B. R. 404, aff'g 153 Fed. 281, 18 A. B. R. 503.

42—New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604.

43—In re Lange Co., 159 Fed. 586, 20 A. B. R. 478.

44—In re Wyoming Valley Ice Co., 145 Fed. 267, 16 A. B. R. 594.



within the meaning of the act;<sup>45</sup> nor a finding of a state board as to the amount of the tax<sup>46</sup> conclusive upon the bankruptcy court.

In order to entitle a tax to priority, it should not be a mere claim clothed with the garb of a tax, but should be actually a tax, so that if it is a mere bonus exacted by the state for the privilege of increasing the capital stock of a corporation<sup>47</sup> or a penalty imposed upon a corporation for failure to perform certain acts<sup>48</sup> it is not entitled to priority. A tax imposed upon corporate bondholders which it is made the duty of the corporation to collect is not a tax upon the corporation and is not entitled to priority in the distribution of the corporation's assets,<sup>49</sup> nor is the liability of the bankrupt to a municipality for taxes collected by him as an officer of the county entitled to priority.<sup>50</sup> However, a license fee or franchise tax imposed upon a corporation is a tax and entitled to priority of payment,<sup>51</sup> as is a cigarette tax imposed against dealers in cigarettes,<sup>52</sup> and water rents due to a municipality.<sup>53</sup>

### § 1352. — Who may claim priority.

The right of priority can only be claimed by the municipality. Neither the purchaser of the property at a foreclosure sale who

45—*New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604; *In re Lange Co.*, 159 Fed. 586, 20 A. B. R. 478.

46—*New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604.

47—*Commonwealth of Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81, 27 A. B. R. 525, aff'g 188 Fed. 735, 26 A. B. R. 650.

48—*In re York Silk Mfg. Co.*, 188 Fed. 735, 26 A. B. R. 650, aff'd 192 Fed. 81, 27 A. B. R. 525.

49—*In re Wyoming Valley Ice Co.*, 145 Fed. 267, 16 A. B. R. 594.

Tax on corporate bonds which was payable by the corporation only in the event that its treasurer failed to pay it after deducting the amount thereof from the interest due bondholders is not entitled to priority. *Commonwealth*

*of Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81, 27 A. B. R. 525, aff'g 188 Fed. 735, 26 A. B. R. 650.

50—*In re Waller*, 142 Fed. 883, 15 A. B. R. 753.

51—*New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604; *In re Halsey Elec. Generator Co.*, 175 Fed. 825, 23 A. B. R. 401, aff'd 179 Fed. 321, 31 L. R. A. (N. S.) 988, 24 A. B. R. 562; *In re Mutual Mercantile Agency*, 8 A. B. R. 435; *Hancock v. Singer Mfg. Co.*, 62 N. J. L. 289; *Western Union Telegraph Co. v. Mass.*, 125 U. S. 530, 547, 31 L. ed. 790; but see *In re Ott*, 1 N. B. N. 571, 95 Fed. 274, 2 A. B. R. 637.

52—*In re Lange Co.*, 159 Fed. 586, 20 A. B. R. 478.

53—*In re Industrial Cold Storage & Ice Co.*, 163 Fed. 390, 20 A. B. R. 904.

has full knowledge of the non-payment of taxes, nor third parties who bid in the property at a tax sale, and hold tax certificates are entitled to relief out of the assets of the estate.<sup>54</sup> So, a grantee who pays taxes assessed against the property while owned by the bankrupt will not be subrogated to the rights of the municipality,<sup>55</sup> and when the trustee transfers property subject to the payment of taxes then owing, the grantee or a purchaser from him are under obligation to pay the same, and cannot be subrogated to the rights of the municipality for a preferential payment thereof out of the estate.<sup>56</sup>

Under the former law it was held that the claim of lessors of a bankrupt lessee for the amount of taxes paid by them, which the lessee had covenanted to pay, was not entitled to priority,<sup>57</sup> nor was a debt due a foreign state for taxes.<sup>58</sup>

### § 1353. — Taxes on exempt property.

Taxes due on exempt property at the time of bankruptcy should be paid by the trustee in bankruptcy out of the fund which would otherwise go to the general creditors, although such taxes are a lien upon and enforceable against such exempted property, since they are taxes legally due and owing as provided by this section, and the bankrupt is entitled to the full amount of exemption allowed by the state law.<sup>59</sup>

### § 1354. — Taxes on firm property.

See post, section 1437.

### § 1355. Care and preservation of property.

### § 1356. — In general.

Clause (1) of section 64, subdivision b, gives priority to the actual and necessary cost of preserving the estate subsequent to the filing of the petition, which would include any expense that might be proper for its care, preservation or protection. It

54—In re Brinker, 128 Fed. 634, 12 A. B. R. 122.

55—Cooper Grocery Co. v. Bryan, 127 Fed. 815, 11 A. B. R. 754.

56—In re Hibbler Mach. Supply Co., 192 Fed. 741, 27 A. B. R. 612.

57—In re Parker, Fed. Cas. No. 10719.

58—In re Ambler, 8 Ben. 176, Fed. Cas. No. 271.

59—In re Tilden, 91 Fed. 500, 1 A. B. R. 300, 1 N. B. N. 134; In re Baker, 1 A. B. R. 526.

would include the compensation of a receiver in bankruptcy,<sup>60</sup> a claim for the services of the attorney for the trustee when necessary for the preservation of the estate and tending to benefit or preserve the estate,<sup>61</sup> as well as the expense of cultivating and harvesting growing crops omitted without fraud and harvested before debtor was required to surrender them to the trustee;<sup>62</sup> and the care of the property pending the adjudication of the trustee's rights where a judgment creditor contested the adjudication and claimed priority.<sup>63</sup> It is for the bankruptcy court to determine what is the actual and necessary cost regardless of what has been paid.<sup>64</sup>

### § 1357. — Prior to filing petition.

An assignee in a voluntary assignment or a receiver in state insolvency proceedings is not entitled under this provision to the cost of caring for the estate or compensation as custodian prior to the filing of the petition,<sup>65</sup> notwithstanding that such services appear to have been for the benefit of the general creditors, but is entitled to a reasonable allowance for such services rendered and disbursements made subsequent to the filing of the petition.<sup>66</sup> Neither the claims of a state court receiver for compensation and counsel fees, nor the debts incurred by him in operating the business of the bankrupt corporation are entitled to priority over the claims of bondholders who have not assented to the receivership. The order of payment in such case should be (1) non-assenting bondholders, (2) costs of bankruptcy administration, including compensation of

60—In re Alaska Fishing & Development Co., 167 Fed. 875, 21 A. B. R. 685.

61—In re Gregnard Lithographing Co., 158 Fed. 557, 19 A. B. R. 743.

62—In re Barrow, 3 N. B. N. R. 95, 98 Fed. 582, 3 A. B. R. 414.

63—In re Carolina Cooperage Co., 1 N. B. N. 534, 96 Fed. 604; see also In re Gregg, 3 N. B. R. 131, Fed. Cas. No. 5796; Zeiber v. Hill, 8 N. B. R. 239, Fed. Cas. No. 18206.

64—In re Allen, 96 Fed. 512, 3 A. B. R. 38.

65—In re Allison Lumber Co., 137 Fed. 643, 14 A. B. R. 78; Stearns v. Flick,

2 N. B. N. R. 1046, 103 Fed. 919, 4 A. B. R. 723; In re McCauley, 2 N. B. N. R. 1089; Hunter v. Byng, 9 Fed. 277; In re Gilblom, 2 N. B. N. R. 60; see also In re Solomon, 2 N. B. N. R. 460; In re Kenney, 2 N. B. N. R. 143; In re Francis Valentine Co., 1 N. B. N. 529; s. c. 1 N. B. N. 532, 2 A. B. R. 522, 94 Fed. 793; contra, In re Klein, 116 Fed. 523, 8 A. B. R. 559.

66—In re Pattee, 143 Fed. 994, 16 A. B. R. 450; In re Hays, 179 Fed. 222, 24 A. B. R. 691; In re Peter Paul Book Co., 104 Fed. 786, 5 A. B. R. 105; Abbott v. Summers, 116 Fed. 687.

receiver and reasonable counsel fees, (3) receivership debts, (4) assenting bondholders, (5) simple contract debts.<sup>67</sup>

A plaintiff in an attachment within four months of bankruptcy is not entitled to priority of payment of the costs of caring for property prior to the petition, such claim being held "a claim for taxable costs," provable under section 63 (3) of the statute<sup>68</sup> unless given priority by the state law.<sup>69</sup>

While costs for the care and preservation of property incurred prior to the filing of the petition are not within the express terms of this provision, when they result in benefit to the whole estate and not to any particular creditor or in the duplication of charges, they are in effect given practical priority under the equity powers of the bankrupt courts and should be paid in full.<sup>70</sup> Thus a judgment creditor, who had set aside a fraudulent conveyance but lost his prior right to the fund by the adjudication of the debtor bankrupt, will be allowed reasonable indemnity for his expenses in securing such result;<sup>71</sup> and an assignee in a voluntary assignment, made in good faith and who has acted likewise, has been allowed the money actually disbursed by him in preserving the estate and a reasonable sum as custodian.<sup>72</sup> This was the view taken under the act of 1867, in which the provision was "costs . . . for the custody of the property, as herein provided,"<sup>73</sup> implying clearly the custody after the commencement of the proceedings.<sup>74</sup> Under the present act, it has been held<sup>75</sup> that this provision relates to

67—In re Benwood Brew. Co., 202 Fed. 326, 29 A. B. R. 759.

68—In re Allen, 96 Fed. 512, 3 A. B. R. 38; In re Lewis, 99 Fed. 935, 4 A. B. R. 51.

69—See *post*, § 1381.

70—In re Kurth, 17 N. B. R. 573; Berkholder v. Stump, 4 N. B. R. 597.

71—In re Lesser, 2 N. B. N. R. 599, 100 Fed. 433, 3 A. B. R. 815.

72—In re Pauly, 1 N. B. N. 405, 2 A. B. R. 334; In re Kingman, 1 N. B. N. 518.

73—Section 28, Act of 1867.

74—In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2966; MacDonald v. Moore, 15 N. B. R. 26, 8 Ben. 579, Fed. Cas. No. 8763; Burkholder v. Stumph, 4 N. B. R. 191, 597, Fed. Cas. No. 2165; In re

Ward, 9 N. B. R. 349, Fed. Cas. No. 17145; In re Irons & Coon, 18 N. B. R. 95, Fed. Cas. No. 7067; Hastings v. Spenser, 1 Curt. C. C. 504; Clark v. Marks, 6 Ben. 275; Platt v. Archer, 13 Blatch. 351; In re Lains, 16 N. B. R. 165, 168, Fed. Cas. No. 7985; In re Kurth, 17 N. B. R. 573, Fed. Cas. No. 7948; In re Stubbs, 4 B. R. 124, Fed. Cas. No. 13557; Hunter v. Byng, 9 Fed. 277; In re New Hope Mining Co., 7 N. B. R. 598; Webb v. Ward, 6 Fed. 163; Bartlett v. Bramhall, 3 Gray, 257; White v. Hill, 148 Mass. 396; Clark v. Sawyer, 151 Mass. 64, *contra*, Catlin v. Foster, 3 B. R. 540; Bishop v. Hart, 28 Vt. 71.

75—In re Lewis, 99 Fed. 935, 4 A. B. R. 51.

costs directly connected with the proceedings in bankruptcy and does not exclude, from the priority given them by the state law, fees and costs accruing, though prior to the petition, in legal proceedings not directly connected with the bankruptcy proceedings; and also includes expenses incurred by a receiver appointed to take charge of the property by the bankruptcy court.<sup>76</sup>

### § 1358. — Receivership.

In bankruptcy matters litigation should not as a rule be conducted by a receiver, yet when services of an attorney or counsel are necessary to a proper care of the estate and the performance of his duties as receiver, he is entitled to an allowance for such services, to be charged and allowed as an expense of the receivership. In that case such expenses would be entitled to priority of payment.<sup>77</sup>

Claims for goods purchased by the receiver in excess of his authority are not entitled to priority over liens.<sup>78</sup>

Receiver's certificates issued to raise money with which to prevent a deterioration of the property have been held entitled to priority,<sup>79</sup> even as against liens.<sup>80</sup> Where the receiver does not issue certificates to the full amount to which he is authorized but creates debts for the purpose of preserving the estate for which he does not issue certificates, the creditors not holding certificates are entitled to share on an equal basis with those holding certificates.<sup>81</sup> Knowledge of the receivership and the receipt of payment from the receiver may estop a mortgagee from denying the right of the holders of the certificates to priority.<sup>82</sup>

### § 1359. — Property recovered for estate by creditor.

Under the amendment of 1903 to section 64b (2), whenever property of the bankrupt which is transferred or concealed by him either before or after the filing of the petition, is recovered

76—Section 2 (3), Act of 1898.

77—In re Kelly Dry Goods Co., 102 Fed. 747, 4 A. B. R. 528.

78—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689.

79—In re Alaska Fishing & Development Co., 167 Fed. 875, 21 A. B. R. 685.

80—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689.

81—In re Restein, 162 Fed. 986, 20 A. B. R. 832.

82—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689.

for the benefit of the estate by the efforts and at the expense of one or more of the creditors, the reasonable expenses of such recovery is entitled to priority of payment.<sup>83</sup> The amendment is not retroactive. The allowance may include reimbursement for the expense of employing counsel to examine the bankrupt prior to the appointment of the trustee.<sup>84</sup>

While the law does not specifically provide for the case where a fund belonging to the estate is rescued from destruction, expenses incurred therein would doubtless be entitled to a like priority.<sup>85</sup> It is not to be understood from this, however, that a creditor may indiscriminately institute proceedings for the recovery of property and thus burden the estate with costs or litigation, but the proper procedure is first to apply to the trustee, who is the logical representative of all the creditors, to bring the suit, and only if he declines would the creditors be authorized to proceed. If there be no trustee, the creditors may proceed. In any case unless there is a resulting benefit to the estate, the expenses incurred by a creditor would not be entitled to priority under this subdivision of the statute.

### § 1360. Filing fees in involuntary cases.

The present act<sup>86</sup> gives priority to the filing fees paid by creditors in involuntary cases,<sup>87</sup> and allows petitioning creditors in involuntary cases, if successful, the same costs as in an equity suit. This gives petitioning creditors practically all the former act did. Under the act of 1867, notaries taking proofs of debt in bankruptcy proceedings were held not entitled to priority in the payment of their fees.<sup>88</sup>

### § 1361. Costs of administration.

### § 1362. — In general.

This expression in section 64b (3), refers only to costs directly connected with the proceedings in bankruptcy but will not necessarily exclude, from the priority given them by state laws, fees and costs accruing in proceedings not directly connected with

83—In re Felson, 139 Fed. 275, 15 A. B. R. 185.

84—In re Medina Quarry Co., 191 Fed. 815, 27 A. B. R. 466, rev'g 182 Fed. 508, 25 A. B. R. 405.

85—In re Groves, 2 N. B. N. R. 466.

86—Section 64b (2), Act of 1898.

87—G. O. XXXIV.

88—In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10073.

the bankruptcy proceedings.<sup>89</sup> The assets should be charged with the payment of the costs and expenses incurred in bringing the same into the state court.<sup>90</sup> The cost and expenses of administration are to be paid out of an estate before any distribution at all is made,<sup>91</sup> notwithstanding that there are specific liens sufficient to absorb all the assets of such estate,<sup>92</sup> and they have priority over dower.<sup>93</sup> The proceeds of a bankrupt's property subject to liens should be charged with the costs of sale before the liens are paid.<sup>94</sup>

### § 1363. — Debts of assignee.

Debts contracted by a common-law assignee are not payable as part of the expenses of administration. Such claims should be paid by the assignee and a claim presented against the estate.<sup>95</sup>

### § 1364. — Auctioneer's fees.

As unless otherwise ordered by the court,<sup>96</sup> all sales must be by public auction, the fees of the auctioneer are allowable and entitled to priority. It is not true now, as held under the act of 1867, that, the trustee being expected to conduct the sales, the necessity of the auctioneer's employment must be affirmatively shown before his fees will be allowed.<sup>97</sup>

### § 1365. — Operation of bankrupt's business.

Expenses of conducting the business of the bankrupt for a limited period after his adjudication are not costs of administration, and have been denied priority over valid liens.<sup>98</sup>

### § 1366. — Rent subsequent to bankruptcy.

This provision includes rent from the time of filing the petition until the premises occupied can be surrendered with due

89—In re Lewis, 99 Fed. 935, 4 A. B. R. 51.

90—Wilson v. Parr, 115 Ga. 629, 8 A. B. R. 230.

91—In re Whitehead, 2 N. B. R. 180, Fed. Cas. No. 17562; In re Lane, 2 N. B. R. 100, 3 Ben, 98, Fed. Cas. No. 8042; see In re Burke, 6 A. B. R. 502.

92—In re Tebo, 101 Fed. 419, 4 A. B. R. 235; In re Sink, 2 N. B. N. R. 645; contra, In re Frick, 1 N. B. N. 214, 1 A. B. R. 719.

93—In re Forbes, 7 A. B. R. 42.

94—McNair v. McIntyre, 113 Fed. 113, 7 A. B. R. 638.

95—In re Pattee, 143 Fed. 994, 16 A. B. R. 450.

96—G. O. XVIII (1).

97—In re Pegues, 3 N. B. R. 19, Fed. Cas. No. 10907; In re Sweet, 9 N. B. R. 48, Fed. Cas. No. 13688.

98—In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 A. B. R. 585.

regard to the best interests of all. Such rent is compensation for use and occupation and hence not necessarily determined by the terms of a previously existing lease or the amount the bankrupt had been previously paying, though such amounts may form the basis of its computation, nor is it a claim against the estate as such, but an expense incurred for its preservation and to be paid pro rata with other costs of administration.<sup>99</sup> The length of such occupation must be reasonable and the court will determine such fact and allow for such time only.<sup>1</sup> It has been held that the prevention of injury to the premises by failing to remove machinery and the like is not to be considered in determining such compensation.<sup>2</sup>

Rent for rooms used by the bankrupt subsequent to the bankruptcy cannot be allowed as an expense of administration.<sup>3</sup>

Rent prior to petition, see post, section 1392.

### § 1367. — Witness fees and mileage.

The witness fees entitled to priority are those usually paid in United States courts, \$1.50 per day for actual attendance and mileage.<sup>4</sup> No extra allowance can be made to an expert witness, in the absence of a contract between him and the party sum-

99—In re Sterne & Levi, 30 A. B. R. 915; In re Adams Cloak, Suit & Fur House, 199 Fed. 337, 28 A. B. R. 923; Bray v. Cobb, 100 Fed. 270, 2 N. B. N. R. 586, 3 A. B. R. 788; In re Jefferson, 93 Fed. 951, 2 A. B. R. 206; In re Luckenbill, 127 Fed. 984, 11 A. B. R. 455; In re Sterne & Levi, 26 A. B. R. 535; In re Ketterer Mfg. Co., 162 Fed. 345, 20 A. B. R. 694; In re Gregnard Lithographing Co., 158 Fed. 557, 19 A. B. R. 743; In re Kelly, 102 Fed. 747, 4 A. B. R. 528; Wilson v. Pennsylvania Trust Co., 114 Fed. 742, 8 A. B. R. 169; In re Luckenbill, 127 Fed. 984, 11 A. B. R. 455; In re Winfield Mfg. Co., 137 Fed. 984, 15 A. B. R. 24; In re Rubel, 166 Fed. 131, 21 A. B. R. 566; In re Grimes Bros., 1 N. B. N. 516, 2 A. B. R. 730, 96 Fed. 529; In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 Fed. 948; In re Butler, 6 N. B. R. 501, Fed. Cas. No. 2236; In re Webb & Co., 6 N. B. R. 302, Fed. Cas. No. 17315; In re Lyon & Co.,

3 N. B. R. 63, Fed. Cas. No. 12043; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6837; In re Walton, 1 N. B. R. 154, Fed. Cas. No. 17131; In re Merrifield, 3 N. B. R. 1, Fed. Cas. No. 9465; In re Hamburger & Frankel, 12 N. B. R. 277, Fed. Cas. No. 5975; In re Ives, 8 N. B. R. 28, Fed. Cas. No. 7116; Buckner v. Jewell, 14 N. B. R. 286; In re Hoagland, 18 N. B. R. 530, Fed. Cas. No. 6545; In re Hart Mfg. Co., 17 N. B. R. 459, Fed. Cas. No. 8592; In re Mitchell, 8 N. B. R. 47, Fed. Cas. No. 9657; In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10866.

1—In re McGrath & Hunt, 5 N. B. R. 254, 5 Ben. 183, Fed. Cas. No. 8808.

2—In re Breck, 12 N. B. R. 215, 8 Ben. 93, Fed. Cas. No. 1822.

3—In re Hersey, 171 Fed. 1001, 22 A. B. R. 860.

4—R. S. 848; The William Branfoot, 52 Fed. 390, 8 U. S. App. 129; In re Rein, 3 N. B. N. R. 45.



moning him, and agreements of counsel cannot bind the court in matters such as this, nor will they be regarded at all unless in writing and signed by the parties to be bound.<sup>5</sup>

### § 1368. Attorney or counsel fees.

Section 64b (3) provides for the allowance as costs of administration of one reasonable attorney's fee, for professional services rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed by the act, and to the bankrupt in voluntary cases as the court may allow.<sup>6</sup> Questions as to the reasonableness and propriety of such fees are fully discussed in the preceding chapter.

An attorney cannot schedule his claim for services prior to the petition as an unsecured claim and then claim it as a priority under section 64,<sup>7</sup> but priority of payment of the fee of bankrupt's attorney out of the funds on hand is not lost because a claim was not presented until after the declaration and payment of the first dividend;<sup>8</sup> nor because there is a claim for rent which became a lien upon the property more than four months before the filing of the petition, the order of payment as well as the priority being fixed by this subdivision;<sup>9</sup> nor because there are specific liens on the property.<sup>10</sup>

An attorney appearing for creditors in opposition of a motion to dismiss the proceedings is entitled to priority.<sup>11</sup> It is held that no allowance of fees to the attorney for a petitioning creditor should be made from the proceeds of incumbered property, where it is impossible to ascertain what sum will remain, after the payment of all valid liens, for distribution among unsecured creditors.<sup>12</sup>

Where a lien creditor's claim to priority is opposed, his

5—In re Carolina Cooperage Co., 1 N. B. N. 534, 96 Fed. 604.

6—64b refers to services of bankrupt's attorney after bankruptcy; § 60d to services prior to bankruptcy. In re Stolp, 199 Fed. 488, 29 A. B. R. 32.

7—In re Morris, 125 Fed. 841, 11 A. B. R. 145.

8—In re Scott, 1 N. B. N. 353, 2 A. B. R. 324, 96 Fed. 607.

9—Section 64b, Act of 1898; In re Duncan, 1 N. B. N. 340, 2 A. B. R. 321.

10—In re Tebo, 101 Fed. 419, 4 A. B. R. 235; contra, In re Frick, 1 N. B. N. 214, 1 A. B. R. 719.

11—In re Baxter & Co., 154 Fed. 22, 18 A. B. R. 450.

12—In re Gillaspie, 190 Fed. 88, 27 A. B. R. 59.

attorney is entitled to a lien on the proceeds for his fee in prosecuting such claim, and the court of bankruptcy has jurisdiction to pass on his right, fix the amount, with or without a jury, and enforce it in the distribution of the proceeds, notwithstanding that the trustee may have paid such lien creditor his distributive share, it having been paid without due authority.<sup>13</sup>

### § 1369. Wages and labor claims.

#### § 1370. — In general.

Wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of filing the petition, not to exceed three hundred dollars to each claimant, are entitled to priority of payment. The words workmen, clerks or servants as here used are neither co-extensive nor limited by the word wage-earner as defined by the law,<sup>14</sup> but are to be understood in their ordinary signification. Thus a clerk is one employed to keep records or accounts, an amanuensis, a scribe, accountant, and bookkeeper,<sup>15</sup> or a salesman in a store.<sup>16</sup> A servant is one employed by another for menial offices, or who labors for the benefit of a master or employer and is subject to command, a subordinate helper or assistant,<sup>17</sup> and may include a musician employed at regular wages,<sup>18</sup> or a salesman in a retail store,<sup>19</sup> but not a factor,<sup>20</sup> or the editor of a newspaper.<sup>21</sup> A workman is one employed in labor, whether in tillage or manufacture, a worker, an artificer or laborer, skilled or unskilled, a mechanic or artisan, a handi-

13—*In re Rude*, 101 Fed. 805, 2 N. B. N. R. 498, 4 A. B. R. 319; and see *Freelander v. Holloman*, 9 N. B. R. 331; Fed. Cas. No. 5081; *In re Devore*, 16 N. B. R. 56, Fed. Cas. No. 3847; *In re Eldridge*, 4 N. B. R. 162, Fed. Cas. No. 4330; *Cowley v. Railroad Co.*, 159 U. S. 569, 575, 40 L. ed. 263.

14—Section 1 (27), Act of 1898; contra, *In re Becker & Co.*, 31 A. B. R. 596.

15—*Webster*; Cent. Dic.; *In re Baumbblatt*, 156 Fed. 422, 19 A. B. R. 500; *In re Roberts Co.*, 193 Fed. 294, 27 A. B. R. 437.

16—*In re Flick*, 105 Fed. 503, 5 A. B. R. 465.

17—*Webster*; Cent. Dic.; *Flesh v. Lindsay*, 115 Mo. 1.

18—*In re Caldwell*, 164 Fed. 515, 21 A. B. R. 236.

19—See *In re Flick*, 3 N. B. N. R. 71, 105 Fed. 503, 5 A. B. R. 465.

20—One engaged in buying goods for merchants from jobbers receiving his pay entirely from the merchants is not within the Act. *In re Smith*, 11 A. B. R. 646.

21—*In re Zotti*, 23 A. B. R. 607.

craftsman.<sup>22</sup> The method of compensation whether by the day, week, month, or by the job or piece is immaterial.<sup>23</sup>

One who is under a contract with the bankrupt by which he agrees to put out certain work for a certain price, furnishing his own men, and getting the benefit of their labor, is not a workman.<sup>24</sup> A teamster is entitled to priority only for such amount as his personal services are worth exclusive of the value of the use of his wagon and team.<sup>25</sup> One engaged at a monthly price to deliver milk at the bankrupt's premises is not a workman or servant,<sup>26</sup> nor is the claim of the proprietor of a blacksmith shop for shoeing horses and sharpening tools of the bankrupt entitled to priority.<sup>27</sup> A contractor using his plant,<sup>28</sup> or a manager in charge of a branch of a broker's office in another state<sup>29</sup> or the president or managing officer of a corporation<sup>30</sup> is not entitled to priority, but a claimant will not be deprived of his or her right to priority as a wage-earner by the fact that he or she is also an officer of the bankrupt corporation,<sup>31</sup> or the wife, or daughter of the bankrupt.<sup>32</sup> The provision in favor of wage-earners should not be stretched, however, to cover claims of principals in disguise.<sup>33</sup>

"Wages" is the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt to those

22—Webster; Cent. Dic.; In re Scanlan, 2 N. B. N. R. 58, 97 Fed. 26, 3 A. B. R. 202; In re Greenwald, 2 N. B. N. R. 791, 99 Fed. 705, 3 A. B. R. 696.

23—Weaver v. Hugill Stone & Supply Co., 15 Ohio Fed. Dec. 208, 16 A. B. R. 516; In re Thomas Deutschle & Co., 182 Fed. 430, 25 A. B. R. 343.

24—In re Thomas Deutschle & Co., 182 Fed. 430, 25 A. B. R. 343.

25—In re Winton Lumber & Mfg. Co., 17 A. B. R. 117.

26—Spruks v. Lackawana Dairy Co., 189 Fed. 287, 26 A. B. R. 554.

27—Weaver v. Hugill Stone & Supply Co., 15 Ohio Fed. Dec. 208, 16 A. B. R. 516.

28—In re Rose, 1 N. B. N. 212, 1 A. B. R. 68.

29—In re Albert O. Brown & Co., 171 Fed. 281, 22 A. B. R. 496.

30—In re Crown Point Brush Co., 200

Fed. 882, 29 A. B. R. 638; In re Carolina Cooperage Co., 2 N. B. N. R. 23, 96 Fed. 950, 3 A. B. R. 154; In re Grubbs Wiley Grocery Co., 1 N. B. N. 281, 96 Fed. 183, 2 A. B. R. 442; but see In re Silverman Brös., 2 N. B. N. R. 760, 101 Fed. 219, 4 A. B. R. 83.

Treasurer and general manager of the bankrupt corporation, whose wife owned majority of capital stock, held not entitled to priority merely because of his efforts as salesman. In re Metropolitan Jewelry Co., 216 Fed. 385, 31 A. B. R. 752.

31—In re Swain Co., 194 Fed. 749, 28 A. B. R. 66; In re Roberts Co., 193 Fed. 294, 27 A. B. R. 437.

32—In re Strauch, 208 Fed. 842, 31 A. B. R. 36.

33—In re Metropolitan Jewelry Co., 216 Fed. 384, 31 A. B. R. 750, 751.

General manager of a mercantile establishment employed and paid as such

who served him in a subordinate or menial capacity.<sup>34</sup> The term includes commissions or other methods of payment, the priority depending upon the character of the service rather than the particular mode of payment.<sup>35</sup> If a clerk permit his employer to retain a portion of his weekly wages, for a benefit fund, the clerk cannot claim priority for the sums so retained during the three months preceding bankruptcy, as wages.<sup>36</sup>

Prior to the amendment of 1906<sup>37</sup> a traveling salesman,<sup>38</sup> or an agent selling goods on a stipulated commission,<sup>39</sup> was not entitled to priority. That amendment, which is not retroactive,<sup>40</sup> provides that the wages due a city or traveling salesman are entitled to the same right of priority as wages due a workman, clerk or servant. The fact that his wages are in the form of commissions<sup>41</sup> or that commissions are based upon all sales made in the salesman's territory rather than upon sales directly traceable to him<sup>42</sup> is immaterial, and the fact that by agreement with his employer the salesman is to pay his own expenses cannot lessen the latter's right to the agreed compensation, where the expenses are fairly incidental to the service to be performed.<sup>43</sup>

does not become entitled to priority merely because he incidentally sweeps the floor, dusts the counters, and assists in selling goods. *In re Greenberger*, 203 Fed. 583, 30 A. B. R. 117.

34—*Weaver v. Hugill Stone & Supply Co.*, 150 Ohio Fed. Dec. 208, 16 A. B. R. 516.

35—*In re Fink*, 163 Fed. 135, 20 A. B. R. 897; *Weaver v. Hugill Stone & Supply Co.*, 15 Ohio Fed. Dec. 208, 16 A. B. R. 516; *In re Deutschle & Co.*, 182 Fed. 430, 25 A. B. R. 343; *In re New England Thread Co.*, 158 Fed. 788, 20 A. B. R. 47; *aff'g* 154 Fed. 742, 18 A. B. R. 840.

The fact that one engaged to sell weather strips superintended their being placed in position and received the balance of the purchase price after the workmen had been paid and the manufacture allowed a profit of 15 per cent held not to disentitle him to priority. *In re Roebuck Weather Strip & Wire Screen Co.*, 180 Fed. 497, 24 A. B. R. 532.

36—*In re Flick*, 105 Fed. 503, 5 A. B. R. 465.

37—Act of June 15, 1906.

38—*In re Scanlan*, 2 N. B. N. R. 58, 97 Fed. 26, 3 A. B. R. 202; *In re Greenwald*, 2 N. B. N. R. 791, 99 Fed. 705, 3 A. B. R. 696.

39—*In re Mayer*, 101 Fed. 227, 4 A. B. R. 119, *aff'g* 2 N. B. N. R. 719.

40—*In re Photo Electrotype Engraving Co.*, 155 Fed. 684, 19 A. B. R. 94.

41—*In re Fink*, 163 Fed. 135, 20 A. B. R. 897; *In re Roebuck Weather Strip & Screen Co.*, 180 Fed. 497, 24 A. B. R. 532; *In re New England Thread Co.*, 158 Fed. 788, 20 A. B. R. 47; *aff'g* 154 Fed. 742, 18 A. B. R. 840.

42—*In re New England Thread Co.*, 158 Fed. 788, 20 A. B. R. 47, *aff'g* 154 Fed. 742, 18 A. B. R. 840.

43—*In re New England Thread Co.*, 158 Fed. 788, 20 A. B. R. 47; *aff'g* 154 Fed. 742, 18 A. B. R. 840.

Under a contract by which a salesman becomes entitled to his commissions only upon the acceptance of the article sold and payment therefor, the date of such acceptance and payment and not the date of the sale determines whether the commission was earned within three months of bankruptcy or not.<sup>44</sup>

It may be generally stated that labor claims are entitled to priority and payment in full before the discharge of liens against the estate;<sup>45</sup> and there appears no reason why the trustee might not pay the same as soon as sufficient money for that purpose comes into his hands.<sup>46</sup> Labor claims are entitled to priority over claims of the United States or a contractor subrogated to its rights,<sup>47</sup> and a claim of a clerk for wages earned within three months of the bankruptcy of his employer has been held superior to a claim of the bankrupt for homestead exemptions out of the proceeds of the bankrupt estate, irrespective of any provisions of the state law.<sup>48</sup>

### § 1371. — Breach of contract of employment.

If an employee under a contract for services for a fixed period is discharged, and before the expiration of such contract period the employer becomes bankrupt, the employee would be entitled to priority of payment for wages due within the three months prior to bankruptcy not to exceed \$300, provided such employee would have a right of action and could recover such wages, since they would not be merged by an action that might be necessary in order to secure their liquidation or collection.<sup>49</sup>

### § 1372. — Wages subsequent to bankruptcy.

Wages earned subsequent to the filing of the petition would doubtless be entitled to priority under that subdivision provid-

44—In re National Marble & Granite Co., 206 Fed. 185, 31 A. B. R. 80.

45—In re Blackstaff Eng. Co., 200 Fed. 1019, 29 A. B. R. 663; In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689; In re Tebo, 101 Fed. 419, 4 A. B. R. 235; In re Byrne, 2 N. B. N. R. 246, 97 Fed. 762, 3 A. B. R. 268; contra, In re Proudfoot, 173 Fed. 733, 23 A. B. R. 106.

46—In re Sawyer, 16 N. B. R. 460, 2 Low. 551, Fed. Cas. No. 12396; Ex parte Rockett, 15 N. B. R. 95, 2 Low. 522, Fed. Cas. No. 11977.

47—Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 56 L. ed. 706, 27 A. B. R. 873, rev'g 174 Fed. 385, 23 A. B. R. 340.

48—In re Strickland, 20 A. B. R. 923. See also *ante*, § 1025.

49—In re Silverman, 2 N. B. N. R. 760, 101 Fed. 219, 4 A. B. R. 83; In re Anson, 2 N. B. N. R. 567, 101 Fed. 698, 4 A. B. R. 231. Contra, In re Lewis Co., 12 A. B. R. 279.

ing for the care and preservation of the estate, if such employment was necessary and to its advantage.<sup>50</sup>

### § 1373. — Application of payments.

Payments made by the bankrupt will be applied in discharge of wages earned prior to the three-month period unless it clearly appears that the parties intended otherwise.<sup>51</sup>

### § 1374. — Priority under state laws.

Subdivision 4 of section 64 of the statute limiting the amount of wages to that earned within three months is not to be considered as being affected or enlarged by any general prior or subsequent provision in the law, as subdivision 5, which accords priority of payment to "debts owing to any person who by laws of the states or United States is entitled to priority," but such latter provision is to be construed as applying to debts other and different from those specified in clause 4.<sup>52</sup>

Priority of labor liens, see also, post, section 1389.

Hence, if under the laws of the state wages for a greater period than three months are entitled to priority, allowance can be made only for such as are earned within the three months.<sup>53</sup>

### § 1375. — Wages assigned or in judgment.

The priority is attached to the debt and not to the person of the wage-earner, hence an assignee of wages earned within three months before the commencement of the proceedings is entitled to priority, whether the assignment is made before<sup>54</sup>

50—In re Gerson, 1 N. B. N. 190, 1 A. B. R. 251.

51—In re McIntyre Bros., 21 A. B. R. 588; In re Van Wert Machine Co., 186 Fed. 607, 26 A. B. R. 597; In re Andrews, 19 A. B. R. 441.

52—In re Crown Point Brush Co., 200 Fed. 882, 29 A. B. R. 638; In re Shaw, 109 Fed. 782, 6 A. B. R. 501.

53—In re Rouse, Hazard & Co., 1 N. B. N. 75, 91 Fed. 96, 1 A. B. R. 234, rev'g 91 Fed. 514, 1 A. B. R. 231; In re Lewis, 99 Fed. 935, 4 A. B. R. 51; In re Union Planing Mill Co., 2 N. B. N. R. 384; In re Marshall Paper Co., 1

N. B. N. 294; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 Fed. 592, 3 A. B. R. 437. Contra, In re Slomka, 117 Fed. 688, 9 A. B. R. 124; In re Lawler, 110 Fed. 135, 6 A. B. R. 184.

54—Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 51 L. ed. 436, 17 A. B. R. 77; United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 24 A. B. R. 726; In re Harmon, 128 Fed. 170, 11 A. B. R. 64. Contra, In re North Carolina Car Co., 127 Fed. 178, 11 A. B. R. 488; In re St. Louis Ice Mfg. & Storage Co., 147 Fed. 752, 17 A. B. R. 194; In re Weslund, 99 Fed. 399, 3 A. B. R. 646.

or after<sup>55</sup> bankruptcy, provided he has not novated the debt or merged it with other debts by taking new obligations or securities wholly due and payable to himself.<sup>56</sup> A party's advancing money to pay labor claims does not, however, entitle him to be subrogated to the rights of the laborers, without an express assignment.<sup>57</sup> There is nothing to prevent a father from proving as entitled to priority, a claim for a minor son for labor as an operative.<sup>58</sup>

The general rule that a cause of action is merged in the judgment, does not apply to the case of an employee having a claim against bankrupt for wages earned within three months of the commencement of the proceedings upon which he recovers a judgment, but such claim for wages may be proved as an unsecured debt and will be entitled to priority of payment.<sup>59</sup>

### § 1376. Debts entitled to priority under state or federal laws.

#### § 1377. — In general.

Fifth in the order of payment of the debts entitled to priority under section 64b of the present bankruptcy law are "debts owing to any person who by the laws of the states or of the United States is entitled to priority." As has been stated, this provision applies to debts other than and different from those specified in the previous clauses of the subdivision; and does not affect or enlarge such specific provision.<sup>60</sup> But it has been held on the contrary that where wage claimants were entitled to liens by virtue of a state law, they are entitled to priority under subdivision 5 of this section, though the wages were not earned within three months before the date of the commencement of bankruptcy proceedings,<sup>61</sup> but this is contrary to the weight of authority.<sup>62</sup> If both a state law and the bankruptcy act give

55—In re Campbell, 102 Fed. 686, 4 A. B. R. 535; In re Brown, 3 N. B. R. 177, 4 Ben. 142, Fed. Cas. No. 1974.

56—In re Fuller & Bennett, 152 Fed. 538, 18 A. B. R. 443.

57—United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 24 A. B. R. 726. Contra, In re Langley and Alderson, 24 A. B. R. 69.

58—In re Harthorn, 4 N. B. R. 27, Fed. Cas. No. 6162.

59—In re Anderson, 2 N. B. N. R. 567, 101 Fed. 698, 4 A. B. R. 231.

60—In re Riehl, 200 Fed. 455, 29 A. B. R. 613; In re Shaw, 109 Fed. 782, 6 A. B. R. 501.

61—In re Slomka, 117 Fed. 688, 9 A. B. R. 124; In re Lawler, 110 Fed. 135, 6 A. B. R. 184.

62—See *ante*, § 1374.

priority to the same class of debts, the latter not alone controls the state law in case of absolute conflict between the two, but by its express regulation of these priorities, excludes the state law altogether.<sup>63</sup>

Provision is made elsewhere for determining the validity of liens; <sup>64</sup> but, if found valid, this provision recognizes their right to priority according to the state or federal laws; <sup>65</sup> notwithstanding that the provision of the state law giving priority forms part of its insolvency law, the insolvency laws being suspended only so far as they come into conflict with the bankrupt law or intrude on its province. The rule that the federal bankruptcy act supersedes all state insolvency or bankruptcy laws relative to persons or acts declared by congress to be subjects of bankruptcy relates merely to the administration of the state laws in proceedings in the state courts, and does not prevent the enforcement in federal bankruptcy proceedings of any general priorities recognized by the state laws, where such priorities are conferred by the state laws as substantive rights of priority not dependent upon the resort to particular remedies accessible only in proceedings in the state courts, and where such priorities are not in conflict with the express priorities declared by the bankruptcy act itself or otherwise in conflict with its provisions.<sup>66</sup>

A prior lien gives a prior claim, and it may be ascertained and

63—In re Lewis, 99 Fed. 935, 4 A. B. R. 51; In re McDavid Lumber Co., 190 Fed. 97, 27 A. B. R. 39.

64—Section 67, Act of 1898.

65—Section 64b, Act of 1898; In re West Norfolk Lumber Co., 112 Fed. 759, 7 A. B. R. 648; In re Yoke Vitri-fied Brick Co., 180 Fed. 235, 25 A. B. R. 18; In re Walker, 2 N. B. N. R. 1014; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 Fed. 592, 3 A. B. R. 437; see also Reed v. Bullington, 11 N. B. R. 408; In re Grinnell, 9 N. B. R. 35, 7 Ben. 42, Fed. Cas. No. 5830; In re Scott, 3 N. B. R. 181, Fed. Cas. No. 12517; In re Union Planing Mill Co., 2 N. B. N. R. 384.

Amendment of 1910 to section 47 (2) does not alter or repeal section 64b (5). In re Lausman, 183 Fed. 647, 25 A. B. R. 186.

66—In re Standard Oak Veneer Co., 173 Fed. 103, 22 A. B. R. 883; In re Jones, 151 Fed. 108, 18 A. B. R. 206; In re Wright, 1 N. B. N. 428, 95 Fed. 807, 2 A. B. R. 592; but see In re Rieser, 2 N. B. N. R. 859; In re West Norfolk Lumber Co., 112 Fed. 759, 7 A. B. R. 648; In re Oconee Milling Co., 109 Fed. 866, 6 A. B. R. 475; In re Daniels, 110 Fed. 745, 6 A. B. R. 699; In re Williams v. Crow, 116 Fed. 111, 7 A. B. R. 545; In re Hoover, 113 Fed. 136, 7 A. B. R. 330.



liquidated.<sup>67</sup> A fraction of a day may be considered in order to determine the priority of liens or conveyances.<sup>68</sup>

### § 1378. — Debts assumed by bankrupt.

Where the bankrupt has assumed the debts of a third party, the creditors of the latter are entitled to share equally with the bankrupt's creditors, in the distribution of the proceeds of a personal privilege of the bankrupt.<sup>69</sup>

### § 1379. — Claim of cestui que trust.

It has been held that the question whether the owner of a trust fund is entitled to a preference over other creditors must be determined by the federal decisions.<sup>70</sup>

Ordinarily, the owner of a trust fund can secure a preference out of the proceeds of the estate only where he can trace the trust property or fund, in its original or substituted form, into the hands of the trustee.<sup>71</sup> So, creditors who base their claims upon the misapplication of trust funds by the bankrupt, or conversion by him of property left in his possession, are not entitled to priority over general creditors unless the money or proceeds of the property can be traced to some specific fund and distinguished.<sup>72</sup>

The claim of a cestui que trust in proceeds of converted property has been held entitled to priority over the claim of trustee for compensation.<sup>73</sup>

Title of trustee to property held in trust, see ante, section 852.

### § 1380. — Claims on checks, or orders.

Whether or not a claim founded on a check given by one, who becomes bankrupt before such check is presented for payment, is entitled to priority, depends on the construction placed on the contract evidenced by the check. In jurisdictions where it

67—In re Winn, 1 N. B. R. 131, Fed. Cas. No. 17876; In re Scott, 3 N. B. R. 181, Fed. Cas. No. 12517; In re Lacy, 4 N. B. R. 15, Fed. Cas. No. 7970.

68—Hayden v. Buddensick, 49 How. Pr. (N. Y.) 246; Clute v. Clute, 4 Den. (N. Y.) 244; Duke v. Clark, 58 Miss. 465.

69—In re Baumbblatt, 153 Fed. 485, 18 A. B. R. 720.

70—In re Dorr, 21 A. B. R. 752.

71—Deere Plow Co. v. McDavid, 137 Fed. 802, 14 A. B. R. 653.

72—In re Larkin & Metcalf, 202 Fed. 572, 30 A. B. R. 903; In re Brown & Co., 183 Fed. 861, 25 A. B. R. 800.

73—Smith v. Township of Augres, 150 Fed. 257, 9 L. R. A. (N. S.) 876, 17 A. B. R. 745.

is held to be an equitable assignment of so much of the fund as the check calls for, it will be entitled to priority.<sup>74</sup> Where prior to bankruptcy the holder of a note deposited it with an attorney and subsequently drew orders requesting him to pay divers sums out of the proceeds, the holders of such orders have been held to be entitled to priority.<sup>75</sup>

### § 1381. — Costs and fees.

While ordinarily, a claim for costs incurred by a creditor in an attachment suit commenced prior to bankruptcy is entitled to priority if accorded such by the state law,<sup>76</sup> it is held that costs incurred in an attachment suit commenced within four months of bankruptcy are not entitled to a preference though the state law so provides.<sup>77</sup> Fees of a sheriff, accruing on a writ of attachment on a provable debt, issued before the filing of the petition, and continuing in force until then, are entitled to priority under the bankruptcy act, where the law of the state gives them priority.<sup>78</sup>

### § 1382. — Claims of bank depositors.

Ordinarily when funds are deposited in bank, the relation of debtor and creditor immediately arises between the banker and the depositor, and the money becomes the property of the former. He has the right to use it but must pay the debt of the depositor by cashing his checks. When the banker obtains the deposit by committing a fraud, as by receiving it after hopelessly insolvent, the relation between the parties is different, and the money does not become the property of the bank but becomes a trust fund in the banker's hands. In such case money and checks deposited are entitled to priority of payment over the general creditors, and an equal amount may be obtained

74—Fourth Nat. Bank of Chicago v. Bank, 10 N. B. R. 44.

75—In re Smith, 16 N. B. R. 399, Fed. Cas. No. 12992.

76—In re Goldberg Bros., 144 Fed. 566, 16 A. B. R. 521; In re Amoratis, 178 Fed. 919, 24 A. B. R. 565.

77—In re Iroquois Mach. Co., 166 Fed. 629, 22 A. B. R. 183; In re Copper King, Ltd., 143 Fed. 649, 16 A. B. R. 148.

Costs of attachment proceedings begun within four months of bankruptcy which proceedings have been voluntarily released by the creditor are not entitled to priority under 64b (5). In re Moncriff Mfg. Co., 31 A. B. R. 674.

78—In re Lewis, 99 Fed. 935, 4 A. B. R. 51; In re Jennings, 8 A. B. R. 358; In re Beaver Coal Co., 107 Fed. 98, 5 A. B. R. 787.

from the receiver of the bank. Checks and drafts delivered to a bank for collection and deposit under like conditions, which had not been collected when the bank closed its doors, remain the property of the depositor, although indorsed to the bank without qualification and their proceeds upon collection may be recovered by him.<sup>79</sup> In the case of drafts purchased of a bank under like condition which are returned unpaid, the purchaser has the right in equity to reclaim the amount paid therefor.<sup>80</sup> A savings bank would be entitled to priority of payment out of the assets of an insolvent bank created under a statute providing that "upon it becoming insolvent, after paying its circulation, the assets should be first applied to paying deposits made with it by savings banks."<sup>81</sup>

The fact that the fund arose from taxes does not alter the relation of debtor and creditor, and the depositor in such case is not ordinarily entitled to any priority, but if the funds have been received from the municipality through the fraud of the bank, the bank becomes a trustee for the municipality, and the municipality is in such case entitled to a return of its entire deposit.<sup>82</sup>

### § 1383. — Claims of other depositors.

Money deposited with bankrupt, not a bank, is not, as a general rule, entitled to priority.<sup>83</sup> So, one who deposited money with the bankrupt as security, which money has been misappropriated by the bankrupt, is not entitled to priority, the money not being traceable into a specific fund,<sup>84</sup> and a lessee who makes a deposit of money as security for rent is only entitled to prove his claim for the unused portion thereof as a general creditor.<sup>85</sup>

79—In re Silver, 208 Fed. 797, 31 A. B. R. 106; Richardson v. N. O. Deben-  
ture Co., 102 Fed. 780, 52 L. R. A. 67;  
Bank v. Blackmore, 75 Fed. 771; Was-  
son v. Hawkins, 59 Fed. 233; Lake Erie  
& W. R. Co. v. Bank, 65 Fed. 690;  
Richardson v. Denegre, 93 Fed. 572.

80—Richardson v. Coffee Co., 102  
Fed. 785.

81—In re Stuyvesant Bank, 9 N. B.  
R. 318, Fed. Cas. No. 13584.

82—In re Salmon & Salmon, 145 Fed.  
649, 16 A. B. R. 623.

83—Riley v. Pope, 186 Fed. 857, 26  
A. B. R. 618.

84—In re See, 209 Fed. 172, 31 A. B.  
R. 360.

85—In re Banner, 149 Fed. 936, 18  
A. B. R. 61.

### § 1384. — Equitable liens.

In some states, an equitable lien is superior to the liens of judgment creditors and to the claims of general creditors.<sup>86</sup>

### § 1385. — Claim of creditor making false representations.

The claim of a creditor making false representations as to the financial condition of the bankrupt upon which another creditor relies will be postponed as to the part thereof which existed at the time of the misrepresentations, to the claim of the creditor relying on the misrepresentations.<sup>87</sup>

The claim of an officer of the bankrupt corporation who has obtained property from creditors by means of fraudulent representations as to financial condition of the corporation will be postponed to the claim of the creditors so parting with their property.<sup>88</sup>

### § 1386. — Judgments.

The liens and priorities of judgments are to be determined as they existed under the state law at the time of the filing of the petition;<sup>89</sup> hence, where an execution has been properly levied, the execution creditors are entitled to priority of payment from the proceeds of the property levied on;<sup>90</sup> but a judgment of a minor court, which is not a lien on personal property until levied thereon, nor on real estate until docketed in a higher court, and from which when the petition is filed an appeal is pending, is not entitled to priority.<sup>91</sup> A judgment or levy must be one which is a valid lien under the bankruptcy act;<sup>92</sup> and it must not only be a valid lien but must be properly presented in the bankruptcy proceedings, so that attaching creditors, who have not proved their claims, cannot move that they be given priority in the proceeds of the attached goods;<sup>93</sup> and the claimant must show

86—Crosby v. Miller, 16 A. B. R. 805.

87—In re Paris Modes Co., 196 Fed. 357, 28 A. B. R. 470; In re Ewald & Brainard, 135 Fed. 168, 14 A. B. R. 267.

88—In re Royce Dry Goods Co., 133 Fed. 100, 13 A. B. R. 257.

89—In re Walker, 2 N. B. N. R. 1014.

90—In re Hughes, 11 N. B. R. 452,

Fed. Cas. No. 6843; Swope v. Arnold, 5 N. B. R. 148, Fed. Cas. No. 13702.

91—In re Wood, 1 N. B. N. 430, 95 Fed. 946, 2 A. B. R. 695.

92—Phillips v. Bowdoin, 14 N. B. R. 43; Reed v. McIntyre, 19 N. B. R. 45, 98 Fed. 507; In re Steele, 16 N. B. R. 105, 7 Biss. 504, Fed. Cas. No. 13345.

93—In re Ogles, 1 N. B. N. 400, 2 A. B. R. 514.

that he has done everything necessary to make his judgment a lien.<sup>94</sup> If a judgment creditor waives his execution as an unlawful preference and files his claim in bankruptcy, he cannot thereafter assert his preference.<sup>95</sup> A judgment for damages for detention of property is not entitled to priority, where the trustees never had possession, and were not responsible for the detention.<sup>96</sup>

A large judgment against a bankrupt, purchased by a national bank for much less than its face value and used to hinder and delay the debtor's creditors is not entitled to priority but should be postponed to the claims of the other creditors;<sup>97</sup> so where the judgment creditor failed for many years to make a levy<sup>98</sup> or to record his lien where the land was located.<sup>99</sup>

### § 1387. — Claims barred by limitations.

A creditor who holds a claim barred by the statute of limitations, but which has been revived by the act of the bankrupt in including it in his schedules, will be postponed to the claims of other creditors.<sup>1</sup>

### § 1388. — Maritime liens.

A claim for towage has been held entitled to priority over a claim of a person advancing money to the bankrupt to pay wages.<sup>2</sup> Where a vessel is sold in admiralty with consent of the bankruptcy court to enforce a maritime lien, the costs of the administration in bankruptcy proceedings are entitled to priority to the debt secured by the lien.<sup>3</sup>

### § 1389. — Mechanic's liens.

The statutory liens of laborers and materialmen are entitled under the bankruptcy law to the same priority as under the state law;<sup>4</sup> but all the requirements of the statute to preserve or

94—In re Wood, 1 N. B. N. 430, 95 Fed. 946, 2 A. B. R. 695.

95—In re Bolinger, 108 Fed. 374, 6 A. B. R. 171.

96—In re Neely, 108 Fed. 371, 5 A. B. R. 836.

97—In re Headley, 2 N. B. N. R. 250, 97 Fed. 765, 3 A. B. R. 272.

98—In re Cozart, 3 N. B. R. 126, Fed. Cas. No. 3313.

99—In re Dunn, 11 N. B. R. 270, 2 Hughes 169, Fed. Cas. No. 4172.

1—In re Currier, 192 Fed. 695, 27 A. B. R. 597.

2—In re Alaska Fishing & Development Co., 167 Fed. 875, 21 A. B. R. 685.

3—In re Hughes, 170 Fed. 809, 22 A. B. R. 303.

4—In re Hobbs & Co., 145 Fed. 211,

render them valid, must be complied with,<sup>5</sup> though if bankruptcy intervene the limitation as to time is governed by the bankruptcy act.<sup>6</sup> The claimant may at once appear in the bankruptcy court and be heard as to his claim without first having it established in another tribunal;<sup>7</sup> but, if some claimants have complied with state statutes so as to give them valid liens while others have not, the former will be given priority over the latter.<sup>8</sup> So in Iowa a labor claim is entitled to priority over the landlord's lien for rent;<sup>9</sup> while in Kentucky the lien of materialmen is subject to the landlord's lien,<sup>10</sup> and in New Jersey landlords and factory operators have equal liens.<sup>11</sup>

Where under a state law a lien for wages is given priority over all claims excepting taxes and costs of administration, and the lien has attached before the fund is turned over to the bankruptcy court, and it is not such an one as is avoided by the bankruptcy act, it will be respected.<sup>12</sup>

### § 1390. — Miscellaneous liens.

An attorney employed at a yearly salary is held to be within a statute giving employees a first and prior lien for all work and labor done for a corporation, and when the lien is filed it relates back to the date of employment but fixes no time limit therefor, it is sufficient if filed during the employment and, if bankruptcy intervenes during the six months after filing such lien within which suit may be brought, the bankruptcy limitation of one year supersedes the other.<sup>13</sup>

Tailors making up garments by the piece, to be returned in

16 A. B. R. 544; In re Bennet, 153 Fed. 673, 18 A. B. R. 320; Browder & Co. v. Hill, 136 Fed. 821, 14 A. B. R. 619.

5—In re Burton Bros. Mfg. Co., 134 Fed. 157, 14 A. B. R. 218.

6—In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 Fed. 582, 3 A. B. R. 437.

7—In re Byrne, 2 N. B. N. R. 247, 97 Fed. 762, 3 A. B. R. 268; In re Emslie, 2 N. B. N. R. 992, 102 Fed. 291, rev'g 2 N. B. N. R. 324, 98 Fed. 716, 3 A. B. R. 516; s. c. 2 N. B. N. R. 171, 97 Fed. 929, 3 A. B. R. 282; In re Beck Provision Co., 2 N. B. N. R. 532.

8—In re Kerby-Denis Co., 1 N. B. N. 399, 95 Fed. 116, 2 A. B. R. 402, aff'g 1 N. B. N. 337, 94 Fed. 818, 2 A. B. R. 218.

9—In re Byrne, 2 N. B. N. R. 247, 97 Fed. 762, 3 A. B. R. 268.

10—In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 Fed. 582, 3 A. B. R. 437.

11—In re McConnell, 9 N. B. R. 387, Fed. Cas. No. 8712.

12—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689; In re Laird, 109 Fed. 550, 6 A. B. R. 1.

13—In re Fort Wayne Elec. Corp., 2 N. B. N. R. 891.

whole or broken lots for examination, and to be paid for at stated intervals if approved, have a lien on all articles in their hands for the work done on them and on any portion of the same specific lot returned for examination; and though a whole lot had been returned for examination, it is not such a delivery as deprives the workmen of their lien, unless the delay in demanding payment amounts to a waiver.<sup>14</sup>

A truckman and cartman cannot claim priority under a state statute relating to general assignments since such statute is incompatible with the bankrupt act.<sup>15</sup>

### § 1391. — Mortgages.

The question of priority of a mortgage is determined by the local law<sup>16</sup> so of two mortgages on the same property the senior will be entitled to priority of payment over the junior.<sup>17</sup> Where a mortgage junior to a mechanic's lien was given in part to pay off a mortgage senior to such lien, the mortgagee may be subrogated pro tanto to the lien of the original mortgage.<sup>18</sup> The right to priority extends only to the property against which the lien exists; so that after sale of the property, under the mortgage, a balance remaining unpaid is not entitled to priority of payment out of the balance of the estate.<sup>19</sup> Where first and second mortgages exist, the latter may be displaced in favor of costs incurred in selling the property, including compensation to the trustee.<sup>20</sup>

### § 1392. — Claims for rent.

A claim for rent accruing prior to the filing of the petition is given priority by the bankruptcy act if entitled to such priority by the state law;<sup>21</sup> but rent which will accrue after the

14—In re Lowensohn, 2 N. B. N. R. 871, 101 Fed. 776, 4 A. B. R. 79.

15—In re Rieser, 2 N. B. N. R. 859.

16—In re Buchner, 199 Fed. 99, 29 A. B. R. 179; Schulze v. Bolting, 17 N. B. R. 167, 8 Biss. 174, Fed. Cas. No. 12489; In re Lacy, 4 N. B. R. 15, Fed. Cas. No. 7970.

17—In re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1068.

18—In re Drolesbaugh, 2 N. B. N. R. 1079.

19—In re Snedaker, 4 N. B. R. 43.

20—In re Utt, 105 Fed. 754, 5 A. B. R. 383.

21—Martin v. Orgain, 174 Fed. 772, 23 A. B. R. 454; In re Burns, 175 Fed. 633, 23 A. B. R. 640; In re V. D. L. Co., 175 Fed. 635, 23 A. B. R. 643; In re Pittsburg Drug Co., 164 Fed. 482, 20 A. B. R. 227; In re Bishop, 153 Fed. 304, 18 A. B. R. 635; In re Morris, 159 Fed. 591, 19 A. B. R. 781.

filing of the petition is not a provable debt,<sup>22</sup> and not entitled to priority as such,<sup>23</sup> but may be allowed as compensation for use and occupation.<sup>24</sup> If a claim is not entitled under the state law to priority, neither is it entitled to priority under the bankrupt law.<sup>25</sup>

Definite sums or sums capable of being made definite, chargeable on the demised premises by way of taxes, or for gas or water, or for improvements and the like, may be considered as rent or included therein when the intention so to consider them is made clear in the lease.<sup>26</sup>

A claim for rent must be proved to entitle it to the priority accorded it by the state law.<sup>27</sup> The priority, if any, is only over claims not specified in section 64 as being higher in right.<sup>28</sup> The claim of the lessee of a hotel, who had assigned the lease to the bankrupt, for rent due prior to the filing of the petition has been held not entitled to priority over a claim for the expense

22—*In re Abrams*, 200 Fed. 1005, 29 A. B. R. 590; *Wilson v. Penn. Trust Co.*, 114 Fed. 742, 8 A. B. R. 169.

23—*In re Abrams*, 200 Fed. 1005, 29 A. B. R. 590; *In re Winfield Mfg. Co.*, 140 Fed. 185, 15 A. B. R. 257; *In re Jefferson*, 1 N. B. N. 288, 93 Fed. 948, 2 A. B. R. 206; *In re Gerson*, 1 N. B. N. 315, 2 A. B. R. 170; *In re Cronson*, 1 N. B. N. 474; *In re Shilladay*, 1 N. B. N. 475; *In re Byrne*, 2 N. B. N. R. 247, 97 Fed. 762, 3 A. B. R. 268; *In re Falls City Shirt Mfg. Co.*, 1 N. B. N. 565, 98 Fed. 592, 3 A. B. R. 437. *Contra*, as to after accruing rent, *In re Goldstein*, 1 N. B. N. 422, 2 A. B. R. 603; see also *In re Ruppel*, 2 N. B. N. R. 88, 97 Fed. 778, 3 A. B. R. 233; *In re Butler*, 6 N. B. R. 501, Fed. Cas. No. 2236; *In re Merrifield*, 3 N. B. R. 25, Fed. Cas. No. 9465; *In re Hamburger*, 12 N. B. R. 277, Fed. Cas. No. 5975; *Austin v. O'Reilly*, 12 N. B. R. 329, 2 Woods 670, Fed. Cas. No. 665; s. c. 8 N. B. R. 129, Fed. Cas. No. 664; *In re Hoagland*, 18 N. B. R. 530, Fed. Cas. No. 6545; *Longstreth v. Pennock*, 12 N. B. R. 95, 20 Wall. 575, 22 L. ed. 451; *In re McConnell*, 9 N. B. R. 387, Fed. Cas. No. 8712; *Barnes' Appeal*, 13 N. B. R. 543; but see *In re Joslyn*, 3 N. B. R.

118, 2 Biss. 235, Fed. Cas. No. 7550; *In re Lucius Hart Mfg. Co.*, 17 N. B. R. 459, Fed. Cas. No. 8592. *Contra*, *In re Pittsburg Drug Co.*, 164 Fed. 482, 20 A. B. R. 227.

Under a lease providing that whole rent for unexpired term becomes due upon bankruptcy, a claim for rent for unexpired term is provable and entitled to priority where landlord does not re-enter. *In re Keith-Gara Co.*, 203 Fed. 585, 29 A. B. R. 466.

24—*In re Abrams*, 200 Fed. 1005, 29 A. B. R. 590; *Wilson v. Penn. Trust Co.*, 114 Fed. 742, 8 A. B. R. 169. See also *ante*, § 1366.

25—*In re Chaudron & Peyton*, 180 Fed. 841, 24 A. B. R. 811; *In re Myers*, 2 N. B. R. 860, 1049, 102 Fed. 869, 4 A. B. R. 536; *In re Frankel*, 2 N. B. N. R. 840.

26—*McCann v. Evans*, 185 Fed. 93, 26 A. B. R. 47. But see *In re O'Malley & Glynn*, 191 Fed. 999, 27 A. B. R. 143.

27—*In re Hayward*, 130 Fed. 720, 12 A. B. R. 264.

28—*In re Consumers' Coffee Co.*, 151 Fed. 933, 18 A. B. R. 500; *In re Sunseri*, 3 N. B. N. R. 65.



of operating the hotel after bankruptcy, where the lessee had not reserved the right of distress.<sup>29</sup>

If the landlord has a lien on the goods and chattels for rent, this will be enforced against the proceeds of the sale by the trustee,<sup>30</sup> though it has been held that this would not extend to the proceeds of a license to sell liquors on such premises.<sup>31</sup>

By accepting the surrender of the premises or re-entering the premises the landlord may waive his right to priority given by the lease or by the state law.<sup>32</sup>

### § 1393. — Priority between residents and nonresidents.

A statute giving claims of resident creditors priority over those of foreign corporations in the distribution of the assets of an insolvent foreign corporation is constitutional.<sup>33</sup>

Under the laws of New York, the proceeds of securities deposited by a bankrupt banker with the state comptroller are distributable among such of its creditors as transacted business with the bankrupt through its offices located within the state.<sup>34</sup>

### § 1394. — Debts due state or municipality or its officers.

The bankrupt law makes no specific provision for debts due to states, counties or municipalities, other than as taxes, but any other debts, if entitled to priority under a state law, are entitled to like priority under the bankrupt law,<sup>35</sup> but not other-

29—In re Bayley, 177 Fed. 522, 22 A. B. R. 249.

30—Longstreth v. Pennock, 12 N. B. R. 95; In re Mitchell, 116 Fed. 87, 8 A. B. R. 324.

31—In re Myers, 2 N. B. N. R. 1049.

32—In re Winfield Mfg. Co., 137 Fed. 984, 15 A. B. R. 24.

Landlord's claim for rent after petition not provable nor entitled to priority where landlord re-entered, and this though state law provided that landlord was entitled to preferred claim for one year's rent although taking possession before rent is due. South Side Trust Co. v. Watson, 200 Fed. 50, 29 A. B. R. 446.

33—In re Standard Oak Veneer Co., 173 Fed. 103, 22 A. B. R. 883.

34—In re Rosett, 204 Fed. 431, 30 A. B. R. 309, aff'g 203 Fed. 67, 29 A. B. R. 341.

35—In re Mercer, 171 Fed. 81, 22 A. B. R. 413, aff'g 166 Fed. 576, 22 A. B. R. 167; In re Wright, 1 N. B. N. 428, 95 Fed. 807, 2 A. B. R. 592; see also In re Dodge, 4 Dill. 532, Fed. Cas. No. 3949; In re Miller, 17 N. B. R. 402, 10 Ben. 58, Fed. Cas. No. 9401; In re Southwestern Car Co., 19 N. B. R. 404, Fed. Cas. No. 13192; In re Chamberlain, 17 N. B. R. 49, 9 Ben. 149, Fed. Cas. No. 2580. Contra, In re Corn Ex. Bank, 15 N. B. R. 431, 7 Biss. 400, Fed. Cas. No. 3242, rev'g 15 N. B. R. 212, Fed. Cas. No. 3243; Gardner v. Cook, 7 N. B. R. 346, Fed. Cas. No. 5226; In re Williams, 2 N. B. R. 79, Fed. Cas. No. 17705; see In re Jenks, 15 N. B. R. 301, Fed. Cas. No. 7276; Ex parte Holmes, 14 N. B. R. 493, Fed. Cas. No. 6631.

wise.<sup>36</sup> A judgment in favor of a state against a surety on a bail bond given for the appearance of a person indicted for a crime; <sup>37</sup> is entitled to priority under the bankruptcy act, if given priority under the state law, as is the claim of a county for the labor of prisoners.<sup>38</sup> Where bonds illegally issued by a city were sold by the bankrupt and the proceeds applied to the establishment of a building for a factory upon which the city was given a mortgage, it was held that the city was not entitled to priority.<sup>39</sup>

The claim of a public officer based on a deposit of public money with an insolvent bank is not entitled to a preference over the claims of other creditors.<sup>40</sup>

### § 1395. — Claims of stockholders.

The rights of innocent general creditors of a bankrupt corporation are superior to those of the stockholders thereof who have been induced through fraud to subscribe to the corporate stock, and their claims are entitled to priority.<sup>41</sup> The holders of preferred stock are not creditors and a provision in a stock certificate which provides that in case of the distribution of the assets of the corporation a certain amount per share shall first be paid to such preferred stockholders, though valid as against holders of common stock, is not valid as to creditors, it being void as to them on ground of public policy.<sup>42</sup>

### § 1396. — Claims based on ultra vires contract.

One whose claim is based on the debt of the bankrupt in excess of the amount of indebtedness which it is authorized to incur will not be postponed to other creditors where it appears that, after the debt was incurred, the bankrupt amended its articles of incorporation so as to increase the amount of indebtedness it was authorized to incur to an amount in excess of its debts then existing, thereby validating its entire indebtedness.<sup>43</sup>

36—In re Devlin, 180 Fed. 170, 24 A. B. R. 863; Six Penny Sav. Bank v. Est. Stuyvesant Bank, 10 N. B. R. 142; 12 Blatch. 179, Fed. Cas. No. 12919; s. c. 9 N. B. R. 318.

37—In re Chamberlain, 17 N. B. R. 50, 9 Ben. 149, Fed. Cas. No. 2580.

38—In re Worcester County, 102 Fed. 808, 4 A. B. R. 497.

39—In re Manistee Watch Co., 197 Fed. 455, 28 A. B. R. 316.

40—In re Smart, 136 Fed. 974, 14 A. B. R. 672. See In re Salmon & Salmon, 145 Fed. 649, 16 A. B. R. 623.

41—Scott v. Abbott, 160 Fed. 573, 20 A. B. R. 335.

42—Spencer v. Smith, 201 Fed. 647, 29 A. B. R. 120.

43—In re Benedict Tea & Coffee Co., 192 Fed. 1011, 27 A. B. R. 409.

**§ 1397. — Claims of United States.**

The present law as the act of 1867, specifically provides that taxes due the federal, state or municipal governments shall be entitled to priority of payment, but, unlike the former, the present law so far as the government is concerned provides for priority of taxes only. The courts have generally held that this provision was not to be considered as superseding, or in anywise limiting, sections 3466 and 3467 of the Revised Statutes, but was to be construed as supplementary and in *pari materia*, being inserted in the present law merely to recognize and reaffirm the right which those sections gave to exclude the possibility of a different conclusion.<sup>44</sup> This construction was, however, expressly disapproved by the supreme court in a recent decision,<sup>45</sup> in which a labor claim was awarded priority over a debt due the United States. It was there said, "By the statute of 1797 (now section 3466) and section 5101 of the Revised Statutes, all debts due to the United States were expressly given priority to the wages due any operative, clerk, or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality.' These were civil obligations, not personal conventions, and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

The decision of the supreme court necessarily renders inoperative the various decisions as to the necessity of proving a claim

44—*In re Stoeper*, 127 Fed. 394, 11 A. B. R. 345; *Title Guaranty & Surety Co. v. Guarantee Title & Trust Co.*, 174 Fed. 385, 23 A. B. R. 340, *rev'g* 22 A. B. R. 851.

45—*Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 56 L. ed. 706, 27 A. B. R. 873, *rev'g* 174 Fed. 385, 23 A. B. R. 340.

of the United States,<sup>46</sup> and as to its right to priority in particular cases,<sup>47</sup> and the liability for ignoring its alleged priority.<sup>48</sup>

Under the present law the trustee is obliged to pay all taxes due and owing, without distinction between the United States and the state, county, district or municipality.<sup>49</sup>

### § 1398. — Unrecorded liens.

The validity and priority of an unrecorded lien is a question of local law.<sup>50</sup> The creditors against whom an unrecorded lien is void are entitled to priority as against the person holding the lien and creditors as to whom the lien is valid, and the person holding such lien is in turn entitled to priority over the creditors as to whom his lien is valid.<sup>51</sup>

It has been held that creditors whose claims arose subsequent to the date of an unrecorded conditional sale contract which has been successfully attacked by the trustee are not entitled to any priority.<sup>52</sup> When the priority to which a mortgage is entitled

46—In re Stoeve, 127 Fed. 394, 11 A. B. R. 345; U. S. v. Barnes, 31 Fed. 705; In re Huddell, 47 Fed. 206; Lewis v. United States, 92 U. S. (2 Otto) 618, 23 L. ed. 513.

47—U. S. v. Barnes, 31 Fed. 705; Field v. U. S., 9 Pet. 182; Howe v. Sheppard, 2 Sumner 133; U. S. v. Bank of N. Carolina, 6 Pet. 29; In re Rosey, 8 N. B. R. 509, 6 Ben. 507, Fed. Cas. No. 12066; Barnes v. U. S., 12 N. B. R. 526, Fed. Cas. No. 1023; In re Vetterlein, 20 Fed. 109; U. S. v. Lewis, Fed. Cas. No. 15595; see Strassburger, Fed. Cas. No. 13526; but see In re Webb, 2 N. B. R. 183, Fed. Cas. No. 17313; In re Kirkland, 14 N. B. R. 139, 2 Hughes 208, Fed. Cas. No. 7843; but see Kerr v. Hamilton, Fed. Cas. No. 7731; In re McBride, Fed. Cas. No. 9682; but see Wilkinson v. Babbitt, Fed. Cas. 17668; Lewis v. U. S., 92 U. S. (2 Otto) 618, 23 L. ed. 513; U. S. v. Griswold, 8 Fed. 496; Cottrell v. Pierson, 12 Fed. 805.

48—U. S. v. Barnes, 31 Fed. 705; U. S. v. Kirkpatrick, 9 Wheat. 720; 735, 6 L. ed. 199; Cooke v. U. S., 91 U. S. (1 Otto) 389, 23 L. ed. 237; Hart v. U. S., 95 U. S. (5 Otto) 316, 24 L. ed. 479; U. S. v. Murphy, 15 Fed. 589;

U. S. v. Barnes, 31 Fed. 705; Field v. U. S., 9 Pet. 182; U. S. v. Murphy, 15 Fed. 589.

49—New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, 17 A. B. R. 63, rev'g 137 Fed. 858, 14 A. B. R. 604.

50—In re Andrae Co., 117 Fed. 561, 9 A. B. R. 135.

51—In re Ducker, 134 Fed. 43, 13 A. B. R. 760. But see In re Ottenwess & Huxoll, 193 Fed. 851, 27 A. B. R. 579.

Creditor holding unrecorded lien held not to have lost priority over simple subsequent creditors by failure to promptly record deed of trust or to secure prompt payment of interest coupons attached to bonds. In re Charles Town L. & P. Co., 199 Fed. 846, 29 A. B. R. 721.

Lien of unrecorded chattel mortgage of shifting stock of goods held not enforceable as against subsequent creditors becoming such prior to the recordation of the mortgage. In re Jacobson & Perrill, 200 Fed. 812, 29 A. B. R. 603; Clayton v. Exchange Bank of Macon, 121 Fed. 630, 10 A. B. R. 173.

52—In re Farmers Co-operative Co.

is claimed for a lease, or other contract, on the ground that by its terms, it is in the nature of a mortgage, it must appear that the requirements of the registration laws have been fulfilled as fully as if the instrument were a mortgage.<sup>53</sup>

### § 1399. — Claims of unpaid vendor.

While ordinarily an unpaid vendor may be entitled to priority in the proceeds of the land conveyed, the rule is not absolute.<sup>54</sup> An unpaid vendor of personal property, whose contract of conditional sale has been held void as to the trustee, may, nevertheless, participate in the estate equally with the other creditors.<sup>55</sup>

In the absence of any agreement as between the vendor in a conditional sale of personal property and the bondholders or mortgagees under a mortgage having an after-acquired property clause, the true test of determining whether the lien of the conditional sale contract is inferior to the lien of the mortgagee is whether the personal property has been so attached to the real property mortgaged as to become a part of the realty.<sup>56</sup>

### § 1400. — Claims of bankrupt's wife.

If the bankrupt's debt to his wife is bona fide and established by proof, she is to be neither postponed nor preferred to other creditors simply because of the marital relation.<sup>57</sup>

### § 1401. — Claims against community property.

In states where the husband has only a community interest in property acquired by himself and wife during their marriage, creditors of the husband who were such prior to his marriage, are entitled to a preference in the distribution of community property as against the individual creditors of the bankrupt husband.<sup>58</sup>

of Barlow, 202 Fed. 1008, 30 A. B. R. 190.

53—In re Dyke, 9 N. B. R. 430, Fed. Cas. No. 4227.

54—Unpaid vendor, who at the time of the conveyance to bankrupt corporation, was an officer thereof, held not entitled to priority. *Bernard v. Lea*, 210 Fed. 583, 31 A. B. R. 436.

55—*Becker Co. v. Gill*, 206 Fed. 36, 30 A. B. R. 429.

56—*Nat. Bank of Commerce v. Carbondale Machine Co.*, 195 Fed. 180, 27 A. B. R. 840.

57—*Savage v. Savage*, 141 Fed. 346, 3 L. R. A. (N. S.) 923, 15 A. B. R. 599, certiorari denied 201 U. S. 646, 50 L. ed. 904. See *In re Strauch*, 208 Fed. 842, 31 A. B. R. 36.

58—*In re Chavez*, 149 Fed. 73, 17 A. B. R. 641.

**§ 1402. Waiver of priority.**

The right of a creditor to priority of payment in the distribution of the estate may be waived by some act inconsistent with the continuance of such right;<sup>59</sup> as where creditors claiming money as the proceeds of collections made on their behalf stand silent while such money is paid out in dividends, of the payment of which they had notice;<sup>60</sup> or where a creditor, having a lien for goods sold the bankrupt, did not ask that the goods furnished be sold separately, when all the bankrupt's property was sold, although such creditor had notice of the sale, and where there was no evidence as to the price which such creditor's goods brought,<sup>61</sup> or if the creditor sues the trustees for damages.<sup>62</sup> But there is no waiver where the original pledgee has no knowledge that his stock has been repledged by the bankrupt, until after he had filed his claim as a preferred creditor.<sup>63</sup>

A claim having been proved within the year allowed by the act, it may be given the preference to which it is entitled under the state law, although no claim of preference is made until after the expiration of the year.<sup>64</sup> So, the fact that a preferred creditor inadvertently votes as a general creditor at the election of a trustee without any declaration of an intention to surrender his priority does not constitute a waiver of his right to priority.<sup>65</sup>

**§ 1403. Marshalling of assets.**

Where there are two classes of creditors having a common debtor, who has several funds, and one class can resort to all funds and the other to but part, the former take payment out of the fund to which they can resort exclusively; if the former resort to the fund common to both classes, to the loss of the latter, the latter are subrogated to the extent of such loss to the place of the former.<sup>66</sup>

Marshalling in partnership cases, see post section 1440.

59—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689.

60—Claffin v. Eason, 1 N. B. N. 360, 2 A. B. R. 263.

61—In re Klapholz, 113 Fed. 1002, 7 A. B. R. 703.

62—In re Oberhoffer, 17 N. B. R. 546, 9 Ben. 485, Fed. Cas. No. 10396.

63—In re Hutchinson, 113 Fed. 202, 8 A. B. R. 20.

64—In re Ashland Steel Co., 168 Fed. 679, 21 A. B. R. 834.

65—In re Ashland Steel Co., 168 Fed. 679, 21 A. B. R. 834.

66—In re Foot, 12 N. B. R. 337, 8 Ben. 228, Fed. Cas. No. 4906; In re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2115.

**§ 1404. Priority in proceeds of property fraudulently transferred.**

The lien of a preferential or fraudulent transfer void under the provisions of the act is discharged by the adjudication and the transferee is not entitled to any preference in the distribution of the bankrupt's estate.<sup>67</sup> The proceeds of property which has been fraudulently or preferentially transferred by the bankrupt should be distributed among all creditors including those who were not creditors at the time of the transfer,<sup>68</sup> as well as the fraudulent grantee if he has a provable claim, and this though the suit by the trustee resulting in the setting aside of the fraudulent conveyance was brought under section 70e as a representative of creditors and not as trustee in bankruptcy.<sup>69</sup> The fact that a conveyance by the bankrupt is void only as to certain creditors and that such creditors instituted a suit to set aside such conveyance does not entitle them to priority out of the proceeds of such suit where their suit was commenced within four months prior to bankruptcy.<sup>70</sup> The bankruptcy court is not bound by a judgment of the state court providing a rule of distribution of the proceeds of a suit commenced therein within four months of bankruptcy.<sup>71</sup>

An infant who has made advances to the bankrupt and taken a preferential bill of sale in settlement thereof cannot, by rescinding the bill of sale, become entitled to priority in payment.<sup>72</sup>

**§ 1405. Procedure to obtain priority.**

A referee may entertain a motion for priority of claim of the funds in the hands of the trustee without proof of claim being filed in regular form.<sup>73</sup> Priority need not be claimed in the peti-

67—Rouse v. Ottenwess & Huxall, 31 A. B. R. 115.

68—In re Kohler, 159 Fed. 871, 20 A. B. R. 89. See In re Farmers Cooperative Co. of Barlow, 202 Fed. 1008, 30 A. B. R. 190.

69—Washington v. Tearney, 194 Fed. 830, 27 A. B. R. 651, aff'g In re Hurst, 188 Fed. 707, 26 A. B. R. 781. See also Maxwell v. McDaniels, 195 Fed. 426, 27 A. B. R. 692.

Claim of fraudulent transferee who after suit has been commenced against

him returns property transferred to him may be postponed to claims of other creditors. Contra, In re Wenatchee Heights Orchard Co., 212 Fed. 787, 31 A. B. R. 550.

70—Martin v. Globe Bank & Trust Co., 193 Fed. 841, 27 A. B. R. 545.

71—Martin v. Globe Bank & Trust Co., 193 Fed. 841, 27 A. B. R. 545.

72—In re Huntenberg, 153 Fed. 768, 18 A. B. R. 697.

73—In re Bellevue Pipe & Foundry Co., 22 A. B. R. 97.

tion for the proof of claim, but may be asserted at any time, in connection with or before the payment of dividends. The burden is upon the claimant to establish his right to priority.<sup>74</sup> Allegations in the proofs of claim as to priority are not to be taken as *prima facie* true for the purpose of establishing the priority.<sup>75</sup>

74—In re Metropolitan Jewelry Co., 216 Fed. 384, 31 A. B. R. 750, 751; In re Crown Point Brush Co., 200 Fed. 882, 29 A. B. R. 638.

75—In re Jones, 151 Fed. 108, 18 A. B. R. 206.



## CHAPTER XXXIII

### DISTRIBUTION AND CLOSING OF ESTATE

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## § 1406. Dividends.

### § 1407. — In general.

Section 65a provides that "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."<sup>1</sup>

A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion.<sup>2</sup> This section expressly excepts claims which have priority or are secured from those on which the dividends of an equal per centum are to be paid; that is, leaves them to be first paid in full. The debts entitled to priority of payment are defined,<sup>3</sup> as are also the secured claims which the law recognizes.<sup>4</sup> Provision is also<sup>5</sup> made for ascertaining the value of the security and that a dividend shall be paid only on the unpaid balance of the claim, as on other unsecured debts.<sup>6</sup> Hence a dividend, that is less than the whole, is not declared, or paid, on a secured claim,<sup>7</sup> nor on a claim entitled to priority,<sup>8</sup> unless the assets applicable to debts of one class entitled to equal priority are not sufficient to pay them in full, but only upon an unsecured claim.<sup>9</sup> If the security is enforced by the aid of the bankruptcy court, whether voluntarily or involuntarily, the amount paid the secured creditor would

1—Analogous provision of Act of 1867. "Sec. 27. . . . That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: Provided, That any debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such

debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct."

2—In re Barber, 1 N. B. N. 559, 1 A. B. R. 307, 97 Fed. 547.

3—Section 64, Act of 1898.

4—Section 67, Act of 1898.

5—Section 57h, Act of 1898.

6—In re Rhoads, 2 N. B. N. R. 178.

7—In re Ft. Wayne Electric Corp., 1 N. B. N. 356, 1 A. B. R. 706, 94 Fed. 109.

8—In re Sabine, 1 N. B. N. 312, 1 A. B. R. 322; In re Fielding, 2 N. B. N. R. 735, 3 A. B. R. 135, 96 Fed. 800; In re Muhlhäuser Co., 9 A. B. R. 80.

9—In re Ft. Wayne Electric Co., 1 N. B. N. 356, 94 Fed. 109, 1 A. B. R. 706.

be considered a dividend.<sup>10</sup> This is the prevailing and apparently correct view since the act very clearly intends that, if the assets are sufficient, the secured claims and those entitled to priority shall be paid in full seriatim, before the question of a "dividend" of equal per centum can arise at all.<sup>11</sup>

It is maintained, however, that this section does not define dividend, but merely provides that an equal per centum except as to secured claims and those entitled to priority, which are elsewhere required to be paid in full if there are sufficient assets, shall be paid on all allowed claims. The exception refers to the equality, not to the dividend. By reference to the definition of dividend in Bouvier's Law Dictionary and the act of 1867, the conclusion is reached that dividend refers to the portion of the estate assigned to a creditor, which is required by this section to be at an equal per centum on those claims not entitled to priority or secured, although the term has been held to include also the portions assigned the secured creditor or the creditor entitled to priority.<sup>12</sup>

#### § 1408. — Declaration and payment.

Referees are required to declare dividends and prepare and deliver to the trustees dividend sheets showing the dividends declared and to whom payable, and they must be paid within ten days thereafter;<sup>13</sup> but in making such declaration they should withhold funds sufficient to pay all expenses and priorities. Creditors must have at least ten days' notice by mail of the declaration and time of payment of dividends,<sup>14</sup> and if, after such notice, they stand silently by and see money claimed to be theirs used to pay dividends, they will not be heard afterwards to claim it.<sup>15</sup> The meeting for the declaration of a dividend should be combined with that for its payment; and, if there is to be only one dividend, the final meeting can and should, in proper cases, be combined with such dividend meetings.<sup>16</sup>

10—In re Barber, 1 N. B. N. 559, 3 A. B. R. 307, 97 Fed. 547; In re Sabine, 1 N. B. N. 312, 1 A. B. R. 322; In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

11—In re Fielding, 2 N. B. N. R. 735, 96 Fed. 800, 3 A. B. R. 135.

12—In re Gerson, 1 N. B. N. 384, 2 A. B. R. 352.

13—Section 39 (1), 47a (9), Act of 1898.

14—Section 58a, Act of 1898.

15—Claffin v. Eason, 1 N. B. N. 360, 2 A. B. R. 263.

16—In re Smith, 2 A. B. R. 648, 1 N. B. N. 404.

### § 1409. — Time of declaring.

“The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.”<sup>17</sup>

The final dividend may be declared and the final report of the trustee approved at any time after the expiration of three months from the time of the first dividend, if the other conditions are present showing the estate to be apparently ready for final accounting, notwithstanding some of the creditors whose claims are scheduled have not proved them and the time for proving claims has not expired.<sup>18</sup> An application for such purpose should, however, be only upon an order to show cause, or other sufficient notice to all persons scheduled or appearing in any way in the proceedings as creditors, giving them an opportunity to

17—Section 65b, Act of 1898.

Subdivision “b” was amended by the Act of February 5, 1903, by the substitution of the matter in the text for the following, which appeared in the Act of 1898: “The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten

per centum or more and upon closing the estate. Dividends may be declared oftener and in small proportions if the judge shall so order.”

Analogous provision of Act of 1867. “Sec. 28. . . . The court shall thereupon [on the discharge of the assignee] order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts.”

18—In re Coulter, 206 Fed. 906, 30 A. B. R. 75; In re Bell Piano Co., 155 Fed. 272, 18 A. B. R. 183.

know not only of the dividend but notifying them that their claims should be proven, or their rights lost.<sup>19</sup>

### § 1410. — Notice.

At least ten days' notice must be given of the declaration and time of the payment of dividends. The form of such notice is prescribed by the supreme court.<sup>20</sup>

### § 1411. — Who entitled to.

The condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors to share in the estate. The filing of the petition vests in each creditor an equitable estate in such a proportion of the bankrupt's property as the creditor's claim bears to the entire amount of provable claims.<sup>21</sup> Only those creditors whose claims have been proved and allowed before the dividend is declared can participate in the dividends derived from the bankrupt's estate,<sup>22</sup> and they will be permitted to participate as long as there is anything to distribute;<sup>23</sup> but where the claims have been withdrawn for amendment by permission, they are to be taken into account.<sup>24</sup> Plaintiffs in a replevin suit against an assignee under a voluntary assignment are entitled to a dividend from the estate of bankrupt assignor on the difference between their total demand and value of goods replevined;<sup>25</sup> and where A, between whom and bankrupt there were mutual debts, paid, after the filing of petition, a note on which he and bankrupt were each liable for half, he cannot set off such payment, but should pay the trustee the difference on the mutual account, and receive a dividend on the payment of half of the note.<sup>26</sup>

If a bankrupt's estate is sufficient to pay the claims of all unpreferred creditors in full and leave a surplus, the preferred creditors are entitled to a dividend out of the surplus without

19—In re Eldred, 155 Fed. 686, 19 A. B. R. 52.

20—Official Form No. 41, § 1744, *post*.

21—Board of County Com'rs v. Hurley, 169 Fed. 92, 22 A. B. R. 209.

22—In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 Fed. 550.

23—In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9337.

24—In re Scott, 1 N. B. N. 353, 2 A. B. R. 324, 96 Fed. 607.

25—In re Wilcox, 1 N. B. N. 188, 1 A. B. R. 544.

26—In re Bingham, 1 N. B. N. 351, 2 A. B. R. 223, 94 Fed. 796.

surrendering their preference, as against the claim of the bankrupt to such surplus.<sup>27</sup>

It has been held that the trustee of a bankrupt corporation, who has proved his debt as a creditor against such corporation, is entitled to a dividend notwithstanding that he is liable individually for such corporation's debts;<sup>28</sup> and a creditor, who has proved a debt against bankrupt's estate on an indorsed note of bankrupt's and has afterwards received a portion thereof from the indorser and released him from further liability, is entitled to a dividend on the whole amount;<sup>29</sup> but, where the note was indorsed by the bankrupt and the partial payment made by the maker, the creditor is entitled to a dividend on the balance only;<sup>30</sup> and a foreign creditor, who had realized on a judgment and levy subsequent to the adjudication, must account to the trustee for the sum realized and can only have a dividend on the original debt.<sup>31</sup> Anything tending to defeat equality among the creditors is in fraud of the act.<sup>32</sup>

Preferences must be surrendered before a creditor can receive a dividend.<sup>33</sup>

A creditor who has surrendered an illegal preference given him by the bankrupt and has proved his claim is entitled to share on an equal basis with the general creditors.<sup>34</sup> So a creditor's fraud in taking and concealing a conveyance from the bankrupt which is subsequently set aside does not preclude him from participating in the distribution of the proceeds arising from the sale of the property as to a debt in no way involved in the fraudulent conveyance.<sup>35</sup>

A creditor who has received a preference should be permitted to prove his claim, and after proof thereof, be directed to pay over the amount of the preference with interest less the amount

27—*In re Morton*, 118 Fed. 908, 9 A. B. R. 508.

28—*Bristol v. Sanford*, 13 N. B. R. 78, 12 Blatch. 341, Fed. Cas. No. 1893.

29—*In re Ellerhorst & Co.*, 5 N. B. R. 144, Fed. Cas. No. 4381.

30—*In re Weeks*, 13 N. B. R. 263, 8 Ben. 265, Fed. Cas. No. 17349.

31—*In re Bugbee*, 9 N. B. R. 258, Fed. Cas. No. 2115.

32—*In re Palmer*, 14 N. B. R. 437, 2 Hughes 177, Fed. Cas. No. 10678.

33—Section 57g, Act of 1898; *In re Privett*, 132 Fed. 592, 13 A. B. R. 151.

34—*Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 49 L. ed. 790, 13 A. B. R. 552; *Lacy v. Citizens Bank*, 198 Fed. 484, 28 A. B. R. 433; *In re Elletson Co.*, 193 Fed. 84, 28 A. B. R. 434.

35—*In re Hurst*, 188 Fed. 707, 26 A. B. R. 781; *In re Medina Quarry Co.*, 179 Fed. 929, 24 A. B. R. 769.

of his dividend. So, where the amount of the dividend exceeds the amount of the preference, the creditor should not be compelled to pay the amount of the preference into court, but the same should be deducted from his dividend and only the balance paid him.<sup>36</sup>

A creditor who has received part payment on his claim as a result of a legal priority, cannot be denied further dividends until the general creditors are paid an amount equal to those received by reason of the priority, but may be allowed dividends as a general creditor for the balance.<sup>37</sup>

A creditor receiving a dividend is entitled to retain the same until the order directing the payment thereof is set aside by proceedings directly taken for that purpose.<sup>38</sup>

The bankruptcy court, being a court of equity, may determine equities between creditors entitled to a dividend. Thus, in one case, it was held that an indorsee of bankrupt's note could have determined the amount of the liability of the indorser thereof, who was also a creditor of the estate, and that the court could direct a payment of such amount from dividends due such indorser.<sup>39</sup>

### § 1412. — Who not entitled to.

Creditors who fail to present their claims on or before the day appointed for the declaration of a dividend are not entitled to a dividend to the prejudice of those who have had their claims allowed, but must look to other property of the bankrupt;<sup>40</sup> nor a creditor, who, without legal excuse, omits to prove and file his claim until after the declaration and order of payment of a final dividend, though his claim may be allowed;<sup>41</sup> and, if a creditor include in his claim valid items, and also known illegal items, supporting the whole by a false oath, he is debarred from any dividend;<sup>42</sup> and creditors of a partnership forced into insolvency

36—In re Wright-Dana Hdw. Co., 212 Fed. 397, 31 A. B. R. 816, mod'g 207 Fed. 636, 31 A. B. R. 192.

37—In re Floyd & Bohr Co., 200 Fed. 1016, 29 A. B. R. 149.

38—In re Wilkesbarre Furniture Mfg. Co., 130 Fed. 796, 12 A. B. R. 472.

39—In re Thompson-Breese Co., 30 A. B. R. 105.

40—In re Hegerty, 2 N. B. N. R. 1083; In re Smith, 15 N. B. R. 97, Fed. Cas. No. 12989.

41—In re Hegerty, 2 N. B. N. R. 1083.

42—Marrett v. Atterbury, 11 N. B. R. 225, 3 Dill. 444, Fed. Cas. No. 9102.

under a state law cannot take dividends, to the prejudice of creditors whose claims arose after the commencement of such insolvency proceedings, against one of the partners who started a new business and was thrown into bankruptcy.<sup>43</sup>

A stockholder of the bankrupt owing a balance on his stock cannot share in a dividend until he pays the balance due on his stock, but where such stockholder settles this claim against him by compromise, he may share in the dividend, though the fund on which it is based is made up principally by moneys received from him.<sup>44</sup>

### § 1413. — Dividends in case of single creditor.

When but a single creditor proves his claim, he is entitled to be paid in full, and, if there is a surplus, the same must be applied to the payment of creditors acknowledged by bankrupt to have valid claims,<sup>45</sup> and it has been held that this is true though the claims have not been proved.<sup>46</sup>

### § 1414. — Dividends in case of foreign bankrupt.

“Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.”<sup>47</sup>

The object of this provision is to place creditors of a domestic bankruptcy proceeding upon an equal footing with creditors who have received dividends in a foreign proceeding; but in the event there are no assets in the latter, such creditors would be entitled to share equally with the domestic creditor. If the two proceedings are being conducted simultaneously, and assets are disclosed in the foreign proceeding, a non-resident creditor should be required to resort to the foreign estate first, and then, after the amount of his dividend is ascertained, should be permitted to share in the dividend of the domestic proceeding after

43—In re Bates, 2 N. B. R. 208.

44—In re Standard Dairy & Ice Co.,  
20 A. B. R. 321.

45—In re Haynes, 2 N. B. R. 78, Fed.  
Cas. No. 6269.

46—In re James, 2 N. B. R. 78, Fed.  
Cas. No. 7175.

47—Section 65d, Act of 1898.



the creditors in the latter have received a sum equal to that received by the former in the foreign proceeding.

**§ 1415. — Suspension of payment.**

Where claims have been presented and permission obtained to amend the proofs, enough may be withheld to pay an equal dividend on such suspended claims, but no lien is thereby acquired on such retained funds, nor is the referee bound to apply them on such claims.<sup>48</sup> The trustee may withhold a dividend declared upon the property of a firm until settlement of a suit brought by such trustee against the dividend creditor to recover an amount due a member of said firm;<sup>49</sup> or on the claim of a judgment creditor from which an appeal has been taken before the bankruptcy proceedings until a decision on the appeal;<sup>50</sup> or payment may be withheld on a particular claim where its declaration was unauthorized;<sup>51</sup> or where a dividend is ordered on a claim for professional services rendered the bankrupt, until those interested have an opportunity to apply to vacate said order.<sup>52</sup> The declaration and payment of dividends, when ready, on proved and allowed claims, will not be delayed for unproved claims, nor will the final settlement and closing of an estate be delayed and other creditors kept waiting for their money, to give a negligent creditor further opportunity to get his claim allowed.<sup>53</sup>

**§ 1416. — Claimant's right to collect limited.**

A claimant is not entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of the act.<sup>54</sup>

**§ 1417. — Reduction of dividend due to laches.**

If by his laches the claimant has allowed the estate to be distributed, so that after payment of expenses the fund remaining

48—In re Scott, 1 N. B. N. 353, 2 A. B. R. 324, 96 Fed. 607.

49—Atkinson v. Kellogg, 10 N. B. R. 535, Fed. Cas. No. 613.

50—In re Sheehan, 8 N. B. R. 345, Fed. Cas. No. 12737.

51—In re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6420.

52—In re N. Y. Mail S. S. Co., 3 N. B. R. 73, Fed. Cas. No. 10212.

53—In re Stein, 1 N. B. N. 339, 1 A. B. R. 662, 94 Fed. 124.

54—Section 65e, Act of 1898.

will be insufficient to cover his claim, the amount which he can receive must be reduced accordingly.<sup>55</sup>

### § 1418. — Interest.

Where there is a surplus after the payment of all proved claims with interest thereon up to the date of the filing of the petition, the same should be applied to the payment of interest after such date, and only the balance remaining after such payment returned to the bankrupt.<sup>56</sup> Allowed claims are to be treated as judgments and interest should be allowed thereon from the date of the allowance though no interest was recoverable under the contract upon which the claim was based.<sup>57</sup> Where mortgaged or pledged property is ample, interest may be allowed on the debt, to the date of the final decree of distribution,<sup>58</sup> and rents and profits collected from mortgaged property may be ordered applied to the unpaid interest upon the mortgage.<sup>59</sup> Taxes carry interest up to the time of payment.<sup>60</sup> Where a claim was sustained on re-examination after objection by a trustee to its proof, the creditor was held entitled to interest on the withheld dividend.<sup>61</sup>

### § 1419. — Setting aside and recovery of dividend by trustee.

A dividend once declared will not be disturbed except for some error or other good cause,<sup>62</sup> but whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the dividend paid, if rejected in whole, or the proportional part, if rejected in part.<sup>63</sup>

55—In re Wilcox & Co., 155 Fed. 704, 19 A. B. R. 91.

56—Johnson v. Norris, 190 Fed. 459, 27 A. B. R. 107; In re Hagan, 10 N. B. R. 383, 6 Ben. 407, Fed. Cas. No. 5898; In re Bank of North Carolina, 12 N. B. R. 130, Fed. Cas. No. 895; In re Town, 8 N. B. R. 40, Fed. Cas. No. 14112.

57—In re Osborne's Sons & Co., 177 Fed. 184, 29 L. R. A. (N. S.) 887, 24 A. B. R. 65.

58—Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513; In re Stevens, 173 Fed. 842, 23

A. B. R. 239; In re Allert, 173 Fed. 691, 23 A. B. R. 101.

59—In re Industrial Cold Storage & Ice Co., 163 Fed. 390, 20 A. B. R. 904.

60—In re Schuyler & Co., 21 A. B. R. 428; In re Kallak, 147 Fed. 276, 17 A. B. R. 414. Contra, In re Fisher & Co., 148 Fed. 907, 17 A. B. R. 404, aff'g 153 Fed. 281, 18 A. B. R. 503.

61—In re Kitzinger, 19 N. B. R. 307, Fed. Cas. No. 7863.

62—In re Smith, 15 N. B. R. 97, Fed. Cas. No. 12989.

63—Section 571, Act of 1898.

A dividend paid to the wrong claimant by mistake may be recovered by the trustee,<sup>64</sup> and a creditor who through mistake has been overpaid may be directed to pay the amount of the overpayment to another creditor to whom it rightfully belongs.<sup>65</sup>

**§ 1420'. — Dividends unaffected by subsequent allowances.**

"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends."<sup>66</sup>

The object of this provision is to give each creditor who proves his claim and has it allowed within the year an equal proportion of his claim with those who have previously received dividends, provided that at the time of the declaration and payment of any dividend, there is enough to pay creditors, who have come in since the last preceding dividend, an amount equal to what the others have previously received; and, if there is not enough to do so, the whole is paid on account to the latter creditors; and this process is continued until each successive batch of creditors, who came in between dividends, are made equal with those preceding them; and, only when this has been done, is a further dividend paid to the first batch of creditors. Since the final dividend is not declared until the estate has been completely administered, as a rule, there is nothing out of which creditors whose claims have been proved and allowed subsequent to the declarations of such dividend can be paid, so that, as a penalty for their laches, such dilatory creditors will receive nothing, unless further funds should come into the trustee's hands.<sup>67</sup>

64—In re Dunlap Carpet Co., 206 Fed. 726, 30 A. B. R. 664.

65—In re Thompson-Breese Co., 30 A. B. R. 105.

66—Section 65c, Act of 1898.

Analogous provision of Act of 1867.

"Sec. 28. . . . No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such

debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter."

67—In re Hegerty, 2 N. B. N. R. 1083; In re Miller, Fed. Cas. No. 9556; In re Hovey, 8 Fed. 314, aff'g 5 Fed. 356; In re Swift, 106 Fed. 65, 3 N. B. N. R. 271, 5 A. B. R. 415.

### § 1421. — Unclaimed dividends.

Section 66a of the act provides that "Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into the court." Instead of permitting the unclaimed dividends to be indefinitely tied up, as was the case under the act of 1867, and perhaps ultimately inuring to the benefit of the depository in which held, pending a claimant therefor, this section provides a determinate period for making claim, after which such dividends are to be distributed to the creditors who have not been paid in full, and the surplus given the bankrupt.<sup>68</sup> Under the act of 1867 it was held that amounts remaining in the hands of the assignee, after discharge of a bankrupt against whose estate no debts were proved, if there was reasonable cause to believe none would be proved, upon proper petition, would be paid to the bankrupt, which would probably be the rule adopted now without reference to the subdivision b of the same section.<sup>69</sup>

"Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt; provided, that in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends."<sup>70</sup>

### § 1422. — Attachment or garnishment of dividends.

The distribution of the assets of a bankrupt cannot be interfered with by attachment, garnishment or any process of a state court.<sup>71</sup>

### § 1423. Disposition of property on setting aside composition or discharge.

"In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bank-

68—See *In re Fielding*, 2 N. B. N. R. 735, 3 A. B. R. 135, 96 Fed. 800.

69—*In re Hoyt*, 3 N. B. R. 13, Fed. Cas. No. 6806, citing *In re James*, 2 N. B. R. 78, Fed. Cas. No. 7175; *In re Haynes*, 2 N. B. R. 78, Fed. Cas. No. 6269.

70—Section 66b, Act of 1898.

71—*In re American Elec. Tel. Co.*, 211 Fed. 88, 31 A. B. R. 612; *In re Thompson-Breese Co.*, 30 A. B. R. 105; *In re Argonaut Shoe Co.*, 187 Fed. 784, 26 A. B. R. 584; *In re Bridgeman*, 2 N. B. R. 84, Fed. Cas. No. 1867.

rupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.' ' 72

Two classes of creditors arise where a confirmation of a composition is set aside or a discharge revoked, i. e., those whose claims accrued prior and those subsequent to the confirmation or discharge. The latter class, acting in good faith on the strength of the confirmation or discharge, give new credit to the debtor, and the purpose of this provision is to permit the application of the subsequently acquired property, together with the estate at the time the composition was confirmed or the adjudication was made, to the payment in full of such claim to the exclusion of those antedating such confirmation or discharge. The residue of the estate, if any, after the payment of such claims, should be applied to the payment of the debts which accrued prior to the adjudication. The purpose of this provision is self-evident. It is only by placing this sanctity upon the adjudication that it will cause full faith and credit to be given it. It permits the transaction of business with persons who have been discharged or who have entered into a composition with creditors, without fear as to the title they may convey, and without fear of loss.

#### § 1424. Exceptions to scheme of distribution.

Exceptions to a proposed scheme of distribution should be filed before the final decree of confirmation is entered and cannot be considered without special allowance if they are filed afterwards.<sup>73</sup>

#### § 1425. Filing and settlement of accounts.

The regular notice of ten days must be given of the filing and settlement of accounts, and the time when and place where they will be examined and passed upon.<sup>74</sup>

72—Section 64c, Act of 1898.

74—In re Stein, 1 N. B. N. 339, 1 A.

73—In re Heebner, 132 Fed. 1003, 13 A. B. R. 256.

B. R. 662, 94 Fed. 124; In re Bustey, 3 N. B. R. 167, Fed. Cas. No. 2227.

### § 1426. Payment of liens out of wrong fund.

Where liens are paid out of the wrong fund the court may recharge, and fix them where they properly belong.<sup>75</sup>

### § 1427. Reopening the estate.

#### § 1428. — In general.

The court or the referee,<sup>76</sup> may, in its discretion, reopen an estate whenever it appears that it was closed before being fully administered.<sup>77</sup> This may be done upon a showing at an ex parte hearing before the referee.<sup>78</sup> The pendency of a petition to set aside a composition does not operate to prohibit the referee from exercising his right independently of, or in conjunction with, such application to reopen the estate, and such reopening is not an interference with the administration of the estate.<sup>79</sup> Where a discharge has been refused upon the ground of concealment of assets, the estate may be reopened for the purpose of reaching such assets.<sup>80</sup>

Title to concealed and non-scheduled property does not revert in the bankrupt upon his discharge so as to deprive the court of jurisdiction thereof upon the reopening of the estate.<sup>81</sup>

#### § 1429. — Who may petition.

An application or petition to reopen the estate must be made by some party interested in the estate and who would be benefited by such reopening. One whose claim has become barred by laches is not a proper petitioner;<sup>82</sup> nor can a former trustee who has been discharged seek a reopening of the estate.<sup>83</sup>

Under subdivision 8, of section 2, a court of bankruptcy has jurisdiction to entertain a supplemental petition filed by a volun-

75—In re Atlanta News Pub. Co., 160 Fed. 519, 20 A. B. R. 193.

76—Section 1 (7), Act of 1898.

77—In re Goldman, 129 Fed. 212, 11 A. B. R. 707; In re Paine, 127 Fed. 246, 11 A. B. R. 351; In re Newton, 107 Fed. 429, 6 A. B. R. 52; section 2 (8), Act of 1898.

78—In re Ryburn, 145 Fed. 662, 16 A. B. R. 514.

79—In re Sonnabend, 18 A. B. R. 117.

80—In re Barton's Estate, 144 Fed. 540, 16 A. B. R. 569.

81—Fowler v. Jenks, 90 Minn. 74, 11 A. B. R. 255.

82—In re Meyer, 181 Fed. 904, 25 A. B. R. 44; In re Paine, 127 Fed. 246, 11 A. B. R. 351.

83—In re Paine, 127 Fed. 246, 11 A. B. R. 351.

tary bankrupt after the estate has been closed and the bankrupt discharged, setting out additional schedules of property, with the reasons for their former omission, and the court may reopen the proceedings for the purpose of administering the new assets for the benefit of creditors who proved their claims in accordance with the statute in the original proceedings. But such supplementary proceedings cannot affect the discharge of the bankrupt, where more than a year has elapsed since it was granted, nor has a creditor who failed to prove his claim in the original proceedings any standing in such supplementary proceedings, or the right to examine the bankrupt therein.<sup>83a</sup>

### § 1430. — Limitations and laches.

While the law is silent as to the time within which an estate may be reopened, this right would doubtless exist at any time when unadministered assets are discovered. An application to reopen is, however, addressed to the sound discretion of the court and where it is not made within a reasonable time may be refused.<sup>84</sup> Laches on the part of a petitioning creditor will bar the right to have the estate re-opened.<sup>85</sup>

### § 1431. — Form and sufficiency of petition.

While it is unnecessary that the petition therefor be of any technical or formal character, it should be either in itself or in connection with supporting affidavits of such persuasive character as to satisfy the court of the existence of assets unadministered.<sup>86</sup>

A petition to reopen the proceedings after a discharge has been granted and to permit petitioners to prove debts on the ground of fraudulent concealment of assets which fails to show what property was surrendered by the bankrupt or what representations were made in his schedules as to property surrendered by him, and which fails to show that any creditor, at the time of

83a—In re Shaffer, 104 Fed. 982, 3 N. B. N. R. 54, 4 A. B. R. 728.

84—In re Paine, 127 Fed. 246, 11 A. B. R. 351; Traub v. Marshall Field & Co., 182 Fed. 622, 25 A. B. R. 410. See In re Shaffer, 104 Fed. 982, 3 N. B. N. R. 54, 4 A. B. R. 728.

Application to reopen proceedings made seven years after granting of dis-

charge denied. Vary v. Jackson, 164 Fed. 840, 21 A. B. R. 334; In re Shaffer, 104 Fed. 982, 3 N. B. N. R. 54.

85—To contest allowance of exemptions. In re Reese, 115 Fed. 993, 8 A. B. R. 411.

86—In re Newton, 107 Fed. 429, 6 A. B. R. 52.

the bankruptcy or within the time within which claims were provable was in any wise deceived as to the facts of the case or by the representations made in the schedules, or to show exactly when the alleged fraud was discovered, or that it was discovered within a year of the filing of the petition is too general.<sup>87</sup>

### § 1432. — Receiver.

A temporary receiver may be appointed upon the reopening of the estate.<sup>88</sup>

### § 1433. Distribution of individual and firm property.

#### § 1434. — In general.

Section 5f provides that "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

This subdivision prescribes the rule for the distribution of assets between individual and firm creditors of bankrupt partners, and applies not only to the case of the adjudication of the partnership, as such, but also where a member of the firm is adjudged bankrupt in his individual capacity.<sup>89</sup> It is but a reaffirmance of the equity rule which remits joint creditors primarily to the joint fund and the individual creditors to the individual fund.<sup>90</sup>

87—*Vary v. Jackson*, 164 Fed. 840, 21 A. B. R. 334.

88—*In re Sonnabend*, 18 A. B. R. 117.

89—*In re Union Bank, Whitney, Gilkey & Co.*, 184 Fed. 224, 25 A. B. R. 148; *In re Wilcox*, 94 Fed. 84, 1 N. B. N. 494, 2 A. B. R. 117; *In re Denning*, 114 Fed. 219.

90—A similar rule existed under the former acts. *In re Jewett*, 1 N. B. R. 131; *In re Byrne*, 1 N. B. R. 122; *Collins v. Hood*, 4 McLean 186, Fed. Cas. No. 3015; *In re Williams*, Fed. Cas. No. 17702; *In re Warren*, Fed. Cas. No. 17191; *In re Lowe*, 11 N. B. R. 221, Fed. Cas. No. 8564; *In re Ingalls*, Fed. Cas. No. 7032; *In re Smith*, 13 N. B. R.



The same rule applies whether the proceeding is on behalf of a partnership or an individual, and partnership creditors cannot resort to the individual assets until the individual creditors have been paid in full, and vice versa,<sup>91</sup> and this rule prevails notwithstanding the fact that there are no partnership assets and is still true where a member of a copartnership is adjudged bankrupt in his individual capacity.<sup>92</sup> The adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy, if an act of bankruptcy has been committed by the firm, as such, although the partners or some of them individually have not committed nor participated in committing any act upon which as individuals they could be adjudged bankrupts.<sup>93</sup> The only way in which the

500, Fed. Cas. No. 12987; *In re Marwick*, Fed. Cas. No. 9181; *In re Dunham*, 1 Hask. 495, Fed. Cas. No. 4144; *In re Morse*, 13 N. B. R. 376, Fed. Cas. No. 9854; *In re McLean*, 15 N. B. R. 333, Fed. Cas. No. 8879. See *Amsinck v. Bean*, 11 N. B. R. 495, 22 Wall. 395, 22 L. ed. 801; but this rule only applied where both estates were before the court for distribution; *In re Downing*, 3 N. B. R. 182, 1 Dill. 33, Fed. Cas. No. 4044; *U. S. v. Lewis*, 13 N. B. R. 33, Fed. Cas. No. 15595; *In re Pease*, 13 N. B. R. 168, Fed. Cas. No. 10881, and it held that where there was no joint estate the joint creditors could receive no dividends until the individual creditors were fully paid; *In re Byrne*, 1 N. B. R. 122, Fed. Cas. No. 2270, though the later cases deny this doctrine; *In re Knight*, 8 N. B. R. 436, Fed. Cas. No. 7880, 2 Biss. 518; *In re McEwen*, 12 N. B. R. 11, 6 Biss. 294, Fed. Cas. No. 8783; *In re Slocum*, Fed. Cas. No. 12951, aff'g 12950; *In re Jewett*, 1 N. B. R. 130, Fed. Cas. No. 7304. It was also held that the rule preferring partnership property to the payment of partnership debts was for the benefit of the partners and that they might waive it. *In re Kahley*, 4 N. B. R. 124, 2 Biss. 383, Fed. Cas. No. 7593; and that subject to this rule, the assets of the separate estates of partners as well as

that of the partnership might be resorted to for payment of a partnership debt; *Mead v. Bank*, 2 N. B. R. 65, 6 Blatch. 180, Fed. Cas. No. 9366; and even that joint creditors of partners might share equally with the partnership creditors in the partnership assets. *In re Nims*, 18 N. B. R. 91, 10 Ben. 53, Fed. Cas. No. 10268.

91—*Adams v. Deckers Valley Lumber Co.*, 202 Fed. 48, 29 A. B. R. 42; *New York Inst. for Deaf & Dumb v. Crockett*, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233; *In re Blanchard*, 161 Fed. 793, 20 A. B. R. 417; *In re Smith*, 13 N. B. R. 500, Fed. Cas. No. 12987; *In re Morse*, 13 N. B. R. 376, Fed. Cas. No. 9854; *In re Byrne*, 1 N. B. R. 122, Fed. Cas. No. 2270; *In re Williams*, Fed. Cas. No. 17702; *In re Ingalls*, Fed. Cas. No. 7032; *In re Lane*, 10 N. B. R. 135, Fed. Cas. No. 8044.

92—*Euclid Nat. Bank v. Union Trust & Deposit Co.*, 149 Fed. 975, 17 A. B. R. 834, aff'g 142 Fed. 588, 16 A. B. R. 91; *In re Wilcox*, 94 Fed. 84, 1 N. B. N. 494, 2 A. B. R. 117; *In re Mills*, 95 Fed. 269, 2 A. B. R. 667; *In re Jones*, 2 N. B. N. R. 193, 100 Fed. 781, 4 A. B. R. 141.

93—*In re Latimer*, 174 Fed. 824, 23 A. B. R. 388; *In re Meyer*, 98 Fed. 976, 3 A. B. R. 559, aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 Fed. 896; *In re Rosen-*

assets of a firm can be administered in bankruptcy (except by consent of the solvent partners) is by putting the firm into bankruptcy; and if a sole surviving or liquidating partner commits an act of bankruptcy he in his individual capacity and as surviving partner may be adjudged bankrupt and the partnership assets and his separate estate may be administered under the act.<sup>94</sup>

Any surplus that remains in an individual estate after payment of individual debts as allowed, should be added to the assets of the partnership and applied to the payment of the partnership debts and not to the payment of interest on the individual debts.<sup>95</sup>

Real estate held by a firm is generally held by the members as tenants in common, but when it is firm property firm creditors are entitled to payment from the proceeds thereof before a judgment of an individual partner.<sup>96</sup>

Where the bankrupt is a partnership composed of an individual and another partnership, the creditors of the latter are entitled to priority in the distribution of the proceeds of its property as against the creditors of the adjudicated partnership.<sup>97</sup>

As joint and separate estates are considered distinct, a joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security, or prove his whole claim against both estates and receive a dividend from each, but so as not to receive more than the full amount of his debt from both sources.<sup>98</sup> So, the holder of a note given by a firm and also by an individual member of the firm

baum, 1 N. B. N. 541; In re Blair, 2 N. B. N. R. 364, 99 Fed. 76; In re Williams, 3 N. B. R. 74, 1 Lowell 406, Fed. Cas. No. 17703.

94—In re Meyer, 98 Fed. 976, 3 A. B. R. 559, aff'g 1 N. B. N. 364, 92 Fed. 896, 1 A. B. R. 565; In re Murray, 1 N. B. N. 570, 96 Fed. 600, 3 A. B. R. 601, 1 N. B. N. 532, 3 A. B. R. 90; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393; In re Meyers, 1 N. B. N. 515, 2 A. B. R. 707, 96 Fed. Cas. No. 408; In re Altman, 1 N. B.

N. 358, 1 A. B. R. 689, 95 Fed. Cas. No. 263.

95—In re Chandler, 184 Fed. 887, 25 A. B. R. 865.

96—Marrett v. Murphy, 11 N. B. R. 131, Fed. Cas. No. 9103.

97—In re Knowlton & Co., 196 Fed. 837, 28 A. B. R. 140.

98—In re Howard, 4 N. B. N. R. 185, Fed. Cas. No. 6750. See also In re Noyes Bros., 127 Fed. 286, 11 A. B. R. 506.

is entitled to receive dividends from the estates of both, but not in the aggregate more than the amount of the note.<sup>99</sup>

**§ 1435. — Absence of firm assets and solvent partner.**

The exception to the general rule that the individual creditors must resort to the individual assets and the joint creditors to the partnership assets, and that when there are no firm assets and no solvent living partner, the creditors of the firm might share *pari passu* with the individual creditors, is no longer applicable,<sup>1</sup> and partnership creditors must look to the partnership assets and can only resort to the individual assets after the individual debts are paid, without regard to whether there are partnership assets or a solvent partner amenable to the court's jurisdiction.<sup>2</sup>

**§ 1436. — Assumption of firm assets and debts by partner.**

After a firm is actually insolvent, a partner cannot by the transfer of his interest to his copartner constitute the assets of the firm the individual property of the latter as against firm

99—*Emery v. Bank*, 7 N. B. R. 217, 3 Cliff. 507, Fed. Cas. No. 4446.

1—*In re Janes*, 133 Fed. 912, 13 A. B. R. 341; *In re Corcoran*, 14 Ohio Fed. Dec. 294, 12 A. B. R. 283; *Buckingham v. First Nat. Bank*, 131 Fed. 192, 12 A. B. R. 465; *In re Wilcox*, 94 Fed. 84, 1 N. B. N. 494, 2 A. B. R. 117; *In re Bates*, 100 Fed. 263; *In re Mills*, 95 Fed. 269, 2 A. B. R. 667; *In re Janes*, 128 Fed. 527, 11 A. B. R. 792. *Contra*, *In re Gray*, 208 Fed. 959, 31 A. B. R. 146; *Conrader v. Cohen*, 121 Fed. 801, 9 A. B. R. 619, *aff'g* 118 Fed. 676, 9 A. B. R. 85.

2—It was held under the Act of 1867 that if a partnership was dissolved and one of the partners purchased all the assets of the firm, agreeing to pay all the debts; and both partners are individually adjudged bankrupt, so that there is no solvent partner and no firm property, the firm and individual creditors of the partner who assumed to pay the firm debts are entitled to share *pari passu* in the estate of such partner. (*In re Downing*, 3 N. B. R. 182,

1 Dill. 39, Fed. Cas. No. 4044; *In re Collier*, 12 N. B. R. 266, Fed. Cas. No. 3002; *In re Rice*, 9 N. B. R. 373, Fed. Cas. No. 11750.) The individual and partnership creditors share equally in the distribution of assets where both classes of debts are incurred upon the credit of the property owned by a member of the firm (*In re Goedde*, 6 N. B. R. 295, Fed. Cas. No. 5500); where the individual assets consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to bankruptcy being the same goods in the purchase of which the partnership debts originated. (*In re Jewett*, 1 N. B. R. 130, Fed. Cas. No. 7309.) If all the assets of a bankrupt firm were expended in the payment of costs, and there was no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner. (*In re McEwen*, 12 N. B. R. 11, 6 Biss. 294, Fed. Cas. No. 8783); but under the present Act there is no provision allowing joint and separate creditors to share *pari*

creditors,<sup>3</sup> but a firm while solvent may in good faith dissolve, the retiring partner transferring the joint property to the remaining partner, who may assume the joint debts, and the joint creditors will share equally with individual creditors in the individual assets, upon the remaining partner becoming bankrupt.<sup>4</sup> If a firm expires by limitation and the interests of all the partners are transferred to one of them, who agrees to apply firm assets to the payment of firm debts, and he afterwards files a voluntary petition in bankruptcy, and includes the firm assets and debts in his schedule, the other members should intervene and have the firm adjudicated bankrupt, that the firm assets may be applied to the firm debts.<sup>5</sup>

### § 1437. — Claims for taxes.

A claim against a partner for personal taxes is not enforceable against the partnership estate as against the claims of partnership creditors.<sup>6</sup> If under state laws a member of a partnership is liable for the taxes due from the firm, taxes levied against a firm must be paid as a preferred claim, from the estate in bankruptcy of a member thereof.<sup>7</sup>

### § 1438. — Claims of the United States.

A claim of the United States against a firm some of whose members are non-residents, has been held to be entitled to priority of payment out of the individual estates of the resident partners;<sup>8</sup> and debts arising out of internal revenue bonds,

*passu* in the separate estates. In the cases cited, if the property could not be held to be partnership assets because the transfer was preferential or fraudulent, or on some other ground, the partnership creditors could not resort to it.

3—In re Damare, 28 A. B. R. 297; In re Terens, 175 Fed. 495, 23 A. B. R. 680; Earle v. Library Pub. Co., 95 Fed. 544; In re Rudnick, 2 N. B. N. R. 769; In re Cook, 3 Biss. 116, Fed. Cas. No. 3151; In re Byrns, 1 N. B. N. 464.

4—In re Green, 116 Fed. 118, 8 A. B. R. 553; In re Keller, 109 Fed. 118, 6 A. B. R. 337. See also Fitzpatrick v. Flanagan, 106 U. S. 648, 27 L. ed. 211; In re Collier, 12 N. B. R. 266, Fed. Cas. No.

3002; In re Long, 9 N. B. R. 227, 7 Ben. 141, Fed. Cas. 8476; In re Downing, 3 N. B. R. 182, 1 Dill. 33, Fed. Cas. 4044; In re Wiley, 4 Biss. 214, Fed. Cas. No. 17656; In re Mills, 11 N. B. R. 74, Fed. Cas. No. 9611; Ex parte Ruffin, 6 Ves. 119; In re Keller, 109 Fed. 118, 6 A. B. R. 334. But see In re Filmar, 177 Fed. 170, 24 A. B. R. 194; In re Worth, 130 Fed. 927, 12 A. B. R. 566.

5—In re Gorham, 18 N. B. R. 419, 9 Biss. 23, Fed. Cas. No. 5624.

6—In re Flatau & Stern, 21 A. B. R. 352.

7—In re Green, 116 Fed. 118, 8 A. B. R. 553.

8—U. S. v. Lewis, 13 N. B. R. 33,

signed by the members of a firm, as sureties, have been held entitled to priority out of the individual assets,<sup>9</sup> but such holdings cannot be held decisive in view of the recent decision of the supreme court holding that the United States was not entitled to priority in payment of any claims but for taxes.<sup>10</sup>

### § 1439. — Subrogation of creditors of partner.

The creditors of an individual partner will be subrogated to the rights of a creditor of the partnership who has received payment of his debt from property belonging to the individual partner; and the trustee of one partner will be subrogated to the rights of the creditors of another partner to the extent that their claims against the latter have been satisfied by the sale of the former's property.<sup>11</sup>

### § 1440. — Claims between estates—Marshalling of assets.

Section 5g provides that "The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

Where a partnership is adjudged a bankrupt, without an adjudication of the members thereof, both the partnership assets and the individual assets of the partners are administered and marshalled.<sup>12</sup>

Where all the partners become bankrupt, the general rule is that a separate estate shall not claim against the joint estate in competition with the joint creditors, nor shall the joint estate claim against a separate estate in competition with the separate creditors,<sup>13</sup> unless there be a surplus of the joint estate to be

Fed. Cas. No. 15595; s. c. on appeal, *Lewis v. U. S.*, 14 N. B. R. 64, 92 U. S. (2 Otto) 618, 23 L. ed. 513.

9—*In re Webb*, 2 N. B. R. 214, Fed. Cas. No. 17313.

10—*Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 56 L. ed. 706, 27 A. B. R. 873, rev'g 174 Fed. 385, 23 A. B. R. 340.

11—*In re Mason & Son*, 1 N. B. R. 331, 2 A. B. R. 60.

12—*In re Wing Yick Company*, 13 A. B. R. 757.

13—*Martin v. Globe Bank & Trust Co.*, 193 Fed. 841, 27 A. B. R. 545; *In re Weisenberg & Co.*, 131 Fed. 517, 12 A. B. R. 417; *In re Union Bank, Whitney, Gilkey & Co.*, 184 Fed. 224, 25 A. B. R. 148; *Amsinck v. Bean*, 11 N. B. R. 495, 22 Wall. 395, 22 L. ed. 801, *In re McEwen*, 12 N. B. R. 11, 6 Biss. 294, Fed. Cas. No. 8783.

divided among the individual creditors and vice versa.<sup>14</sup> It is equally clear that a solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner, so as to come in competition with the joint creditors of the partnership, for the reason that he is himself liable to all the joint creditors, which is sufficient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are fully paid.<sup>15</sup> Neither can a solvent partner prove against the separate estate of the bankrupt partner in competition with the separate creditors of the bankrupt until all the joint creditors of the partnership are paid or fully indemnified, for if a dividend were reserved to such a party on such proof the joint creditors might be injured by such solvent partner stopping the surplus of the separate estate, which would otherwise be carried over to the joint estate, or the separate creditors might be injured by the funds being stopped and the transmission of the same be delayed.<sup>16</sup> The exceptions to this rule are (1) where the property of a partner has been fraudulently applied for the purpose of a partnership; (2) where a distinct trade is prosecuted by one or more of the members of the firm.<sup>17</sup>

Where a bankrupt is a member of two firms, the assets should be so marshalled that the creditors of each firm may have priority in the distribution of the assets of the firms of which they are creditors. If a surplus remains after paying the creditors of one firm, it is subject to the claims of the individual creditors and not to the creditors of the other firm. If, however, there is a surplus of individual assets, it should be apportioned pro rata among creditors of both firms according to the partner's respective interests,<sup>18</sup> and where the partnership estate is indebted to another firm, one of the members of which is also

14—*In re Rice*, 164 Fed. 509, 21 A. B. R. 205; *In re Lane*, 10 N. B. R. 135, 2 Lowell 333, Fed. Cas. No. 8044.

The claim of a partner for money lent to the partnership in excess of the amount he was bound to contribute as his share of the capital cannot share in the distribution until all the firm creditors are paid. *In re Effinger*, 184 Fed. 728.

15—*Ex parte Richardson*, 3 Dea. & Ch. 244; *Ex parte Buggs*, Id. 36; *In re*

*Strawbridge*, 25 A. B. R. 355; *Emery v. Bank*, 7 N. B. R. 217.

16—*Ex parte Lodge*, 1 Ves. Jr. 166.

17—*Amsinck v. Bean*, 11 N. B. R. 495, 22 Wall. 395, 22 L. ed. 801.

18—*In re Leland*, 5 N. B. R. 222, 5 Ben. 168, Fed. Cas. No. 8228; *In re Hinds*, 3 N. B. R. 91, Fed. Cas. No. 6516; *In re Dunkerson*, 12 N. B. R. 391, 4 Ben. 423, Fed. Cas. No. 4159; *Ex parte Franklin*, Buck, 332.

a member of the bankrupt firm, the court will deduct from the payment due the creditor firm the amount to which the bankrupt member is entitled.<sup>19</sup>

**§ 1441. — Claim of partner against bankrupt partner.**

A bankrupt creditor of his bankrupt copartner has the residuum of the estates, separate and joint, belonging to the latter after all the bankrupt debtor's separate creditors and the firm debts are paid, but not until then,<sup>20</sup> and a solvent partner cannot prove against the separate estate of the bankrupt partner in competition with the bankrupt partner's separate creditors until all the partnership creditors are paid or fully indemnified,<sup>21</sup> nor for interest on the balances in his favor shown by the firm's books, unless by express agreement.<sup>22</sup>

19—*In re Ellis*, 5 Ben. 421, Fed. Cas. No. 4399.

20—*In re McLean*, 15 N. B. R. 333, Fed. Cas. No. 8879.

21—*Amsinck v. Bean*, 11 N. B. R. 495,

22 Wall. 395, 22 L. ed. 801; *In re Dunning*, 8 A. B. R. 133.

22—*In re Stevens*, 104 Fed. 323, 5 A. B. R. 9.

CHAPTER XXXIV  
THE DISCHARGE OF THE BANKRUPT  
PART I

THE RIGHT TO A DISCHARGE

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## PART I

### THE RIGHT TO A DISCHARGE

#### § 1442. Nature of right and congressional control thereof.

The right to a discharge is not an absolute one, but is a mere privilege granted to the bankrupt under certain conditions,

which congress may alter from time to time.<sup>1</sup> If an amendatory act is silent as to its effect, it affects all pending proceedings.<sup>2</sup>

### § 1443. Who is entitled to discharge.

This is the correlative of "Who may be a bankrupt,"<sup>3</sup> for the law does not offer a meaningless and useless proceeding, but says that certain persons may become bankrupt through voluntary or involuntary proceedings and to such gives the discharge provided for as of right, unless the bankrupt is guilty of one of the offenses prescribed in the act.

A corporation or partnership which has been adjudged bankrupt is entitled to a discharge in all respects as an individual would be.<sup>4</sup>

The fact that a bankrupt is a non-resident of the district does not affect his right to a discharge.<sup>5</sup>

An order granting a discharge is proper, notwithstanding a creditor objected to the reference of the case to a referee to report the facts, which objection was renewed before the judge, if no legal grounds appear for opposing the discharge and the creditor had an opportunity to present such grounds.<sup>6</sup>

### § 1444. Discharge of a partnership.

All or any number of partners may petition for a partnership discharge.<sup>7</sup>

A discharge is granted to a partnership upon the same terms and under the same conditions as to any other person, and therefore the general discussion of discharges which is given with reference to an individual will apply equally here. The grounds of opposition to a discharge in the case of a partnership are the same as in the case of individuals and are confined to those named in the act.<sup>8</sup>

1—National Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; In re Neely, 134 Fed. 667, 12 A. B. R. 407.

2—In re Neely, 134 Fed. 667, 12 A. B. R. 407.

3—See Section 4, Act of 1898, ante.

4—In re Marshall Paper Co., 2 N. B. N. R. 1053, 102 Fed. 872, 4 A. B. R. 468.

5—In re Goodale, 109 Fed. 783, 6 A. B. R. 493.

6—In re McDuff, 101 Fed. 241, 4 A. B. R. 110.

7—In re Pincus, 147 Fed. 621, 17 A. B. R. 331.

8—See In re Peacock, 101 Fed. 560, 4 A. B. R. 136; In re Clisdell, 101 Fed. 246, 2 N. B. R. 638.

## § 1445. Discharge of partner.

An individual seeking a discharge from both individual and partnership liabilities cannot obtain a discharge from the latter unless proceedings are had on behalf of the partnership itself, or unless he makes his partners parties to the individual proceedings.<sup>9</sup> Where the firm has been adjudicated bankrupt on the voluntary petition of the partners composing the firm, either partner without reference to the other, may present his individual petition for a discharge, in which event the petition therefor should recite the adjudication of the firm and of the petitioners as a member of the firm, and should pray for a discharge from both firm and individual debts, and the notice to creditors should advise them of the same facts.<sup>10</sup> A prayer for discharge from "provable debts" is, however, equivalent to an application for discharge from partnership debts.<sup>11</sup>

Individual discharges cannot be granted under an adjudication against the partnership only<sup>12</sup> although an adjudication of partners as individuals may be entered in an involuntary proceeding against the partnership entity alone, and individual discharges thereafter obtained.<sup>13</sup> An individual member of a firm, may on his own independent application, made in his own right, obtain a discharge from firm liabilities, regardless of the existence or nonexistence of firm assets.<sup>14</sup> A partner is not prevented from filing his individual petition in bankruptcy after

9—In re Elliott, 2 N. B. N. R. 350; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re Laughlin, 96 Fed. 589, 3 A. B. R. 1; In re McFaun, 96 Fed. 592, 3 A. B. R. 66; In re Meyers, 1 N. B. N. 515, 2 A. B. R. 707, 96 Fed. 408; In re Meyers, 2 N. B. N. R. 111, 97 Fed. 757; 3 A. B. R. 260; Amsinek v. Bean, 22 Wall. 395, 405, 22 L. ed. 801; and see Hudgins v. Lane, 11 N. B. R. 462, 2 Hughes, 361, Fed. Cas. No. 6827; Corey v. Perry, 17 N. B. R. 147; In re Noonan, 10 N. B. R. 330, Fed. Cas. No. 10292; In re Wilkins, 2 N. B. R. 113, Fed. Cas. No. 17875; Crompton v. Conklin, 15 N. B. R. 417, Fed. Cas. No. 3408; In re Brick, 19 N. B. R. 508; contra, Jarecki Mfg. Co. v. McElwaine, 118 Fed. 249; In re Abbe, 2 N. B. R. 26, Fed. Cas. No. 4; In re Bidwell, Fed. Cas. No. 1392; In re Frear, 1 N. B. R. 201, 2 Ben.

467, Fed. Cas. No. 5074; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393; Loomis v. Wallblom, 94 Minn. 392, 13 A. B. R. 687.

10—In re Meyers, 2 N. B. N. R. 111, 97 Fed. 757, 3 A. B. R. 260; In re Gay, 98 Fed. 870, 3 A. B. R. 529; see also Wilkin v. Davis, 15 N. B. R. 60, 2 Low. 511, Fed. Cas. No. 17664.

11—In re Pierson, 10 N. B. R. 107, Fed. Cas. No. 11153.

12—In re Neyland & McKeithen, 184 Fed. 144, 24 A. B. R. 879; In re Pincus, 147 Fed. 621, 17 A. B. R. 331; In re Hale, 107 Fed. 432, 6 A. B. R. 35.

13—In re Pincus, 147 Fed. 621, 17 A. B. R. 331.

14—New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233.

a discharge has been denied in the partnership proceedings, although he sets forth the same debts and the same assets.<sup>15</sup>

That one partner commits an act barring his discharge may not be ground for the refusal of a discharge to his co-partner but the burden is on the latter to show he did not participate in such act.<sup>16</sup>

A bankrupt partner who has obtained a discharge from his individual debts may thereafter amend his application for a discharge so as to render the same applicable to his liability on firm debts which were scheduled by him, even though the time for proving such firm debts has expired.<sup>17</sup>

For a discussion of particular acts barring a discharge, see subsequent sections.

### § 1446. Application for discharge.

#### § 1447. — Form.

The application for a discharge should be substantially in the prescribed form.<sup>18</sup>

#### § 1448. — Filing.

It is held that the petition may be filed with the referee,<sup>19</sup> though there is authority to the contrary.<sup>20</sup>

#### § 1449. — Time for making.

After the expiration of one month and within the next twelve months subsequent to his adjudication, a bankrupt has an absolute right to apply for a discharge,<sup>21</sup> and after that, and within the next six months, his petition may be filed by leave of court,<sup>22</sup> if it shall be made to appear to the judge that he was unavoidably prevented from making his application within the year,<sup>23</sup> but not otherwise.<sup>24</sup>

15—In re Feigenbaum, 7 A. B. R. 339.

16—In re Schachter, 170 Fed. 683, 22 A. B. R. 389.

17—In re Kaufman, 136 Fed. 262, 14 A. B. R. 393.

18—Official Form 57, § 1824, *post*.

19—In re Pincus, 147 Fed. 621, 17 A. B. R. 331.

20—In re Hockman, 205 Fed. 330, 30 A. B. R. 921.

21—Section 14a, Act of 1898; In re Glasberg, 197 Fed. 896, 28 A. B. R. 826.

22—In re Fahy, 8 A. B. R. 354, 116 Fed. 239.

23—Section 14a, Act of 1898; In re Harris and Algor, 15 A. B. R. 705; In re Lewin, 135 Fed. 252, 14 A. B. R. 358.

24—In re Holmes, 165 Fed. 225, 21 A. B. R. 339; In re Levenstein, 180 Fed. 957, 24 A. B. R. 822.

In a recent well-considered case, the twelve-month period was held to date from one month after the adjudication and not from the adjudication.<sup>25</sup> In computing the time within which the application may be filed the day on which the bankrupt was adjudicated should be excluded. Where the last day of the period falls on Sunday or a holiday the application may be filed on the following day.<sup>26</sup>

An adjudication will not be opened after the expiration of the eighteen-month period to allow the bankrupt to apply for a discharge where there are no allegations of fraud, mistake, or error in the adjudication.<sup>27</sup> Where the application is filed more than twelve months after an adjudication, but without leave and without a showing of unavoidable delay, leave will not be granted *nunc pro tunc*, if prayed for after the expiration of the period of eighteen months fixed by law.<sup>28</sup> Under the act of 1867 it was held that whatever be the showing of unavoidable delay in the filing of the application for discharge, it had to be made before the administration of the estate was completed and the trustee discharged,<sup>29</sup> though in view of the clear terms of the present statute that would not now be true.

The provisions of this clause apply both to involuntary and voluntary bankrupts.<sup>30</sup>

The discretion vested in the judge in allowing a petition filed more than a year after adjudication is a judicial one, and not a discretion of an arbitrary nature.<sup>31</sup> The words "unavoidably prevented" should be given a broad interpretation, so as to empower the court, in the exercise of its discretion, to grant an application for an extension of time whenever it appears that his failure to file his application was due to excusable neglect, mistake, reliance upon advice of counsel, and the like, and not merely where such failure was due to physical obstacles, or other

25—In re Walters, 209 Fed. 133, 31 A. B. R. 565.

26—Section 31a, Act of 1898; In re Holmes, 165 Fed. 225, 21 A. B. R. 339; In re Lang, 2 N. B. R. 151, Fed. Cas. No. 8056.

27—In re Morse, 168 Fed. 157, 21 A. B. R. 709.

28—In re Wagner, 139 Fed. 87, 15 A. B. R. 100; In re Wolff, 100 Fed. 430, 4 A. B. R. 74.

29—In re Brightman, 15 N. B. R. 213, 14 Blatch. 130, Fed. Cas. No. 1878; In re Cross, 16 N. B. R. 294, Fed. Cas. No. 3427.

30—In re Clark, 3 N. B. R. 3, 2 Biss. 73, Fed. Cas. No. 2800; In re Bunster, 5 N. B. R. 82, 5 Ben. 242, Fed. Cas. No. 2136.

31—In re Lewin, 135 Fed. 252, 14 A. B. R. 358.

facts or circumstances which literally deprived the bankrupt of his will or power to exercise his right.<sup>32</sup> Inadvertance of the bankrupt's attorney<sup>33</sup> or an erroneous notice from the referee that the time for the filing of the application expires on a certain date does not, in all cases, however, excuse a failure to file the same within the proper time. It is the duty of the bankrupt to take notice of the date of the adjudication and see that the application is filed within a year from such date,<sup>34</sup> and no extension should be allowed where he could have avoided default by ordinary diligence or attention.<sup>35</sup> While poverty of the bankrupt and sickness in his family during the year after the adjudication may be a sufficient excuse,<sup>36</sup> an allegation that the bankrupt deferred filing his petition for a discharge until late in the year when sickness in the family prevented him from filing it has been held not to be warrant relief.<sup>37</sup>

An application for an extension of time within which to file an application for a discharge may be entertained not only *ex parte*, but in such summary and informal manner as may be proper and convenient. No notice to creditors is required.<sup>38</sup> The application may be made through an attorney,<sup>39</sup> and requires no answer.<sup>40</sup> It is the duty of the bankrupt to appear at the hearing of his application for an extension of time, and the burden is upon him to show that he has been unavoidably prevented from filing the petition within the statutory time. The *ex parte* averments of his petition are not admissible as evidence in support thereof.<sup>41</sup>

A creditor waives his objection to an order extending the time within which to file an application for discharge by filing specifications of objections to the discharge,<sup>42</sup> or by failing to move for a vacation of the order until after the eighteen-month

32—In *re* Churchill, 197 Fed. 111, 28 A. B. R. 607.

33—In *re* Anderson, 134 Fed. 319, 14 A. B. R. 221.

34—In *re* Knauer, 133 Fed. 805, 13 A. B. R. 503.

35—In *re* Daly, 205 Fed. 1002, 30 A. B. R. 475.

36—In *re* Casey, 195 Fed. 322, 28 A. B. R. 359.

37—In *re* Lewin, 135 Fed. 252, 14 A. B. R. 358.

38—In *re* Churchill, 197 Fed. 111, 28 A. B. R. 607; In *re* Fritz, 173 Fed. 560, 23 A. B. R. 84.

39—In *re* Fritz, 173 Fed. 560, 23 A. B. R. 84.

40—In *re* Glickman & Pisonoff, 164 Fed. 209, 21 A. B. R. 171.

41—In *re* Glickman & Pisonoff, 164 Fed. 209, 21 A. B. R. 171.

42—In *re* Casey, 195 Fed. 322, 28 A. B. R. 359.

An order extending the time to file the

period in which an application for discharge may be filed has expired.<sup>43</sup> Proceedings to vacate an order permitting the filing of the application after the expiration of a year are of a special character, analogous to a proceeding to vacate service of process, and any error or irregularity in permitting the filing of the application within the enlarged time will be deemed waived where the objecting parties have filed an answer to the merits.<sup>44</sup>

### § 1450. — Notice to creditors.

Prior to the amendment of 1910, a creditor was entitled merely to ten days' notice of the hearing upon the application for a discharge, and it was held that notice to creditors of the application for leave to apply for a discharge, or for an extension of time for such application was unnecessary ample notice of the hearing upon the application being insured them.<sup>45</sup> Under the amendment, however, creditors are entitled to at least thirty days' notice of the application for discharge.<sup>46</sup>

As they may examine the bankrupt to discover whether he has complied with the statute in order to entitle him to a discharge, to avoid extra expense and delay, the notice of application for discharge should contain a notice also of his examination, but only one such examination should be had.<sup>47</sup>

While the official form<sup>48</sup> requires copies of the petition and order to accompany the notice of application for discharge, it is not to be treated as a "certified copy of the record" for the purpose of fees.<sup>49</sup>

Where notice has been given to creditors they are regarded as consenting if they make no opposition.<sup>50</sup> It has been held that a court of bankruptcy has jurisdiction to grant a discharge, even though there may be creditors not regularly brought before it by the service of notice;<sup>51</sup> and that it is not necessary to give

application for a discharge cannot be reviewed on the hearing of the specifications of objections to the discharge. *Id.*

43—*In re Casey*, 195 Fed. 322, 28 A. B. R. 359.

44—*In re Churchill*, 197 Fed. 111, 28 A. B. R. 607.

45—*In re Fritz*, 173 Fed. 560, 23 A. B. R. 84.

46—Section 58a as amended June 25, 1910.

47—*In re Price*, 1 N. B. N. 131, 1 A. B. R. 419, 91 Fed. 635.

48—Official Form No. 57, § 1824, *post*.

49—*Anon.*, 1 N. B. N. 239.

50—*In re Antisdell*, 18 N. B. R. 289, Fed. Cas. No. 480.

51—*Thurmond v. Andrews*, 13 N. B. R. 157.

jurisdiction to such court that creditors have actual notice, or personal service, and that the lack of it will not vitiate a discharge, if the requirements of the act were honestly complied with.<sup>52</sup> So it is held that a discharge is conclusive in the absence of fraud, and cannot be impeached collaterally by a creditor who had no notice.<sup>53</sup> Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to make its decrees of discharge or otherwise, if sufficient opportunity to show cause to the contrary is afforded, or notice given in the same way.<sup>54</sup>

When the bankrupt furnishes a list of creditors but states that their addresses are unknown, before the discharge is granted, satisfactory proof should be adduced to show that the same cannot be produced after due search has been made.<sup>55</sup>

### § 1451. — Withdrawal.

The application for a discharge cannot be withdrawn after the opposing creditors have proceeded to a hearing thereon and practically closed their case.<sup>56</sup>

### § 1452. — Dismissal.

The dismissal of an application for a discharge is in effect the denial of a discharge.<sup>57</sup> Hence an application for a discharge will not be dismissed because of dilatory tactics used by the bankrupt in not bringing the issues raised by the creditor's specifications to a trial.<sup>58</sup>

### § 1453. — Effect of failure to apply.

The refusal of an application for discharge on the ground that it is not made within the prescribed period is not a bar to the filing of a new petition in bankruptcy,<sup>59</sup> and the filing of a new

52—In re Fritz, 173 Fed. 560, 23 A. B. R. 84; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1; Rayl v. Lapham, 15 N. B. R. 508.

53—Williams v. Butcher, 12 N. B. R. 143; Rayl v. Lapham, 15 N. B. R. 508.

54—Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

55—In re Dvorak, 107 Fed. 76, 6 A. B. R. 66

56—In re Henschel, 12 A. B. R. 31.

57—In re Wolff, 132 Fed. 396, 13 A. B. R. 95.

58—In re Wolff, 132 Fed. 396, 13 A. B. R. 95.

59—In re Wolff, 132 Fed. 396, 13 A. B. R. 95; In re Farrell, 5 N. B. R. 125, Fed. Cas. No. 4680; In re Royal, 113 Fed. 140, 7 A. B. R. 636.



petition under such circumstances constitutes an abandonment of the first petition, so that the court will have jurisdiction, which is also conferred where the first petition is withdrawn.<sup>60</sup> In such subsequent proceedings a discharge may be granted as to new debts,<sup>61</sup> but not as to debts which were scheduled and provable in the former proceedings.<sup>62</sup> The fact that a creditor proves his claims in the second proceeding does not estop him to set up the fact that the bankrupt failed to apply for a discharge in a prior proceeding in which his claim was provable,<sup>63</sup> especially where in the later proceedings there are no assets and no benefit can possibly result to the creditor.<sup>64</sup>

The proper proceeding in such case is to restrain the bankrupt from applying for a discharge from the debts provable in the former proceedings.

#### § 1454. Who may oppose discharge.

"Parties in interest" which would include any person having a personal pecuniary interest, or a representative pecuniary interest in preventing the discharge,<sup>65</sup> and creditors scheduled by the bankrupt, without regard to whether, or not, they had proved their claims,<sup>66</sup> or their assignee,<sup>67</sup> may oppose a discharge. This is unlike the act of 1867, under which it was a disputed point whether a creditor who had not proved his debt could be heard in opposition to the discharge of the bankrupt,<sup>68</sup>

60—In re White, 18 N. B. R. 106, Fed. Cas. No. 17533; In re Svenson, 19 N. B. R. 229, 9 Biss. 69, Fed. Cas. No. 13659.

61—In re Pullian, 171 Fed. 595, 22 A. B. R. 513.

62—In re Pullian, 171 Fed. 595, 22 A. B. R. 513; In re Kuffler, 168 Fed. 1021, 22 A. B. R. 289, aff'g 155 Fed. 1018, 19 A. B. R. 181; In re Elby, 157 Fed. 935, 19 A. B. R. 734; In re Schnable, 166 Fed. 383, 23 A. B. R. 22; In re Bramlett, 161 Fed. 588, 20 A. B. R. 402; In re Silverman, 157 Fed. 675, 19 A. B. R. 460; In re Kuffler, 151 Fed. 12, 18 A. B. R. 16; In re Stone, 172 Fed. 947, 23 A. B. R. 24; In re Von Borries, 168 Fed. 718, 21 A. B. R. 849; In re Richter, 190 Fed. 905, 27 A. B. R. 215; Kuntz v. Young, 131 Fed. 719, 12 A. B. R. 505; In re Weintraub, 133 Fed. 1000, 13 A. B. R.

711; Bacon v. Buffalo Cold Storage Co., 193 Fed. 34, 27 A. B. R. 736.

63—In re Collins, 157 Fed. 120, 19 A. B. R. 688.

64—Bacon v. Buffalo Cold Storage Co., 193 Fed. 34, 27 A. B. R. 736.

65—In re Levey, 133 Fed. 572, 13 A. B. R. 312; see also In re Carton & Co., 148 Fed. 63, 17 A. B. R. 343.

66—In re Conroy, 134 Fed. 764, 14 A. B. R. 249; In re Nathanson, 155 Fed. 645, 19 A. B. R. 56; In re Frice, 1 N. B. N. 432, 2 A. B. R. 674, 96 Fed. 611.

67—One to whom a claim listed in the bankrupt's schedules has been assigned after bankruptcy may oppose the discharge although the claim has not been proved. Haley v. Pope, 206 Fed. 266, 30 A. B. R. 644.

68—In re Murdock, 3 N. B. R. 36, 1 Lowell, 362, Fed. Cas. No. 9939; In re

but is in accord with the act of 1841, which was, in this respect, worded similarly to that of the act of 1898, since it referred to "other parties in interest," and under which it was held that creditors who had not proved their debts might oppose the discharge,<sup>69</sup> and even persons having contingent claims incapable of proof. It would seem that if such party in interest neglected to prove his objections, other creditors might do so.<sup>70</sup> An objection that a creditor is not entitled to oppose bankrupt's discharge because of acquiescence is immaterial, if the facts sustain such ground;<sup>71</sup> but a creditor who has without fraud assented in writing to the discharge of the bankrupt and thereby influenced others to assent cannot withdraw such assent, especially upon the day fixed for the hearing.<sup>71a</sup> The fact that a person has been scheduled by the bankrupt as a creditor is *prima facie* evidence of his right to oppose the discharge.<sup>72</sup>

A creditor whose claim will not be affected by the discharge is not a party in interest.<sup>73</sup>

An attorney at law admitted to practice in the United States district court who enters his appearance and files objections to the discharge, on behalf of a creditor, must be presumed to have authority to do so without any special written power of attorney to take such action.<sup>74</sup> It has been held, however, that power to attend and vote does not authorize the filing of objections to a discharge.<sup>75</sup>

By the amendment of 1910 the trustee is expressly authorized to oppose a discharge provided he is authorized to do so at a meeting of creditors called for that purpose,<sup>76</sup> by the court or

Sheppard, 1 N. B. R. 115, Fed. Cas. No. 12753; In re Boutelle, 2 N. B. R. 51, Fed. Cas. No. 1705; In re Stansfield, 16 N. B. R. 268, 4 Sawy. 334, Fed. Cas. No. 13294; In re Burk, 3 N. B. R. 76, Deady, 425, Fed. Cas. No. 2156; In re Palmer, 3 N. B. R. 77, Fed. Cas. No. 10682; In re Borst, 11 N. B. R. 96, Fed. Cas. No. 1666.

69—In re Book, 3 McLean, 317 Fed. Cas. No. 1637.

70—In re Guilbert, 154 Fed. 676, 18 A. B. R. 830; In re Houghton, 10 N. B. R. 337, 2 Lowell, 328, Fed. Cas. No. 6730; *contra*, In re McDonald, 14 N. B. R. 477, Fed. Cas. No. 4753.

71—In re Hoffman, 2 N. B. R. 969, 102 Fed. 979, 4 A. B. R. 331.

71a—In re Brent, 8 N. B. R. 444, 2 Dill. 129, Fed. Cas. No. 1832.

72—In re Barrager, 191 Fed. 247, 27 A. B. R. 366.

73—In re Servis, 140 Fed. 222, 15 A. B. R. 271.

74—In re Gasser, 104 Fed. 537, 5 A. B. R. 32; *contra*, In re Glass, 119 Fed. 509, 9 A. B. R. 391.

75—Creditors v. Williams, 4 N. B. R. 187, Fed. Cas. No. 3379.

76—Section 14b, Act of 1898 as amended June 25, 1910; In re Churchill, 197 Fed. 114, 28 A. B. R. 603; See also

referee.<sup>77</sup> Where such authority from the creditors exist, his right to oppose the discharge and to be given a reasonable opportunity to be heard is absolute, and conditions annexed to his right by the referee or court are unwarranted. The referee cannot impose a condition denying to the trustee reimbursement for his costs and reasonable expenses in exercising the authority given to him by the creditors,<sup>78</sup> or a condition that the order granting to the trustee authority to oppose the discharge shall not delay the final settlement of the estate more than sixty days.<sup>79</sup>

### § 1455. Specification of objections.

#### § 1456. — Necessity.

Whenever the objections to the granting of a discharge rest on facts, there must be a specification in order that the bankrupt may be advised of what he is accused, the judge or referee know to what the testimony is to be directed and a trial of the fact be had,<sup>80</sup> but until the bankrupt has made a full and sufficient disclosure, the trustee or creditors cannot be required to specify objections or definitely abide by objections which have been specified.<sup>81</sup> When proper notice has been given to creditors, they are regarded as consenting to a discharge, if they make no opposition. Similarly, where it appears that the bankrupt has committed an act that, if properly pleaded, will bar a discharge, it has been held the court will not of its own motion refuse it.<sup>82</sup>

Where a creditor with a provable debt, who has notice of the application fails to appear at the hearing, his debt will be discharged though the bankrupt has in a prior proceeding in which the debt was scheduled been denied a discharge upon objection of the creditor.<sup>83</sup>

In re Levey, 133 Fed. 572, 13 A. B. R. 312, decided prior to the amendment.

77—In re Hockman, 205 Fed. 330, 30 A. B. R. 921; In re Reiff, 205 Fed. 399, 29 A. B. R. 753.

78—In re Churchill, 197 Fed. 114, 28 A. B. R. 603.

79—In re Churchill, Id.

80—In re White, 18 N. B. R. 106, Fed. Cas. No. 17533; see In re Adams, 104 Fed. 72, 2 N. B. R. 1034, 4 A. B. R. 696.

81—In re Long, 3 N. B. R. 66, Fed. Cas. No. 8477.

82—In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490; In re Clark, 19 N. B. R. 301, Fed. Cas. No. 2812; contra, In re Sohoo, 3 N. B. R. 52, Fed. Cas. No. 13162.

83—Bluthenthal v. Jones, 208 U. S. 64, 52 L. ed. 390, 19 A. B. R. 288, aff'g 51 Fla. 396.

When the objection to a discharge is based on questions of law, or arising in the record, it has been held that no specification is necessary. A court will refuse a discharge where it appears, upon an inspection of the record, that the bankrupt is not entitled thereto, although there are no objections interposed by creditors,<sup>84</sup> but if all the modal prerequisites to a discharge have been complied with, a court will not seek out of its own motion grounds to refuse it.<sup>85</sup>

### § 1457. — Objections by partnership.

Where a partnership which is the only objecting creditor becomes dissolved the discharge will be granted unless all the partners join in continuing the objections.<sup>86</sup>

### § 1458. — Time of filing specifications.

General Order XXXII gives to the creditor the entire day upon which the creditors are required to show cause to enter his appearance in opposition to the discharge, and ten days thereafter in which to file his specifications of objections.<sup>87</sup> A failure of a creditor to enter an appearance on the return day of the order to show cause why the bankrupt shall not be granted a discharge precludes him from thereafter filing specifications of objections; even though they be filed within ten days,<sup>88</sup> but the court may, in its discretion and in a proper case, relieve a person from default if no laches appear,<sup>89</sup> or permit amended<sup>90</sup> specifications to be pleaded after the expiration of that time.<sup>91</sup> The failure to file the specification within ten days after the return day of the order to show cause would probably be cured by filing the same *nunc pro tunc*, provided notice of opposition to the

<sup>84</sup>—In re Wilkinson, 3 N. B. R. 74, Fed. Cas. No. 17667; In re Sohoo, 3 N. B. R. 52, Fed. Cas. No. 13162.

<sup>85</sup>—In re Hixon, 1 N. B. N. 556, 1 A. B. R. 610, 93 Fed. 440; In re Royal, 113 Fed. 140, 7 A. B. R. 636.

<sup>86</sup>—In re Hendrick, 143 Fed. 647, 16 A. B. R. 218.

<sup>87</sup>—In re Barrager, 191 Fed. 247, 27 A. B. R. 366; In re Marsh, 2 N. B. N. R. 649; In re Albrecht, 3 N. B. N. R. 335, 104 Fed. 974, 5 A. B. R. 223; In re

McVey, 2 N. B. R. 85, Fed. Cas. No. 8932.

<sup>88</sup>—In re Ginsburg, 130 Fed. 627, 12 A. B. R. 459.

<sup>89</sup>—In re Levin, 176 Fed. 177, 23 A. B. R. 845; In re Frice, 1 N. B. N. 432, 2 A. B. R. 674, 96 Fed. 611.

<sup>90</sup>—In re Mudd, 2 N. B. N. R. 1112, 5 A. B. R. 242, 105 Fed. 348; In re Osborne, 115 Fed. 1, 8 A. B. R. 165.

<sup>91</sup>—In re Morgan, 2 N. B. N. R. 846, 101 Fed. 982, 4 A. B. R. 402.

discharge had been duly filed,<sup>92</sup> or even where it has not been,<sup>93</sup> especially in view of the power of the court to enlarge the time; and, if proceedings in opposition to discharge are adjourned, this would seem to give other creditors the right to file specifications during the period of adjournment.<sup>94</sup> Additional time in which to oppose a discharge may be procured by creditors, when specifications of another creditor have been overruled on grounds applying to him alone.<sup>95</sup>

On motion, specifications will be stricken out, if no appearance is made on the order to show cause,<sup>96</sup> or if filed or amended<sup>97</sup> after the prescribed time without leave of court, or no valid excuse is given for the delay.<sup>98</sup>

### § 1459. — With whom filed.

It has been held that objections to the bankrupt's discharge must be filed with the court and not with the referee.<sup>99</sup>

### § 1460. — Form and sufficiency.

Specifications should be clear, positive and direct,<sup>1</sup> and should distinctly allege the particular grounds relied upon to defeat the discharge, so as to advise the bankrupt of the grounds relied upon, in order that he may prepare to meet the same, and to advise the court of the issue to be tried,<sup>2</sup> and should show how the objecting party is interested,<sup>3</sup> and, if a creditor, that he has a provable debt affected by a discharge,<sup>4</sup> and allege freedom from laches.<sup>5</sup> They must contain a distinct, specific and unequivocal allegation that the offense complained of has been

92—In re Marsh, 2 N. B. N. R. 649; In re Price, 1 N. B. N. 432, 96 Fed. 611, 2 A. B. R. 674; In re Grefe, 2 N. B. R. 106, Fed. Cas. No. 5794.

93—In re Levin, 14 N. B. R. 385, 7 Biss. 231, Fed. Cas. No. 8291.

94—In re Tallman, 1 N. B. R. 145, 2 Ben. 404, Fed. Cas. No. 13740.

95—In re Antisdell, 18 N. B. R. 289, Fed. Cas. No. 490.

96—In re Smith, 5 N. B. R. 20, Fed. Cas. No. 12985.

97—In re Clothier, 108 Fed. 199, 6 A. B. R. 203.

98—In re Albrecht, 104 Fed. 974, 5 A. B. R. 223.

99—In re Hockman, 205 Fed. 330, 30 A. B. R. 921.

1—In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78.

2—In re Servis, 140 Fed. 222, 15 A. B. R. 271.

3—In re Servis, 140 Fed. 222, 15 A. B. R. 271; In re Levey, 133 Fed. 572, 13 A. B. R. 312.

4—In re Main, 205 Fed. 421, 30 A. B. R. 547.

5—In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78.

committed by the bankrupt knowingly and with fraudulent intent,<sup>6</sup> in or subsequent to the verification of the petition or schedules, and also a full statement of the essential facts, as distinguished from conclusions of law,<sup>7</sup> necessary to establish the commission of the offense, though not necessarily with the technical certainty required in an indictment.<sup>8</sup> While the allegation need not be in the phraseology or words of the statute, it must be in such equivalent language as conveys the full sense of the statute, and leaves nothing to inference or construction, for each specification must be complete in itself and independent of support from any other source.<sup>9</sup> A specification in vague, indefinite or general terms is insufficient.<sup>10</sup>

A substantial compliance with the form provided<sup>11</sup> is sufficient.<sup>12</sup>

6—In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78; In re Levey, 133 Fed. 572, 13 A. B. R. 312; In re Taplin, 135 Fed. 861, 14 A. B. R. 360; In re Roger Brown & Co., 196 Fed. 758, 28 A. B. R. 336; In re Beebe, 116 Fed. 48, 8 A. B. R. 597; In re Mudd, 105 Fed. 348, 5 A. B. R. 242; In re Blalock, 118 Fed. 679; In re Crist, 9 A. B. R. 1, 116 Fed. 1007; In re Bemis, 5 A. B. R. 36, 104 Fed. 672; In re Pierce, 103 Fed. 64, 4 A. B. R. 554; but see In re Gift, 130 Fed. 230, 12 A. B. R. 244.

7—In re Main, 205 Fed. 421, 30 A. B. R. 547; In re Jacob Nathanson, 155 Fed. 645, 19 A. B. R. 56; In re Remmers, 713 Fed. 484, 23 A. B. R. 78; In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78; In re Goodale, 109 Fed. 783, 6 A. B. R. 493.

8—In re Magen Bros. Co., 192 Fed. 883, 27 A. B. R. 729.

9—In re Mudd, 2 N. B. N. R. 1112; In re Pierce, 102 Fed. 977, 4 A. B. R. 489; In re Hunter, 2 N. B. N. R. 490; In re Marsh, 2 N. B. N. R. 649; In re Kaiser, 2 N. B. N. R. 123, 99 Fed. 689, 3 A. B. R. 767; In re Headley, 2 N. B. N. R. 684; In re Peacock, 2 N. B. N. R. 758, 101 Fed. 560, 4 A. B. R. 136; In re Hirsch, 96 Fed. 468, 2 A. B. R. 715; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 Fed. 512; In re McGurn, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 Fed. 743; In re Thomas, 1 N. B. N. 329, 1 A.

B. R. 515, 92 Fed. 912; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Butterfield, 14 N. B. R. 147, 5 Biss. 120, Fed. Cas. No. 2247; In re Hill, 1 N. B. R. 42, 2 Ben. 136, Fed. Cas. No. 6482; In re Freeman, 4 N. B. N. R. 71, 4 Ben. 245, Fed. Cas. No. 5082; In re Graves, 24 Fed. 550; In re Hixon, 1 N. B. N. 326, 566, 93 Fed. 440, 1 A. B. R. 610; In re Rathbone, 1 N. B. R. 50, 2 Ben. 138, Fed. Cas. No. 11580; In re Eidom, 3 N. B. R. 27, Fed. Cas. No. 4314.

10—In re Troeder, 150 Fed. 710, 17 A. B. R. 723; In re Shepherd, 2 N. B. N. R. 1020; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 Fed. 512; In re Hixon, 1 N. B. N. 326, 566, 1 A. B. R. 610, 93 Fed. 440; In re Tyrrel, 2 N. B. R. 73, Fed. Cas. No. 14314; In re Hill, 1 N. B. R. 42, 2 Ben. 136, Fed. Cas. No. 6482; In re Beardsley, 1 N. B. R. 52, Fed. Cas. No. 1183; In re Hansen, 2 N. B. R. 75, Fed. Cas. No. 6039; In re Dreyer, 2 N. B. R. 76, Fed. Cas. No. 4082; In re McVey, 2 N. B. R. 85, Fed. Cas. No. 8932; In re Rosenfield, 1 N. B. R. 161, Fed. Cas. No. 12058; In re Smith, 5 N. B. R. 20, Fed. Cas. No. 12985; In re Blalock, 118 Fed. 679; In re Crist, 116 Fed. 1007, 9 A. B. R. 1.

11—Official Form 58, § 1827, *post*.

12—In re Nathanson, 155 Fed. 645, 19 A. B. R. 56.

A specification in the language of the statute and covering non-keeping, concealment or destruction of books of account without specifying whether the charge is destruction, concealment, or a failure to keep books of account, is sufficient.<sup>13</sup> So, it is held that, though a specification which charges that the bankrupt has failed to keep books of account from which his true condition may be ascertained is too indefinite, it not appearing whether an utter failure to keep books, or merely an improper keeping thereof is intended to be charged, it will be held sufficient where the bankrupt testifies that he kept no books of account.<sup>14</sup> A specification alleging the cancellation of checks by the bankrupt with intent to conceal his financial condition is not insufficient because not alleging the date the same were drawn.<sup>15</sup> A specification which charges that books were kept with an intent to conceal the bankrupt's financial condition is insufficient to prevent a discharge for failure to keep any books whatever.<sup>16</sup>

A specification charging concealment, removal, alteration and destruction of books and papers without averring fraudulent intent, is insufficient.<sup>17</sup>

A specification relying on a false oath as an objection to the discharge should show wherein the bankrupt made a false oath.<sup>18</sup> A specification which merely alleges that he swore falsely that he was indebted to a creditor named in his schedule and did not disclose to his trustee that the claim was false and fictitious, without alleging that he knew the claim was false,<sup>19</sup> or that the bankrupt swore that the schedules contained a full and true list of the creditors and assets and that it appears bankrupt did not know whether the schedule was complete or not,<sup>20</sup> is insufficient.

A specification alleging the obtaining of credit upon a materi-

13—*Godshalk Co. v. Sterling*, 129 Fed. 580, 12 A. B. R. 302; *In re Patterson*, 121 Fed. 921, 10 A. B. R. 371; *In re Ginsburg*, 130 Fed. 627, 12 A. B. R. 459; *In re Magen Bros. Co.*, 192 Fed. 883, 27 A. B. R. 729; *In re Brod*, 166 Fed. 1011, 21 A. B. R. 426; *contra*, *In re Milgram & Ost*, 129 Fed. 827, 12 A. B. R. 306.

14—*In re Lewis*, 163 Fed. 137, 20 A. B. R. 711.

15—*Godshalk Co. v. Sterling*, 129 Fed. 580, 12 A. B. R. 302.

16—*In re Halsell*, 132 Fed. 562, 13 A. B. R. 106.

17—*In re Bradin*, 179 Fed. 768, 24 A. B. R. 793; *In re Cordick*, 19 N. B. R. 142, Fed. Cas. No. 3094, but see *In re Randall*, 159 Fed. 298, 20 A. B. R. 305.

18—*In re Ginsburg*, 130 Fed. 627, 12 A. B. R. 459.

19—*In re Blumenthal*, 18 N. B. R. 555, Fed. Cas. No. 1576.

20—*In re White*, 1 N. B. N. 202.

ally false statement in writing should contain at least the substance of the alleged false statement,<sup>21</sup> and the names of the persons alleged to have been defrauded.<sup>22</sup> A general averment that a financial statement set forth in full in the specification is false, without alleging wherein it was false, presents no issuable fact.<sup>23</sup>

Property alleged to have been transferred, removed, destroyed and concealed should be specified.<sup>24</sup> A specification that the bankrupt has offered to surrender all his property and that he is withholding property from his creditors;<sup>25</sup> or that he has concealed part of his effects from the court, or has in contemplation of bankruptcy made payments, transfers and assignments preferring a creditor;<sup>26</sup> or that he has omitted property from his schedule willfully,<sup>27</sup> or with fraudulent intent;<sup>28</sup> or charging concealment of assets without alleging fraudulent intent,<sup>29</sup> is insufficient.

Although a specification shows concealment prior to the four-month period, if it is so drawn as to raise the question whether the offense is continuing, it is sufficient.<sup>30</sup>

In a case where no trustee was appointed a specification of objection that the bankrupt had concealed property "from his estate in bankruptcy" instead of "from his trustee," has been held insufficient.<sup>31</sup>

21—*In re Levey*, 133 Fed. 572, 13 A. B. R. 312; *Godshalk Co. v. Sterling*, 129 Fed. 580, 12 A. B. R. 302.

22—*In re Levey*, 133 Fed. 572, 13 A. B. R. 312.

23—*In re Main*, 205 Fed. 421, 30 A. B. R. 547.

24—*Godshalk Co. v. Sterling*, 129 Fed. 580, 12 A. B. R. 302; *In re Ginsburg*, 130 Fed. 627, 12 A. B. R. 459.

Specification held sufficiently specific. *In re Milgraum & Ost*, 129 Fed. 827, 12 A. B. R. 306; *In re Magen Bros. Co.*, 192 Fed. 883, 27 A. B. R. 729.

25—*In re Hirsch*, 96 Fed. 468, 2 A. B. R. 715.

26—*In re Butterfield*, 14 N. B. R. 147, 5 Biss. 120, Fed. Cas. No. 2247; *In re*

*Hill*, 1 N. B. R. 42, 2 Ben. 136, Fed. Cas. No. 6482; *In re Freeman*, 4 N. B. R. 71, 4 Ben. 245, Fed. Cas. No. 5082; *In re Graves*, 24 Fed. 550; *In re Hixon*, 1 N. B. N. 326, 556, 1 A. B. R. 610, 93 Fed. 440.

27—*In re Keefer*, 4 N. B. R. 126, Fed. Cas. No. 7636; *In re Hummitsch*, 2 N. B. R. 3, Fed. Cas. No. 6866.

28—*In re Adams*, 2 N. B. N. R. 1034, 104 Fed. 72, 4 A. B. R. 696.

29—*In re Griffin Bros.*, 154 Fed. 537, 19 A. B. R. 78; *In re Condict*, 19 N. B. R. 142, Fed. Cas. No. 3094; *contra*, *In re Gift*, 130 Fed. 230, 12 A. B. R. 244.

30—*In re McCann Bros.*, 171 Fed. 266, 22 A. B. R. 557.

31—*In re Adams*, 171 Fed. 599, 22 A. B. R. 613.



## § 1461. — Plea to specifications.

While no pleading by the bankrupt is necessary when specifications in opposition to his discharge are filed, the specifications not being confessed by failure to answer<sup>32</sup> but proof thereof being necessary.<sup>33</sup> Yet, if there is reason to do so, the bankrupt may demur, seek by motion or exception the relief desired, or answer.<sup>34</sup> Where the specification affirmatively shows that the party making the same is not a party in interest and will not be affected by the discharge,<sup>35</sup> or fails to allege any fact barring a discharge,<sup>36</sup> it will be disregarded though not excepted to by the bankrupt. The right to object to a defective specification is waived if the objection is not raised at the proper time.<sup>37</sup> If the objections to the specification be insufficient in law, they will be overruled.<sup>38</sup>

## § 1462. — Amendment.

If the specifications be insufficient they may be amended,<sup>39</sup> provided there be no laches,<sup>40</sup> though not after the evidence has been taken, to include a new charge,<sup>41</sup> nor unless the party can specify facts, and his failure to be specific is excusable.<sup>42</sup> An amendment presenting a new issue will not be allowed where the time for filing original specifications has expired,<sup>43</sup> though where the amendment merely amplifies, makes more definite,

32—In re Crist, 116 Fed. 1007, 9 A. B. R. 1.

33—In re Logan, 102 Fed. 876, 2 N. B. N. R. 1056, 4 A. B. R. 525.

34—In re Hendrick, 138 Fed. 473, 14 A. B. R. 795; In re Crist, 116 Fed. 1007, 9 A. B. R. 1; In re Hendrick, 138 Fed. 473, 14 A. B. R. 795; In re Marsh, 2 N. B. N. R. 649; In re McNamara, 1 N. B. N. 326, 2 A. B. R. 566.

35—In re Servis, 140 Fed. 222, 15 A. B. R. 271.

36—In re McCarthy, 170 Fed. 859, 22 A. B. R. 499.

37—In re Osborne, 115 Fed. 1, 8 A. B. R. 165.

38—In re Howell, 105 Fed. 594; In re Crist, 116 Fed. 1007, 9 A. B. R. 1.

39—In re Bradin, 179 Fed. 768, 24 A. B. R. 793; In re Knaszak, 151 Fed. 503, 18 A. B. R. 187; In re Wittenberg,

160 Fed. 991, 20 A. B. R. 398; In re Nathanson, 155 Fed. 645, 19 A. B. R. 56; In re Mintzer, 197 Fed. 647, 28 A. B. R. 743; In re Hendrick, 138 Fed. 473, 14 A. B. R. 795; In re Pierce, 102 Fed. 977, 4 A. B. R. 489; In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 Fed. 282; In re Hirsch, 96 Fed. 468, 2 A. B. R. 715; In re Kaiser, 2 N. B. N. R. 123, 99 Fed. 689; In re Glass, 119 Fed. 509; In re McIntire, 1 N. B. R. 115, 2 Ben. 345, Fed. Cas. No. 8823, 3 A. B. R. 767.

40—Patten v. Carley, 117 Fed. 130, 8 A. B. R. 720; In re Mudd, 105 Fed. 348, 5 A. B. R. 242.

41—In re Pierce, 102 Fed. 977, 4 A. B. R. 489.

42—In re Hixon, 1 N. B. N. 326, 556, 1 A. B. R. 610, 93 Fed. 440.

43—In re Johnson, 192 Fed. 356, 27 A. B. R. 644.

or makes specific objections which have already been filed, it may be allowed at the discretion of the court at any stage of the proceedings.<sup>44</sup>

A specification fairly indicating the statutory ground upon which it rests may be amended to conform with the words of the statute,<sup>45</sup> but amendments will not be allowed where they amount to more than an enlargement of the original specifications,<sup>46</sup> nor where the original specifications contain no statement of fact but are merely in the language of the statute.<sup>47</sup>

The application for leave to amend must be made to the judge and not to the referee,<sup>48</sup> and its grant rests in his sound discretion.<sup>49</sup>

### § 1463. — Signature and verification.

It is no objection to a specification that it carries the signatures of more than one creditor.<sup>50</sup>

The specifications should be verified as to facts alleged,<sup>51</sup> but this may be done by the attorney of the creditor.<sup>52</sup> If signed or verified by counsel the reason should be stated.<sup>53</sup> The affidavit need not be in the exact language of the official form,<sup>54</sup> and is sufficient if it states that the allegations are true to the best of the affiant's knowledge, information and belief.<sup>55</sup>

The want of verification being a mere irregularity may be sup-

44—In re Nathanson, 152 Fed. 585, 18 A. B. R. 252; In re Morgan, 2 N. B. N. R. 846, 101 Fed. 982, 4 A. B. R. 402; In re Johnson, 192 Fed. 356, 27 A. B. R. 644; In re Knaszak, 151 Fed. 503, 18 A. B. R. 187.

45—In re Weston, 206 Fed. 281, 30 A. B. R. 647.

46—In re Gift, 130 Fed. 230, 12 A. B. R. 244.

47—In re Bromley, 152 Fed. 493, 18 A. B. R. 227.

48—In re Headley, 2 N. B. N. R. 684; In re Kaiser, 2 N. B. N. R. 123, 99 Fed. 689, 3 A. B. R. 767; In re Leszynsky, 2 N. B. N. R. 738.

49—In re Mudd, 105 Fed. 348, 5 A. B. R. 242.

50—In re Milgraum & Ost, 129 Fed. 827, 12 A. B. R. 306.

51—In re Brown, 112 Fed. 49, 7 A. B. R. 252; see In re Baerncopf, 117 Fed. 975, 9 A. B. R. 133; In re Glass, 119 Fed. 509, 9 A. B. R. 391.

52—In re Milgraum & Ost, 129 Fed. 827, 12 A. B. R. 306.

53—In re Baerncopf, 117 Fed. 975, 9 A. B. R. 133; In re Randall, 159 Fed. 298, 20 A. B. R. 305.

54—Official Form 3, § 1683, *post*; In re Nathanson, 155 Fed. 645, 19 A. B. R. 56.

55—In re Milgraum & Ost, 129 Fed. 827, 12 A. B. R. 306.

plied *nunc pro tunc*,<sup>56</sup> and cannot be objected to after the testimony has been taken.<sup>57</sup>

### § 1464. Hearing on application.

### § 1465. — Motion for hearing.

The bankrupt must move for a hearing a reasonable time after his application for a discharge is filed.<sup>58</sup>

### § 1466. — Powers and duties of referee or special master.

In matters relating to an application for a discharge,<sup>59</sup> the judge only has power to determine them finally,<sup>59</sup> but he may refer the application, or any issue thereon, on his own motion or upon the petition of the bankrupt, trustee, or creditors,<sup>60</sup> to the referee or a special master to ascertain and report the facts, and state his conclusions of law,<sup>61</sup> and before doing so should dispose of any technical objections. A referee cannot decide any questions relating to the right to a discharge until the matter has been referred to him by the judge,<sup>62</sup> and his report on the right to a discharge should not be made until the examination of the bankrupt made to discover assets is formally closed,<sup>63</sup> though it is held that the taking of testimony by the referee before returning the petition for a discharge and the specifications in opposition thereto to the court is an irregularity which may be waived.<sup>64</sup>

The referee should pass on all grounds of objection to a dis-

56—*In re Hanna*, 168 Fed. 238, 21 A. B. R. 843; *In re Meurer*, 144 Fed. 445, 15 A. B. R. 823; *In re Miller*, 192 Fed. 730, 27 A. B. R. 606; *In re Gift*, 130 Fed. 230, 12 A. B. R. 244; *In re Wolfstein*, 1 N. B. N. 202.

57—*In re Baernkopf*, 117 Fed. 975, 9 A. B. R. 133.

Whether failure to verify specifications may be waived by failure to object *quære*. *In re Main*, 205 Fed. 421, 30 A. B. R. 547.

58—*Lindeke v. Converse*, 198 Fed. 618, 28 A. B. R. 596.

Delay of five months held unreasonable. *Id.*

59—*In re Elby*, 157 Fed. 935, 19 A. B. R. 734; *In re Johnson*, 158 Fed. 342, 19 A. B. R. 814.

60—*In re Sykes*, 106 Fed. 669, 6 A. B. R. 264.

61—*In re Steed*, 107 Fed. 682, 6 A. B. R. 73; but see *In re Brockman*, 168 Fed. 1015, 21 A. B. R. 251; *In re Hockman*, 205 Fed. 330, 30 A. B. R. 921.

62—*In re Randall*, 159 Fed. 298, 20 A. B. R. 305.

63—*In re Johnson*, 158 Fed. 342, 19 A. B. R. 814.

64—*In re Goodhile*, 130 Fed. 471, 12 A. B. R. 380.

charge, so as to prevent the necessity of sending the case back, if he is not upheld in his conclusions on particular charges.<sup>65</sup>

A referee or special master is authorized to rule upon the sufficiency of the specifications of objections and will not take evidence upon such as are clearly insufficient; but the application for discharge must be heard and finally determined by the court of bankruptcy.<sup>66</sup>

It is the duty of the special master to take and report the evidence in aid of the court, and return the same, together with the rulings as to its admissibility. He may reserve his decision as to the admissibility of testimony.<sup>67</sup>

The referee has no authority to dismiss the proceedings upon determining that the bankrupt is not entitled to a discharge.<sup>68</sup>

The referee may call a meeting of creditors to authorize the trustee to interpose objections to a discharge, but the notice of the hearing on such objections and the fixing of the date of the hearing should be upon order of the judge.<sup>69</sup> It is held that a referee cannot be granted the power to fix the date for the hearing of the application or to make an order requiring notice to be given to the creditors.<sup>70</sup>

### § 1467. — Attendance of bankrupt.

The bankrupt may be required to attend the hearings upon his application for a discharge.<sup>71</sup>

### § 1468. — Appearance of creditors.

A creditor opposing a discharge should enter his appearance not later than on the return day on the rule to show cause,<sup>72</sup> but his failure to appear at the hearing of the objections cannot be urged for the first time upon appeal.<sup>73</sup> The filing of objec-

65—In re Haskell, 164 Fed. 301, 20 A. B. R. 914.

66—In re Kaiser, 2 N. B. N. R. 123, 99 Fed. 689, 3 A. B. R. 767; *Fellows v. Freudenthal*, 102 Fed. 731, 4 A. B. R. 490; In re Liszynsky, 2 N. B. N. R. 738; In re McDuff, 1 A. B. R. 110, 101 Fed. 241.

67—But see In re Knaszak, 151 Fed. 503, 18 A. B. R. 187.

68—In re Elby, 157 Fed. 935, 19 A. B. R. 734.

69—In re Hockman, 205 Fed. 330, 30 A. B. R. 921.

70—In re Johnson, 158 Fed. 342, 19 A. B. R. 814.

71—In re Shanker, 138 Fed. 862, 15 A. B. R. 109.

72—G. O. XXXII; In re Grant, 135 Fed. 889, 14 A. B. R. 398.

73—*Shaffer v. The Koblegard Co.*, 183 Fed. 71, 24 A. B. R. 898, aff'g 169 Fed. 724, 22 A. B. R. 147.

tions before the return day is a sufficient appearance within the meaning of the general order.<sup>74</sup>

A creditor cannot, as of right, appear and oppose a discharge after the return day, though there be an adjournment for some other purpose, but the court may permit opposition at any time prior to discharge.<sup>75</sup>

### § 1469. — Jury trial.

Any question of fact arising on specifications in opposition to discharge<sup>77</sup> may be referred to a jury in the discretion of the court. However, the findings of the jury upon which the adjudication in bankruptcy is based not only do not bind the special master, but should be disregarded, as it is his duty to exercise an independent judgment on the facts brought before him.<sup>78</sup>

### § 1470. — Reconsideration of claims.

Claims will not be reconsidered upon the hearing of an application for a discharge, where no objection was made by the bankrupt at the time they were allowed.<sup>79</sup>

### § 1471. — Presumptions and burden of proof.

The filing of specifications in opposition to a bankrupt's application for discharge does not make out a *prima facie* case against the bankrupt which he is bound to disprove, but the burden of proof is upon the creditors<sup>80</sup> and if the specifications are not sustained by proper proof, they will be dismissed.<sup>81</sup> If

74—In re Magen Bros. Co., 192 Fed. 883, 27 A. B. R. 729.

75—In re Houghton, 10 N. B. R. 337, Fed. Cas. No. 6730; In re Olmstead, 4 N. B. R. 71, Fed. Cas. No. 10505.

77—Morgan v. Thornhill, 5 N. B. R. 1, 11 Wall. 65, 20 L. ed. 60.

78—In re Mayer, 195 Fed. 571, 28 A. B. R. 342.

79—In re Carton & Co., 148 Fed. 63, 17 A. B. R. 343.

80—In re Cohen, 206 Fed. 457, 30 A. B. R. 653, rev'g 201 Fed. 188, 29 A. B. R. 698; In re Main, 205 Fed. 421, 30 A. B. R. 547; In re Hodge, 205 Fed. 824, 30 A. B. R. 522; In re Brown, 199 Fed. 356, 29 A. B. R. 73; In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78; In re Walder,

152 Fed. 489, 18 A. B. R. 419; In re Garrison, 149 Fed. 178, 17 A. B. R. 831; In re Jacobs, 144 Fed. 868, 16 A. B. R. 482; In re Hamilton, 133 Fed. 823, 13 A. B. R. 333; In re Keefer, 135 Fed. 885, 14 A. B. R. 290; In re Prager, 134 Fed. 1006, 13 A. B. R. 527; In re Dauchy, 130 Fed. 532, aff'g 122 Fed. 688, 10 A. B. R. 527; In re Cason, 27 A. B. R. 903; In re Wermuth, 179 Fed. 1009, 24 A. B. R. 785; In re Chamberlain, 125 Fed. 629, 11 A. B. R. 95; In re Corn, 106 Fed. 143, 5 A. B. R. 478; In re Conn, 108 Fed. 525, 6 A. B. R. 217.

81—In re Prager, 134 Fed. 1006, 13 A. B. R. 527; In re Fitchard, 103 Fed. 742, 2 N. B. N. R. 1075, 4 A. B. R. 609; In re Penny, 2 N. B. N. R. 1001; In re Mc-

the evidence leaves in doubt the existence of a fraudulent intent,<sup>82</sup> it is not to be presumed, but must be proved, not necessarily by direct testimony, but it may be proved convincingly by circumstantial evidence.<sup>83</sup>

If the creditors have shown the existence of assets and their disappearance or large shrinkage within a short time before the bankruptcy, the burden<sup>84</sup> is then on the bankrupt<sup>85</sup> to account for the diminution of his estate; and a fraudulent concealment may be inferred, if the bankrupt does not satisfactorily explain.<sup>86</sup> The burden of proof does not shift merely because creditors show that, as between themselves and the bankrupt, there is property not scheduled.<sup>87</sup> The degree of proof required to establish objections which would prevent the granting of a discharge need not be beyond a reasonable doubt,<sup>88</sup> but there should

Gurn, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 Fed. 743; In re Finan, 2 N. B. N. R. 872; In re Marsh, 2 N. B. N. R. 649; In re Phillips, 2 N. B. N. R. 424, 98 Fed. 844, 3 A. B. R. 542; In re Berner, 2 N. B. N. R. 268, 3 A. B. R. 425; In re Wetmore, 2 A. B. R. 700, 99 Fed. 703; In re Idzall, 96 Fed. 314, 2 A. B. R. 741; In re Okell, 2 N. B. R. 35, Fed. Cas. No. 10475; In re Herdic, 19 N. B. R. 385, 1 Fed. 242, Fed. Cas. No. 6403; In re May, 2 N. B. N. R. 93; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 Fed. 512; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Hixon, 1 N. B. N. 326, 556, 1 A. B. R. 610, 93 Fed. 440; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353; In re Baerneopf, 117 Fed. 975, 9 A. B. R. 133.

82—In re Pierce, 103 Fed. 64, 4 A. B. R. 554; In re McGurn, 2 N. B. N. R. 877, 102 Fed. 743, 4 A. B. R. 493; In re Wetmore, 2 A. B. R. 700, 99 Fed. 703; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Sidle, 2 N. B. R. 77, Fed. Cas. No. 12844; In re Plager, 2 N. B. R. 10; In re Hill, 1 N. B. R. 42, 2 Ben. 136, Fed. Cas. No. 6482; In re Orcutt, 4 N. B. R. 176, 5 Ben. 19, Fed. Cas. No. 10550; In re Herdic, 1 Fed. 242, Fed. Cas. No. 6403.

83—In re Miller, 203 Fed. 170, 30 A. B. R. 113.

84—In re Finkelstein, 101 Fed. 418, 2 N. B. N. R. 839, 3 A. B. R. 800; In re Leslie, 119 Fed. 406, 9 A. B. R. 561.

85—In re Slechter, 2 N. B. N. R. 951.

86—Seigel v. Cartel, 164 Fed. 691, 21 A. B. R. 140; In re Slechter, 2 N. B. N. R. 951; In re Cashman, 2 N. B. N. R. 980, 103 Fed. 67, 4 A. B. R. 326; In re Meyers, 1 N. B. N. 515, 2 A. B. R. 707, 96 Fed. 408; In re Wood, 98 Fed. 972, 3 A. B. R. 572; In re Mendelsohn, 102 Fed. 119; In re Morgan, 101 Fed. 982, 2 N. B. N. R. 846, 4 A. B. R. 402.

87—In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353.

88—In re Chamberlain, 180 Fed. 304, 25 A. B. R. 37; In re Finan, 2 N. B. N. R. 872; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Greenberg, 114 Fed. 773, 8 A. B. R. 94; In re Marsh, 2 N. B. N. R. 593.

Concealment of assets need only be established by a fair preponderance of evidence. In re Delmour, 161 Fed. 589, 20 A. B. R. 405; In re Margolis, 181 Fed. 591, 24 A. B. R. 934; In re Doyle, 199 Fed. 247, 29 A. B. R. 102; In re Bacon, 205 Fed. 545, 30 A. B. R. 584.

Proof of offense sufficient to bar a discharge must be beyond reasonable doubt. In re Hennebry, 207 Fed. 882, 31 A. B. R. 231.

be a fair preponderance of the credible evidence,<sup>89</sup> and sufficient to establish each element by clear and satisfying evidence to a high degree of certainty.<sup>90</sup>

The making of a false oath need not be established by the same quantum of proof that would be necessary to sustain a conviction for perjury.<sup>91</sup>

### § 1472. — Admissibility of evidence.

Evidence cannot be introduced by objecting creditors without first having filed a specification of objections as required by law. If filed, the special master or referee should not disregard a specification, but should confine the evidence to the material facts alleged in them.<sup>92</sup> Furthermore, his authority is not limited to the taking and reporting of the testimony and ruling as to its admissibility, but he has authority to rule upon the sufficiency of specifications of objections and should not take evidence on such as are clearly insufficient.<sup>93</sup>

The testimony of the bankrupt given in his examination under section 21 of the statute, is admissible in support of the specifications in opposition to the discharge, but the evidence of creditors and others taken at examinations restricted to no issues and governed by no precise rules of evidence cannot be applied as proof to the exceedingly definite issues presented by specifications in opposition to a discharge, such examinations being largely for purpose of discovery, while the filing of speci-

89—In re Leslie, 119 Fed. 406, 9 A. B. R. 561.

90—In re Simon, 201 Fed. 1004, 29 A. B. R. 808; In re Brockman, 168 Fed. 1015, 21 A. B. R. 251; In re Kolster, 146 Fed. 138, 17 A. B. R. 52; In re Troeder, 150 Fed. 710, 17 A. B. R. 723; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 20 L. R. A. (N. S.) 785, 21 A. B. R. 457; rev'g 143 Fed. 607, 16 A. B. R. 313; In re Chamberlain, 180 Fed. 304, 25 A. B. R. 37; In re Berner, 2 N. B. N. R. 268; In re Salsbury, 113 Fed. 833, 7 A. B. R. 771; In re Miner, 117 Fed. 953, 8 A. B. R. 248; In re Gaylord, 112 Fed. 668, 7 A. B. R. 1, affirming 106 Fed. 833, 5 A. B. R. 410; In re Wakefield, 207 Fed. 180, 31 A. B. R. 42.

91—In re Remmers, 173 Fed. 484, 23

A. B. R. 78; In re Troeder, 150 Fed. 710, 17 A. B. R. 723; but see In re Hennebry, 207 Fed. 882, 31 A. B. R. 231.

92—In re McGivin, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 Fed. 743; In re Frice, 96 Fed. 611; In re Adams, 2 N. B. N. R. 1034, 104 Fed. 72; In re Marsh, 2 N. B. N. R. 649; In re Hirsh, 96 Fed. 468, 2 A. B. R. 715; In re Smith, 16 Fed. 465; In re Fry, 9 Fed. 376; In re Hixen, 1 N. B. N. 326, 556; 1 A. B. R. 610, 93 Fed. 440; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 Fed. 512; In re Kaiser, 2 N. B. N. R. 123, 99 Fed. 689; Tenney v. Collins, 4 N. B. R. 156, Fed. Cas. No. 13833.

93—In re Kaiser, 2 N. B. N. R. 123, 99 Fed. 689, 3 A. B. R. 1767; see also In re Lyon, 1 N. B. R. 111, Fed. Cas. No. 8643.

fications in opposition to a discharge is equivalent to the commencement of an action against the bankrupt by the objectors, and the principles of procedure must be logically applied to that fact.<sup>94</sup> Such evidence may be admitted, however, where there is an express stipulation in writing signed by the parties.<sup>95</sup>

It has been held that testimony given by the bankrupt on a hearing under a state insolvency law cannot be offered to prove that he swore falsely though his counsel had agreed that it might be used before the referee with the same force and effect as if taken before him, on the ground that the bankrupt took no oath before the referee that his former testimony was true, and that therefore he was not bound by his counsel's stipulation.<sup>96</sup>

Evidence tending to show a concealment of alleged exempt property is admissible on the question of knowledge and intent in the concealment of other assets.<sup>97</sup> The affidavit of a former partner of the bankrupt, contradicting the recitals in an agreement signed by the affiant, may be used to show that the recitals are designed to cover a fraudulent concealment by the bankrupt of an interest in his former business.<sup>98</sup>

It is inadmissible to introduce in opposition to a discharge as evidence of fraud the dying declarations of a fraudulent grantee in a proceeding to set aside a bankrupt's discharge.<sup>99</sup>

### § 1473. — Examination of witnesses.

The creditors are not entitled to the production and inspection of the books of a witness claimed to be a partner of the bankrupt for the sole purpose of discovering evidence.<sup>1</sup>

An application for an order for the examination of a witness before a referee in another district in support of the creditor's

94—*Shaffer v. The Koblegard Co.*, 183 Fed. 71, 24 A. B. R. 898, aff'g 169 Fed. 724, 22 A. B. R. 147; *In re Goodhile*, 130 Fed. 471, 12 A. B. R. 380; see *In re Penny*, 2 N. B. N. R. 1001; *In re Marsh*, 2 N. B. N. R. 649; *Creditors v. Williams*, 4 N. B. R. 187, Fed. Cas. No. 3379; *In re Wilcox*, 109 Fed. 628, 6 A. B. R. 362; *In re Penny*, 2 N. B. N. R. 1001; *In re Krueger*, 2 Lowell, 182; *In re Gaylord*, 112 Fed. 668, 7 A. B. R. 1; *In re Cooke*, 109 Fed. 631, 5 A. B. R. 434; and see *In re Walder*, 152 Fed. 489, 18 A. B.

R. 419; *In re Murray*, 162 Fed. 983, 20 A. B. R. 700.

95—*In re Penny*, 2 N. B. N. R. 1001.

96—*In re Goldsmith*, 2 N. B. N. R. 1013, 101 Fed. 570, 4 A. B. R. 234.

97—*In re Isaacson*, 175 Fed. 292, 23 A. B. R. 665.

98—*In re Plager*, 2 N. B. N. R. 10.

99—*In re Marrioneaux*, 13 N. B. R. 222, 1 Woods, 37, Fed. Cas. No. 9088.

1—*In re Romine*, 138 Fed. 837, 14 A. B. R. 785.



specifications of objections to the bankrupt's discharge should be made to the federal court in the district where the witness resides. If the creditors do not desire to proceed in that court, a commissioner may be appointed to take the testimony of the witness.<sup>2</sup>

#### § 1474. — Conclusiveness of findings or report.

The referee's or special master's determination upon the sufficiency of the evidence to support specifications of objections is entitled to weight<sup>3</sup> and will not be set aside unless it be clearly erroneous.<sup>4</sup> If exceptions thereto be filed, the errors must be specifically pointed out.<sup>5</sup> An order denying a discharge will be reversed where the findings of the referee recommending a discharge are amply supported by testimony.<sup>6</sup>

#### § 1475. — Rehearing.

If no objections are filed to the referee's finding as to facts, and the court refuses a discharge, it will not grant a rehearing,<sup>7</sup> but where upon motion to confirm a report of a special master recommending the denial of a discharge, the court finds the proof of the commission of an offense insufficient it may send the matter back to the special master for further inquiry, or may conduct an independent investigation of its own.<sup>8</sup>

#### § 1476. Adjournment of hearing—Stay of discharge.

The proceedings upon the order to show cause why the discharge shall not be granted can, on the return day of the order, be postponed by reason of the adjournment of the examination of the bankrupt, or for other good reason,<sup>9</sup> but should not be adjourned to await the result of protracted litigation, a speedy hearing and decision being desirable.

The hearing upon the application for a discharge may be post-

2—In re Robinson, 179 Fed. 724, 24 A. B. R. 617.

3—In re Forth, 151 Fed. 951, 18 A. B. R. 186; In re Knaszak, 151 Fed. 503, 18 A. B. R. 187.

4—In re Lafleche, 109 Fed. 307, 6 A. B. R. 483; In re Covington, 110 Fed. 143, 6 A. B. R. 373.

5—In re Covington, 110 Fed. 143, 6 A. B. R. 143.

6—Boyd v. Arnold, Loucheim & Co., 149 Fed. 187, 17 A. B. R. 839.

7—In re Royal, 113 Fed. 140, 7 A. B. R. 636.

8—In re Mayer, 195 Fed. 571, 28 A. B. R. 342.

9—In re Mawson, 1 N. B. R. 41, Fed. Cas. No. 9320; In re Thompson, 1 N. B. R. 65, 2 Ben. 166, Fed. Cas. No. 13935.

poned until creditors, who have agreed to be postponed to other creditors, and whom the bankrupt has therefore not listed as creditors, either release their claims, or consent to be scheduled *nunc pro tunc* so as to make the discharge effective as to them.<sup>10</sup>

The hearing should not be postponed to enable creditors to take proceedings to recover alleged assets, where the right of the creditors will be unaffected by the discharge,<sup>11</sup> but may properly be postponed to enable the trustee to commence an action to recover a surplus income to which the bankrupt is entitled under a will.<sup>12</sup>

The discharge may be postponed a reasonable time to enable a creditor holding a waiver of exemptions to assert his rights in a state court.<sup>13</sup> A creditor having a dischargeable claim seeking to reach exempt property should apply to the bankruptcy court for a withholding of the discharge until he has fastened a specific lien on the property. If he fails so to do and the bankrupt secures his discharge before the fastening of such a lien, the claim is barred.<sup>14</sup> In deciding whether a discharge should be withheld the district court cannot finally pass on the validity of the waiver of exemptions, but should merely decide whether a *prima facie* waiver exists.<sup>15</sup>

Proceedings for a discharge will not be stayed to enable a plaintiff in an action in the state court to proceed to judgment and to subject exempt property to the satisfaction of such judgment where it appears that the discharge, if granted, would not be a bar to the plaintiff's action.<sup>16</sup> Where a creditor holding a judgment enforceable against the bankrupt's exempt property has withdrawn his claim from the bankruptcy court for the

10—In re Josephs, 205 Fed. 548, 30 A. B. R. 586.

11—In re Morris, 204 Fed. 770, 30 A. B. R. 319.

12—In re Morris, 204 Fed. 770, 30 A. B. R. 319.

13—Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 10 A. B. R. 107; Bowen & Thomas v. Keller, 130 Ga. 31, 22 A. B. R. 727; In re Allen & Co., 134 Fed. 620, 13 A. B. R. 518; In re Mitchell, 175 Fed. 877, 23 A. B. R. 707; In re Brumbaugh, 128 Fed. 971, 12 A. B. R. 204; In re Pullman, 171 Fed. 595, 22 A. B. R. 513.

Discharge withheld reasonable time to enable enforcement of a claim against exempt property. Meinhard & Bro. v. Pincus, 200 Fed. 736, 29 A. B. R. 619.

14—So held where creditor held notes waiving exemptions; discharge obtained pending suit in equity to reach property. Bowen & Thomas v. Keller, 130 Ga. 31, 22 A. B. R. 727.

15—Meinhard & Bro. v. Pincus, 200 Fed. 736, 29 A. B. R. 619.

16—Ex parte Butler-Kyser Mfg. Co., 174 Ala. 237, 27 A. B. R. 419.

express purpose of enforcing it in the state courts, the discharge will not be delayed to enable him to enforce his judgment against exempt property;<sup>17</sup> nor will a discharge be withheld pending a suit against the bankrupt for the conversion of a note containing a waiver of exemptions.<sup>18</sup>

A creditor suing and acquiring a lien by garnishment before the four-month period is entitled to have the discharge stayed for a reasonable time so as to enforce his rights against the garnishees and sureties on the garnishment bond,<sup>19</sup> but it is held that the granting of a discharge against the bankrupt, a contractor, will not be stayed to enable a lien claimant to obtain a personal judgment against the bankrupt and thereby perfect his lien against the owner of the property on which the labor and material was used.<sup>20</sup>

A decision by a bankruptcy court upon an application for discharge will not be stayed to await the result of a pending action in a state court by which creditors seek to set aside as fraudulent a transfer made before the adjudication of bankruptcy, although the same plaintiffs oppose the bankrupt's discharge on the same ground, since the decree of the state court would not necessarily determine the right of the bankrupt to be discharged.<sup>21</sup>

Where the bankrupt commits perjury in the proceedings for his discharge, the proceedings may be stayed until the determination of the contempt proceedings.<sup>22</sup>

### § 1477. Grounds for refusing discharge.

#### § 1478. — In general.

The supreme court has held that congress may prescribe any regulations concerning discharges in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental laws, and that there is nothing in the act of 1898 on that subject

17—*Lockwood v. Exchange Bank* distinguished: *In re Weaver*, 144 Fed. 229, 16 A. B. R. 265.

18—*In re Hartsell & Son*, 140 Fed. 30, 15 A. B. R. 177.

19—*In re Maher*, 169 Fed. 997, 22 A. B. R. 290.

20—*In re Goodrich*, 192 Fed. 746, 27 A. B. R. 619.

21—*In re Tiffany*, 147 Fed. 314, 17 A. B. R. 296; *In re Cornell*, 97 Fed. 29, 3 A. B. R. 172.

22—*In re Kretsch*, 172 Fed. 523, 22 A. B. R. 284.

that would justify an overthrow of its action.<sup>23</sup> By the provisions of the act a discharge may be refused when the bankrupt has committed an offense punishable by imprisonment, that is, with unlawful intent;<sup>24</sup> has knowingly and fraudulently<sup>25</sup> concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy, or made a false oath or account in, or in relation to, any proceeding in bankruptcy; or if he has, with intent to conceal his true financial condition, destroyed, concealed, or failed to keep books of account, or records from which his true condition might be ascertained,<sup>26</sup> obtained property on false representations, concealed or removed property with intent to prefer, been granted a discharge in voluntary proceedings within six years, or refused to obey a lawful order of the court or answer a material question.<sup>27</sup>

The participation in an offense under the act committed by another is sufficient to bar a discharge.<sup>28</sup>

The only grounds upon which a discharge can be refused are those specified in section 14b,<sup>29</sup> hence a discharge cannot be refused because of the pendency of an application for discharge under the act of 1867;<sup>30</sup> or general dishonesty, or unfair and sharp dealing with creditors,<sup>31</sup> or the violation of a criminal law of the state,<sup>32</sup> or the omission of a debtor to have himself adjudged a voluntary bankrupt, when his property is attached at the suit of a hostile creditor;<sup>33</sup> or because of an adjudication of bankruptcy suffered by default;<sup>34</sup> or that money is offered certain creditors to vote for a composition;<sup>35</sup> or that the original

23—*National Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 8 A. B. R. 1.

24—Section 14b (1), Act of 1898; *In re Smith v. Keegan*, 111 Fed. 157, 7 A. B. R. 4.

25—*Klein v. Powell*, 174 Fed. 640, 23 A. B. R. 494.

26—Sections 14b and 29b, Act of 1898; *Strause v. Hooper et al.*, 105 Fed. 590, 5 A. B. R. 225; *In re Schachter*, 170 Fed. 683, 22 A. B. R. 389.

27—Section 14b, Act of 1898.

28—*In re Luftig*, 162 Fed. 322, 15 A. B. R. 773.

29—*In re Griffin Bros.*, 154 Fed. 537, 19 A. B. R. 78; *In re Wolff*, 132 Fed. 396,

13 A. B. R. 95; *In re Peacock*, 2 N. B. N. R. 758, 101 Fed. 560, 4 A. B. R. 136; *In re Clisdell*, 2 N. B. N. R. 638, 101 Fed. 246, 4 A. B. R. 95.

30—*In re Herrmann*, 102 Fed. 753, 2 N. B. N. R. 905, 4 A. B. R. 139.

31—*In re Chamberlain*, 180 Fed. 304, 25 A. B. R. 37.

32—*In re McLellan*, 204 Fed. 482, 30 A. B. R. 325.

33—*In re Belden*, 2 N. B. R. 14, Fed. Cas. No. 1240.

34—*In re Lathrop*, 3 N. B. R. 11, Fed. Cas. No. 8105.

35—*In re Morris*, 19 N. B. R. 111, Fed. Cas. No. 9824.

adjudication resulted from collusion, in the absence of fraud;<sup>36</sup> or because the bankrupt has an interest in property which can neither be transferred or levied upon and which would not pass to the trustee.<sup>37</sup>

A discharge will not be denied on the ground that the principal claim from which the debtor seeks a release is one which would not be affected by the discharge.<sup>38</sup>

Only the grounds specified in the objections can be considered.<sup>39</sup>

### § 1479. — Discretion of court.

A refusal to grant a discharge does not rest in the discretion of the judge; but the applicant is entitled to a discharge as a matter of right, unless proved guilty of one of the prescribed offenses, the sole duty of the judge being to decide after a due hearing if he is guilty.<sup>40</sup>

The decision of a court refusing a discharge being essentially one of fact, will not be reversed on appeal unless manifest error appears.<sup>41</sup>

### § 1480. — Statute not retroactive.

To constitute a valid objection to a discharge, the acts complained of must have taken place after the passage of the law and within the period prescribed by it, and the same principle applies to alleged dishonest disposition of assets;<sup>42</sup> or of a fraudulent conveyance or preference.<sup>43</sup>

36—In re Ordway, 19 N. B. R. 171, Fed. Cas. No. 10552.

37—In re Rennie, 1 N. B. N. R. 335, 2 A. B. R. 182.

38—In re Brumbaugh, 128 Fed. 971, 12 A. B. R. 204.

39—In re Taplin, 135 Fed. 861, 14 A. B. R. 360; In re Bouck, 199 Fed. 453, 28 A. B. R. 378; In re Adams, 104 Fed. 72, 2 N. B. N. R. 1034, 4 A. B. R. 696.

40—In re Marshall Paper Co., 2 N. B. N. R. 1053, 102 Fed. 872, 4 A. B. R. 468.

41—Barton Bros. v. Texas Produce Co., 136 Fed. 355, 14 A. B. R. 502; Woods v. Little, 134 Fed. 229, 13 A. B. R. 742; Osborne v. Perkins, 112 Fed. 127, 7 A. B. R. 250.

42—In re Webb, 2 N. B. N. R. 11, 3 A. B. R. 204, s. c. 2 N. B. N. R. 289, 3 A. B. R. 386, 98 Fed. 404; In re Lieber, 2 N. B. N. R. 21, 3 A. B. R. 217; In re Moore, 1 Hask. 134, Fed. Cas. No. 9751; In re Quackenbush, 2 N. B. N. R. 964, 102 Fed. 282, 4 A. B. R. 274; In re Shorer, 1 N. B. N. R. 331, 2 A. B. R. 165, 96 Fed. 90; In re Stark, 1 N. B. N. R. 232, 1 A. B. R. 180; In re Holtz, 1 N. B. N. R. 204.

43—In re House, 2 N. B. N. R. 1099, 103 Fed. 616, 4 A. B. R. 603; In re Fitchard, 2 N. B. N. R. 1075, 103 Fed. 742, 4 A. B. R. 609; In re Rosenfield, 1 N. B. R. 161, Fed. Cas. No. 12058.

### § 1481. — Irregularity of proceedings.

The provisions of the act must be strictly complied with and a discharge will be refused the bankrupt, if, upon examination, it appears that the requirements of the law entitling him thereto have not been complied with, or he has failed to do what he was required to do.<sup>44</sup> Accordingly, a discharge will be refused where it appears that the majority of creditors have received no notice either of the bankruptcy proceedings or of the application for a discharge, and in such case it is immaterial whether the proceedings are voluntary or involuntary since in either case it is the duty of the bankrupt to see that the creditors receive proper notice.<sup>45</sup> So a failure to hold the first meeting of creditors before the filing of the application for a discharge is a ground for refusing the discharge,<sup>46</sup> but an irregularity in the calling of the first meeting, such as a misspelling of the name of the bankrupt in the printed notice of the meeting, will not prejudice the right to a discharge.<sup>47</sup>

The application for a discharge is an independent proceeding incidental and subordinate to the distribution of property of the bankrupt,<sup>48</sup> and the validity of the adjudication, where not appealed from, reversed, or set aside, cannot be questioned, except by showing it was made by a court having no jurisdiction.<sup>49</sup> Objections going to the jurisdiction must be raised at the first or at least an early opportunity or they will be deemed to have been waived and a creditor, who appeared at the first meeting, nominated the trustee and examined the bankrupt, cannot, on application for discharge, for the first time urge that the court is without jurisdiction on the ground that the adjudication was made by the referee and not by the judge.<sup>50</sup>

A discharge will not be refused because the referee has failed to file a certificate showing that the bankrupt has conformed with the provisions of section 14,<sup>51</sup> nor because of failure to

44—In re Levenstein, 180 Fed. 957, 24 A. B. R. 822; In re Palmer, 14 N. B. R. 437, 2 Hughes, 177 Fed. Cas. No. 10678.

45-46—In re Wollowitz, 192 Fed. 105, 27 A. B. R. 558.

47—In re Elkind & Schwartz, 175 Fed. 64, 23 A. B. R. 166.

48—In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 A. B. R. 282.

49—In re Walrath, 175 Fed. 243, 24 A. B. R. 541.

50—In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Mason, 2 N. B. N. R. 425, 99 Fed. 256, 3 A. B. R. 599.

51—In re Fritz, 173 Fed. 560, 23 A. B. R. 84.

publish notice of the trustee's appointment,<sup>52</sup> or failure of a trustee to act after qualifying;<sup>53</sup> nor because it is alleged that the court which made the adjudication had no jurisdiction on account of the lack of residence, where the objecting creditor was a party to the proceedings at the time of adjudication.<sup>54</sup>

If the entire proceedings be irregular and defective,<sup>55</sup> and if a *prima facie* case of fraud is made out, the discharge will be withheld until the *prima facie* case is overthrown.<sup>56</sup>

### § 1482. — Laches.

A discharge will not be refused because of the laches of the bankrupt in not bringing the issues raised by the creditor's objections to trial.<sup>57</sup>

Time for filing application, see *ante*, section 1449.

### § 1483. — Failure to pay costs.

If a bankrupt files an affidavit of inability to make a deposit on filing his petition in voluntary bankruptcy, there is no authority for withholding the discharge until the fees of the clerk and referee have been paid.<sup>58</sup> The law is clear and explicit as to the grounds for refusing a discharge and there is no authority for adding to its provisions.

### § 1484. — Buying off opposition to discharge.

Under the act of 1867, it was held that if the opposition of a creditor to the discharge of a bankrupt was bought off through the procurement of privity of the bankrupt, it was such fraud upon the law as would warrant the setting aside of the discharge, the fact itself being *prima facie* evidence that the bankrupt was not entitled to it,<sup>59</sup> though if the negotiations for the

52—*In re Strachen*, 3 N. B. R. 148;  
*In re Litchfield*, 3 N. B. R. 13, 1 Low.  
 331, Fed. Cas. No. 8398.

53—*In re Pierson*, 10 N. B. N. R. 107,  
 Fed. Cas. No. 11153.

54—*In re Buck*, 3 N. B. R. 76, Deady,  
 425, Fed. Cas. No. 2156; *In re Ives*, 19  
 N. B. R. 97, 5 Dill. 146, Fed. Cas. No.  
 7115; *In re Clisdell*, 2 N. B. N. R. 638,  
 4 A. B. R. 96, 101 Fed. 246; *In re Wil-*  
*liams*, 99 Fed. 544, 3 A. B. R. 677.

55—*In re Doyle*, 3 N. B. R. 190, Fed.  
 Cas. No. 4052.

56—*Mahoney v. Ward*, 2 N. B. N. R.  
 538, 3 A. B. R. 770, 100 Fed. 278.

57—*In re Wolff*, 132 Fed. 396, 13 A.  
 B. R. 95.

58—See G. O. XXXV (4); *In re*  
*Plimpton*, 3 N. B. N. R. 14, 103 Fed. 775,  
 4 A. B. R. 614; *In re Collins*, 1 N. B. N.  
 132; *In the matter of Fees payable by*  
*voluntary bankrupts*, 1 N. B. N. 376, 95  
 Fed. 120; *In re Fritz*, 173 Fed. 560, 23  
 A. B. R. 84.

59—*In re Dietz*, 2 N. B. N. R. 125,  
 3 A. B. R. 316, 97 Fed. 563; *In re Guard-*

withdrawal of opposition were consummated without the actual or constructive knowledge of the bankrupt, it would not vitiate the discharge,<sup>60</sup> it being held that the suppression of such opposition should be condemned as at variance with the policy of a bankruptcy law, whether expressly prohibited or not.<sup>61</sup>

Under the law now in force the buying off of opposition not being one of the grounds specifically enumerated for opposing a discharge, and not being an offense, the rule prevailing under the act of 1867 would not now be a valid objection,<sup>62</sup> but the purchase of a claim for the purpose of preventing or reducing opposition to a discharge may constitute such fraud as will justify the revocation of a discharge under section 15.<sup>63</sup>

#### § 1485. — Fraud in preventing proof of claim.

Fraud in preventing a creditor from proving his claim in proceedings against a firm of which the bankrupt was a member is no bar to a discharge.<sup>64</sup>

#### § 1486. — Insanity.

The fact that the bankrupt becomes insane after the filing of the petition will not bar his discharge.<sup>65</sup>

#### § 1487. — Larceny and embezzlement.

The commission of the offense of larceny, or larceny as bailee against a creditor more than a year prior to the filing of the petition is no bar to a discharge.<sup>66</sup>

#### § 1488. — False oath.

Unless there is a specification charging the making of a false oath, that question will not be considered.<sup>67</sup>

ener, 2 N. B. N. R. 924; In re Steindler, 3 N. B. N. R. 81, 5 A. B. R. 63; In re Mawson, 1 N. B. R. 115, 2 Ben. 332, Fed. Cas. No. 9318; Tuzbury v. Miller, 19 John. 311; In re Douglass, 14 Fed. 403, 406; In re Palmer, 14 N. B. R. 437; Blasdel v. Fowle, 120 Mass. 447; Bell v. Leggett, 7 N. Y. 176.

60—In re Dietz, 2 N. B. N. R. 125, 97 Fed. 563, 3 A. B. R. 316; Ex parte Driggs, 2 Low. 389.

61—Smith v. Bromley, Doug. Rep. 696.

62—In re Luftig, 162 Fed. 322, 15 A. B. R. 773, but see In re Sanborn, 131 Fed. 397, 12 A. B. R. 428.

63—In re Luftig, 162 Fed. 322, 15 A. B. R. 773.

64—In re Cason, 27 A. B. R. 903.

65—In re Miller, 133 Fed. 1017, 13 A. B. R. 345.

66—In re Wolf, 159 Fed. 299, 20 A. B. R. 304.

67—In re Adams, 2 N. B. N. R. 1034, 104 Fed. 72, 4 A. B. R. 696.



A false oath in any part of the bankruptcy proceedings is an offense and ordinarily a bar to a discharge,<sup>68</sup> though it is held that the bankrupt's perjury in the proceedings for his discharge is no ground for refusing same.<sup>69</sup> The provision<sup>70</sup> that no testimony given by bankrupt on his examination shall be offered in evidence against him in any criminal proceeding<sup>71</sup> does not prevent his being denied a discharge for making a false oath on such examination.<sup>72</sup> The making of a false oath by a bankrupt in a proceeding in bankruptcy, not against him, but against the corporation with which he was connected, is not ground for refusing his discharge.<sup>73</sup>

To sustain an objection to a discharge on the ground of false oath, the test is whether or not an indictment for perjury could be sustained on the alleged facts, which requires an intentional untruth in a matter material to an issue which is itself material.<sup>74</sup>

It is not material that the bankrupt subsequently corrects a false oath by telling the truth, except in so far as it throws light upon his intention when he made his first statement,<sup>75</sup> and the fact that the bankrupt correctly lists the property after the discovery of his false oath will not relieve him from the consequences of the same.<sup>76</sup> It is open to the bankrupt to show from the whole testimony that his testimony upon a particular point, if actually false, was not intended to mislead on a particular point.<sup>77</sup>

A discharge will be refused where the bankrupt falsely swears as to his inability to pay the court fees,<sup>78</sup> or that all his property

68—In re Berger, 200 Fed. 325, 29 A. B. R. 712; In re Luftig, 162 Fed. 322, 15 A. B. R. 773; In re Conroy, 134 Fed. 764, 14 A. B. R. 249; In re Slingluff, 2 N. B. N. R. 1115, 105 Fed. 502; In re Leslie, 119 Fed. 406; In re Gaylord, 112 Fed. 668, 7 A. B. R. 1.

69—In re Kretsch, 172 Fed. 523, 22 A. B. R. 284.

70—Section 7, Act of 1898.

71—In re Marx, 102 Fed. 676, 4 A. B. R. 521; but see In re McGuire, 1 N. B. N. 279.

72—See "False Oath," *post*, § 1612.

73—In re Bialock, 118 Fed. 679, 9 A. B. R. 266.

74—In re Chamberlain, 180 Fed. 304,

25 A. B. R. 37; In re Troeder, 150 Fed. 710, 17 A. B. R. 723; In re Miner, 114 Fed. 998, 8 A. B. R. 248; Bauman v. Feist, 107 Fed. 83, 5 A. B. R. 703; In re Lewin, 103 Fed. 852; In re Freund, 2 N. B. N. R. 236, 98 Fed. 81, 3 A. B. R. 418; In re Strouse, 2 N. B. N. R. 64; In re Bullwinkle, 111 Fed. 364, 6 A. B. R. 756; In re Wilcox, 109 Fed. 628, 6 A. B. R. 362.

75—In re Marcus & Scherr, 192 Fed. 743, 27 A. B. R. 164.

76—In re Breiner, 129 Fed. 155, 11 A. B. R. 684.

77—In re Marcus & Scherr, 192 Fed. 743, 27 A. B. R. 164.

78—In re Williams, 2 N. B. N. R. 206.

had gone into the possession of a state receiver, when it had not;<sup>79</sup> or that he was indebted to a creditor when he was not;<sup>80</sup> or if he submits an intentionally fraudulent "statement of expenditures,"<sup>81</sup> or fails to list in his schedules his equity in property standing in his wife's name.<sup>82</sup> A false oath as to the ownership of property is an offense and will prevent a discharge even though the property cannot be administered in the proceeding.<sup>83</sup>

The verification by the bankrupt of his schedules from which he has omitted property fraudulently concealed or transferred is not such false oath as will bar his discharge,<sup>84</sup> nor will a discharge be denied because the bankrupt includes in his schedule property by advice of counsel which he afterwards swears was not his, and says that, though in his name, he considers it his wife's, who advanced the money for it and received the profits, he having been her agent;<sup>85</sup> or omits stock in his wife's name, purchased with money borrowed on their joint note,<sup>86</sup> or omits property transferred by the bankrupt as to which a receiver was appointed by a state court before the petition was filed.<sup>87</sup> The failure to schedule worthless securities or invalid claims does not render bankrupt guilty of false oath.<sup>88</sup>

The false oath must be wilfully and knowingly false,<sup>89</sup> and this fact should be established clearly and to a high degree of certainty,<sup>90</sup> but it is not necessary that it be proved beyond a

79—In re Lesser, 108 Fed. 205, 5 A. B. R. 331.

80—In re Blumenthal, 18 N. B. R. 555, Fed. Cas. No. 1576.

81—In re Dews, 2 N. B. N. R. 437, 3 A. B. R. 691, 101 Fed. 549.

82—In re Guilbert, 169 Fed. 149, 22 A. B. R. 221.

83—In re Conroy, 134 Fed. 764, 14 A. B. R. 249.

84—In re Hennebery, 207 Fed. 882, 31 A. B. R. 231; Schreiber v. Schomaker Piano Forte Mfg. Co., 152 App. Div. (N. Y.) 817, 28 A. B. R. 858; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632; In re McCarthy, Fed. Cas. No. 8684; In re Robertson, Fed. Cas. No. 11921; contra, In re Gammon, 109 Fed. 312, 6 A. B. R. 482.

85—In re Finan, 2 N. B. N. R. 872.

86—Fellows v. Freudenthal, 102 Fed. 231, 4 A. B. R. 490.

87—In re Freeman, 4 N. B. R. 17, Fed. Cas. No. 5082.

88—In re McCrea, 161 Fed. 246, 20 L. R. A. (N. S.) 246, 20 A. B. R. 412; In re Adams, 171 Fed. 599, 22 A. B. R. 613.

89—In re Hale, 206 Fed. 856, 31 A. B. R. 88; In re Bushnell, 1 N. B. N. 528; In re Bryant, 2 N. B. N. R. 1061; Kentucky Nat. Bank of Louisville v. Carley, 127 Fed. 686, 12 A. B. R. 119; In re Slingsluff, 2 N. B. N. R. 1115, 105 Fed. 502.

90—In re Hamilton, 133 Fed. 823, 13 A. B. R. 333; In re Salisbury, 113 Fed. 833, 7 A. B. R. 771; In re Gaylord, 106 Fed. 833, 5 A. B. R. 410, aff'd 7 A. B. R. 1; In re Miner, 117 Fed. 953, 9 A.

reasonable doubt.<sup>91</sup> It must be shown wherein the bankrupt made a false oath, and mere proof of contradictory statements at different stages of the proceedings without proof as to which was false is insufficient,<sup>92</sup> and where a bankrupt makes a statement not under oath, and afterwards contradicts that statement under oath, his statement under oath is not proved to be false by proof that he made the contradictory statement not under oath.<sup>93</sup>

The condition of insolvency being a complex one, the court will hesitate to hold the bankrupt guilty of false swearing, because in the course of an extended examination he makes some misstatement of his want of knowledge of his insolvency at a particular time.<sup>94</sup>

The omission of alleged assets must be proved by the objecting creditor in the first instance.<sup>95</sup>

Effect of advice of counsel, see post, section 1500.

### § 1489. — Books of account and records.

Section 14b(2), prior to the amendment of February 5, 1903, provided that a discharge should be refused any bankrupt who (1) with fraudulent intent to conceal his true financial condition, and (2) in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.<sup>96</sup> Prior to said

B. R. 100; s. c. 114 Fed. 998, 8 A. B. R. 243.

91—In re Remmers, 173 Fed. 484, 23 A. B. R. 78, In re Troeder, 150 Fed. 710, 17 A. B. R. 723; In re Marcus & Scherr, 192 Fed. 743, 27 A. B. R. 164; In re Marsh, 2 N. B. N. R. 593; In re Slingluff, 2 N. B. N. R. 1115, 105 Fed. 502; but see In re Hennebry, 207 Fed. 882, 31 A. B. R. 231.

92—In re Mayer, 195 Fed. 571, 28 A. B. R. 342.

93—Bauman v. Feist, 107 Fed. 83, 5 A. B. R. 703.

94—In re Marcus, 203 Fed. 29, 30 A. B. R. 176, aff'g 192 Fed. 743, 27 A. B. R. 164.

95—In re Penny, 2 N. B. N. R. 1001.

96—Van Ingen v. Schophofen, 129 Fed. 252, 12 A. B. R. 24; In re Studebaker,

127 Fed. 951, 11 A. B. R. 384, rev'g 124 Fed. 945, 10 A. B. R. 205; In re Chamberlain, 125 Fed. 629, 11 A. B. R. 95; In re Shepherd, 2 N. B. N. R. 1070; In re Bemis, 3 N. B. N. R. 49, 104 Fed. 672, 5 A. B. R. 36; In re Shertzer, 2 N. B. N. R. 520, 99 Fed. 706, 3 A. B. R. 699; In re Idzall, 96 Fed. 314, 2 A. B. R. 741; In re Hirsch, 96 Fed. 468, 2 A. B. R. 715; In re Cohn, 1 N. B. N. 330, 1 A. B. R. 655. This provision differs from the Act of 1867, which refused a discharge to (1) a merchant or tradesman who failed to keep proper books of account, regardless of his intent (In re Bound, 4 N. B. R. 164, Fed. Cas. No. 1697; In re Odell, 17 N. B. R. 73, 9 Ben. 209, Fed. Cas. No. 10426; In re O'Bannon, 2 N. B. R. 6, Fed. Cas. No. 10394; In re Tyler, 4 N. B. R. 27, Fed. Cas. No. 14305; In re Moss,

amendment it was necessary to prove both the intent and contemplation of bankruptcy. By the amendment the words "in contemplation of bankruptcy" were omitted. The effect of this is that the only point now to be passed upon by the court is whether the books were destroyed or concealed or were not kept "with intent to conceal his financial condition."<sup>97</sup> This avoids any possible question as to whether the term "in contemplation of bankruptcy" included involuntary proceedings and generally renders this regulation more easy of construction. The omission of the word "fraudulent" as qualifying the word "intent" does not vary the force of this regulation, since the destruction or concealment of books to conceal the financial condition exhibited by them, must of necessity be fraudulent.

It is immaterial that the bankrupt is or is not a merchant or trader, but a man's occupation and condition are to be considered in determining whether his failure to keep books should bar a discharge,<sup>98</sup> as his being a farmer,<sup>99</sup> or a large trader,<sup>1</sup> or a school teacher,<sup>2</sup> or a mine superintendent,<sup>3</sup> or a mining promoter.<sup>4</sup>

The provisions of this section do not include false and fraudulent reports to commercial agencies.<sup>5</sup>

### § 1490. — Failure to keep after passage of act.

The term "in contemplation of bankruptcy" used in this section prior to the amendment meant either in contemplation

19 N. B. R. 132, Fed. Cas. No. 9877; In re Cote, 14 N. B. R. 503, 2 Lowell, 374, Fed. Cas. No. 3267; In re Archenbrow, 12 N. B. R. 17, Fed. Cas. No. 505; In re Solomon, 2 N. B. R. 94, Fed. Cas. No. 13167; In re Newman, 2 N. B. R. 99, 3 Ben. 20, Fed. Cas. No. 10175), and (2) to all debtors who destroyed, mutilated, altered or falsified books of account with intent to defraud creditors. Under this first provision the lack of intent is immaterial and under the second provision the act need not have been in contemplation of bankruptcy.

97—In re Newbury & Dunham, 209 Fed. 195, 31 A. B. R. 365; In re Hodge, 205 Fed. 824; 30 A. B. R. 522.

98—Baylor v. Rawlings, 200 Fed. 131,

28 A. B. R. 773; In re Corn, 106 Fed. 143, 5 A. B. R. 478.

Ignorance and illiteracy of bankrupt and want of training in business methods held to account for failure to keep proper books. In re Brown, 199 Fed. 356, 29 A. B. R. 73.

99—In re Marsh, 2 N. B. R. 593.

1—In re Newbury & Dunham, 209 Fed. 195, 31 A. B. R. 365.

2—In re Keefer, 135 Fed. 885, 14 A. B. R. 290.

3—In re McCrea, 161 Fed. 246, 20 L. R. A. (N. S.) 246, 20 A. B. R. 412.

4—In re Howard, 180 Fed. 399, 24 A. B. R. 841.

5—In re Steed, 107 Fed. 682, 6 A. B. R. 73.

of a voluntary application or of the commission of an act upon which an adjudication of the bankrupt in involuntary proceedings might be had; in other words, it meant in contemplation of proceedings in bankruptcy, and did not apply to something done long prior to the passage of a law not in existence, or to a condition of insolvency.<sup>6</sup> Consequently, if prior to the passage of the act of 1898, a bankrupt, with fraudulent intent to conceal his financial condition, destroyed, concealed or failed to keep books of account, his discharge could not be refused,<sup>7</sup> but if continued subsequent to its passage,<sup>8</sup> and it had to be so alleged,<sup>9</sup> it would bar a discharge, as where loans made to a bankrupt and not entered in his regular account book, were made before the bankruptcy act was passed, and were not entered after its passage.<sup>10</sup> Where for a year prior to his failure his condition was one of hopeless insolvency, his failure to keep requisite books of account will be deemed to have been in contemplation of bankruptcy.<sup>11</sup> In view of the amendment, whether the failure to keep books was in contemplation of bankruptcy, is immaterial, so far as cases instituted since such amendment are concerned.

### § 1491. — Intent to conceal financial condition.

Prior to the amendment of February 5, 1903, the bankruptcy law specified that the act in question must be done with fraud-

6—In re McGurn, 2 N. B. N. R. 877, 102 Fed. 743, 4 A. B. R. 459; In re Marx, 102 Fed. 676, 4 A. B. R. 521; In re Brice, 102 Fed. 114, 4 A. B. R. 355; In re Hirsch, 96 Fed. 468, 2 A. B. R. 715; In re Stark, 1 N. B. N. 232, 1 A. B. R. 180, 96 Fed. 88; In re Carmichael, 96 Fed. 594, 2 A. B. R. 815; In re Bamberger, 2 N. B. N. R. 95; In re Shertzer, 2 N. B. N. R. 520, 99 Fed. 706, 3 A. B. R. 699; In re Kamsler, 2 N. B. N. R. 97, 97 Fed. 194; Buckingham v. McLean, 13 How. 151, 14 L. ed. 91; In re Craft, 2 N. B. R. 44, 6 Blatch. 177, Fed. Cas. No. 3317; In re Goldschmidt, 3 N. B. R. 41, 3 Ben. 379, Fed. Cas. No. 5520; In re Lieber, 2 N. B. N. R. 21, 3 A. B. R. 217; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 Fed. 512; In re Holtz, 1 N. B. N. 204; In re Shorer, 1 N. B. N. 331, 2 A. B. R.

165, 96 Fed. 90; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353.

7—In re Prager, 134 Fed. 1006, 13 A. B. R. 527; In re Stark, 1 N. B. N. 232, 1 A. B. R. 180, 96 Fed. 88; In re Holtz, 1 N. B. N. 204; In re Shorer, 1 N. B. N. 331, 96 Fed. 90, 2 A. B. R. 165; In re Sellers v. Bell, 94 Fed. 801, 2 A. B. R. 529.

8—In re Bragassa, 2 N. B. N. R. 837, 103 Fed. 936, 4 A. B. R. 519; In re Holstein, 114 Fed. 794, 8 A. B. R. 147.

9—In re Holtz, 1 N. B. N. 204.

10—In re Feldstein, 115 Fed. 259, 8 A. B. R. 160, aff'g 108 Fed. 794, 6 A. B. R. 458.

11—In re Feldstein, 115 Fed. 259, 8 A. B. R. 160, aff'g 108 Fed. 794, 6 A. B. R. 458.

ulent intent<sup>12</sup> and if this were not established the discharge would be granted.<sup>13</sup> The fraudulent intent must have been that of the bankrupt, so that, where the business of a married woman was conducted wholly by her husband and he, without her knowledge, failed to keep true books of account, with fraudulent intent, her discharge was not barred;<sup>14</sup> nor was the discharge of a member of a firm barred, if the failure to keep true books of account be entirely the fault of his partner,<sup>15</sup> and, on the same principle, such an act by an agent would not bar a principal's discharge, since such act of the agent is in excess of his authority, though where the bankrupt created a corporation for the sole purpose of conducting his individual business, the failure of the corporation to keep proper books has been held to bar the bankrupt's discharge, on the theory that the corporation was acting only as bankrupt's agent.<sup>16</sup> As already stated the word "fraudulent" has been omitted from before the word "intent," though the scope of the section does not seem to be thereby varied. If, therefore, the failure to keep books was with the intent to conceal his condition, the discharge will be refused.<sup>17</sup> Since such books or records must be kept as will give a true condition of the bankrupt's affairs, a false entry or wilful omission with intent to conceal will bar a discharge,<sup>18</sup> but the omission of a single transaction from books of account does not

12—In re Blalock, 118 Fed. 679, 9 A. B. R. 266; In re Corn, 106 Fed. 143, 5 A. B. R. 478; Bauman v. Feist, 107 Fed. 83, 5 A. B. R. 703.

13—In re Mackenzie, 132 Fed. 114, 12 A. B. R. 605; In re Spear, 103 Fed. 779, 4 A. B. R. 617; In re Cashman, 2 N. B. N. R. 980, 103 Fed. 67, 4 A. B. R. 326; In re Mendelsohn, 102 Fed. 119, 4 A. B. R. 103; In re Morgan, 101 Fed. 982, 4 A. B. R. 402, 2 N. B. N. R. 846; In re Brice, 102 Fed. 114; In re Marx, 102 Fed. 676, 4 A. B. R. 521, 4 A. B. R. 355; In re Wetmore, 3 A. B. R. 700, 99 Fed. 703; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re De Leeuw, 2 N. B. N. R. 267, 3 A. B. R. 418, 98 Fed. 408; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 Fed. 81; In re Sidle, 2 N. B. R. 77, Fed. Cas. No. 12844; In re Plager, 2 N. B. R. 10; In re Hill, 1 N. B. R. 42, 2 Ben. 136, Fed. Cas. No. 6482; In re Or-

cutt, 4 N. B. R. 176, 5 Ben. 19, Fed. Cas. No. 10550; In re Herdie, 1 Fed. 242, Fed. Cas. No. 6403; In re Lafleche, 109 Fed. 307, 6 A. B. R. 483.

14—In re Hyman, 97 Fed. 195, 3 A. B. R. 169; In re Meyers, 105 Fed. 353, 5 A. B. R. 4.

15—In re Schultz, 107 Fed. 264, 6 A. B. R. 91.

16—In re Berger, 200 Fed. 325, 29 A. B. R. 712.

17—In re Hanna, 168 Fed. 238, 21 A. B. R. 843; In re Alvord, 135 Fed. 236, 14 A. B. R. 264.

Broker's failure to keep books held to have been with intent to conceal his financial condition. In re Weston, 206 Fed. 281, 30 A. B. R. 647.

18—In re Greenberg, 114 Fed. 773, 8 A. B. R. 94; In re McBachron, 116 Fed. 783, 8 A. B. R. 732.

necessarily show an intent to conceal where a memorandum was kept of such transaction.<sup>19</sup> The entry of an excessive credit in favor of one purchasing goods from the bankrupt for the purpose of deceiving general creditors into a belief that an ordinary sale of lumber had been made to an unsecured creditor is not sufficient to bar a discharge.<sup>20</sup>

Though the reasonable consequences of such conduct may be a concealment of one's financial condition, the mere keeping of imperfect books or the failure to keep any books will not bar a discharge unless it is shown that the bankrupt thereby intended to conceal his financial condition from his creditors,<sup>21</sup> and such intent will not be presumed, as a matter of law, from mere bad book-keeping or a failure to keep any books.<sup>22</sup> But where the bankrupt is in a business which ordinarily requires the keeping of accurate books, it is held that the intent may be presumed from the fact that he knew that he was insolvent and yet failed to keep books of account.<sup>23</sup> A fraudulent failure to keep books with intent to conceal his true condition would not exist when bankrupt is not a business man and is willing to give evidence as to the unrecorded transactions;<sup>24</sup> or where he had no business transactions;<sup>25</sup> or as to property of his wife;<sup>26</sup> or if there is a discrepancy or even a contradiction between his testimony and the facts as shown on the books where he alludes

19—In re Sabsevitz, 197 Fed. 109, 28 A. B. R. 623.

20—In re Hamilton, 133 Fed. 823, 13 A. B. R. 333.

21—In re Marcus & Scherr, 203 Fed. 29, 30 A. B. R. 176, aff'g 192 Fed. 743, 27 A. B. R. 164; In re Brown, 199 Fed. 356, 29 A. B. R. 73; In re Finan, 2 N. B. N. R. 872; In re Tanner, 192 Fed. 572, 27 A. B. R. 615; In re Napier, 23 A. B. R. 560; In re Hodge, 205 Fed. 824, 30 A. B. R. 522; In re Burstein, 160 Fed. 765, 20 A. B. R. 399; In re Goldich, 164 Fed. 882, 21 A. B. R. 249; In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78; In re Allendorf, 129 Fed. 981, 12 A. B. R. 320; In re Garrison, 149 Fed. 178, 17 A. B. R. 831; In re Haskell, 164 Fed. 301, 20 A. B. R. 914.

22—In re Brockman, 168 Fed. 1015, 21 A. B. R. 251.

Failure of illiterate to keep books of account held not conclusive on question of intent. In re Pinsker, 25 A. B. R. 494.

23—In re Feldstein, 108 Fed. 794, 6 A. B. R. 458; aff'd 115 Fed. 259, 8 A. B. R. 160; Bragassa v. St. Louis Cycle, 107 Fed. 77, 5 A. B. R. 700; In re Kenyon, 112 Fed. 658, 7 A. B. R. 527; and see In re Currie, 23 A. B. R. 539; McKibbin v. Haskell, 198 Fed. 639, 28 A. B. R. 588.

24—In re Marsh, 2 N. B. R. 593.

25—In re Penny, 2 N. B. N. R. 1001; Sellers v. Bell, 2 A. B. R. 529, 94 Fed. 801.

26—In re Dews, 1 N. B. N. 411, 2 A. B. R. 483, 96 Fed. 181.

to them in his testimony and expresses a willingness to produce them.<sup>27</sup>

The section as amended is intended to prevent a discharge if the bankrupt, whether in contemplation of bankruptcy or not, for any reason, whether fraudulent or not, has kept his books with intent to conceal his financial condition from any one, irrespective of his being a creditor. If the act be done wilfully it will bar a discharge though the purpose was to conceal a crime, and not to injure creditors,<sup>28</sup> or to conceal the bankrupt's financial condition from his confidential manager and not to defraud creditors.<sup>29</sup>

A bankrupt may be denied a discharge because of his partners failure to keep proper books of account unless he affirmatively shows his innocence or ignorance of the wrongdoing of his partner.<sup>30</sup>

### § 1492. — Concealment and destruction of books.

Concealment of books of account, as an objection to discharge, required three things to be proven prior to the amendment of 1903; (1) concealment of the books, (2) fraudulent intent to conceal bankrupt's condition, and (3) that the concealment was in contemplation of an act of bankruptcy or a voluntary application in bankruptcy, and not merely a state of insolvency. Since the passage of said amendment, it is not necessary to show fraudulent intent, nor that the concealment was committed in contemplation of an act of bankruptcy. The burden of proof is upon the attacking creditor, and he must make out a *prima facie* case before the burden shifts to the bankrupt.<sup>31</sup>

The mere destruction of books of account, without proof of the bankrupts intent to conceal his financial condition is not sufficient to bar a discharge.<sup>32</sup> An intent exists and a discharge will be refused where a bankrupt destroys vouchers while the papers in bankruptcy are being prepared, so that the disposition

27—In re Strouse, 2 N. B. N. R. 64.

28—In re Wolf, 156 Fed. 543, 19 A. B. R. 70.

29—In re Hanna, 168 Fed. 238, 21 A. B. R. 843.

30—In re Currie, 23 A. B. R. 539.

31—In re Hodge, 205 Fed. 824, 30 A. B. R. 522; In re Eades, 143 Fed. 293, 16

A. B. R. 30; In re Robert Lewin, 155 Fed. 501, 18 A. B. R. 72; In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353; In re Carmichael, 96 Fed. 594, 2 A. B. R. 815; In re Ablowich, 2 N. B. N. R. 386, 99 Fed. 81, 3 A. B. R. 586.

32—In re Hodge, 205 Fed. 824, 30 A. B. R. 522.



of his funds in bank cannot be shown, especially if no books of account are kept;<sup>33</sup> or if he destroys cancelled checks and stubs showing the purpose for which checks were paid and to whom payable,<sup>34</sup> or if an original book be concealed and a copy is substituted from which certain entries are omitted;<sup>35</sup> or if slips containing a correct record of goods sold and the amount of the sales are destroyed and no other books are kept;<sup>36</sup> or if books were kept prior to the passage of the act, and were concealed or destroyed after its passage;<sup>37</sup> or where he swears falsely that the books are correct, or that he does not know where they are.<sup>38</sup>

A discharge will not be refused if the books were partially destroyed by fire without the bankrupt's fault or connivance;<sup>39</sup> or if his ledger is mutilated, if not done by him or with his knowledge, and the entries on the missing pages are to be found repeated in other parts of the book.<sup>40</sup> Placing books deemed of little account in a barrel in a cellar has been held not conclusive on the question of intent to conceal.<sup>41</sup>

To sustain a charge of concealment of books, it must appear that the bankrupt, at or about the time of the filing of the petition, knew or might have ascertained where the old books were, and that he was, therefore, privy to their non-production, and the burden of proof falls upon the creditors.<sup>42</sup> The failure of a bankrupt to deliver his books to the trustee, make return of them in his schedules, or otherwise account for them, creates the presumption that he has them and is guilty of concealing them.<sup>43</sup>

33—In *re Schlesinger*, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 Fed. 930; In *re Salkey*, 11 N. B. R. 423.

34—In *re Hodge*, 205 Fed. 824, 30 A. B. R. 522.

35—In *re McBachron*, 116 Fed. 783, 8 A. B. R. 732.

36—In *re Hirshowitz*, 194 Fed. 562, 27 A. B. R. 701.

37—In *re Hirsch*, 96 Fed. 468, 2 A. B. R. 715; In *re Slekter*, 2 N. B. N. R. 951; *Ablowich v. Stursburg*, 105 Fed. 751, 5 A. B. R. 403.

38—In *re McGuire*, 1 N. B. N. 279; In

*re Kamsler*, 2 N. B. N. R. 97, 97 Fed. 194.

39—In *re Guardineer*, 2 N. B. N. R. 924.

40—In *re Brice*, 102 Fed. 114, 4 A. B. R. 355.

41—In *re Murray*, 162 Fed. 983, 20 A. B. R. 700.

42—In *re Phillips*, 2 N. B. N. R. 424, 98 Fed. 844, 3 A. B. R. 542.

43—*Baylor v. Rawlings*, 200 Fed. 131, 28 A. B. R. 773; In *re Beal*, 2 N. B. R. 178, Fed. Cas. No. 1156.

### § 1493. — Books held proper.

Books of account must be such as will, at all times, exhibit the condition of the debtor, so that when placed before creditors for investigation they may at once ascertain his standing and property, and the result of his business, and whether everything has been fair and honest on his part.<sup>44</sup>

Books of account need not have been kept in the most scientific manner,<sup>45</sup> but may be of any form, provided a true condition of the bankrupt's affairs can be gathered from them, that is, they must show receipts, payments, assets, liabilities and the stock on hand.<sup>46</sup> A discharge will not be refused merely because the books have been so kept as to make it difficult, if not impossible, to get an exact financial condition, without further examination.<sup>47</sup> It is sufficient if a stock book, day book and ledger were kept,<sup>48</sup> or if the invoices were kept carefully together, without an invoice book, the other customary books being kept;<sup>49</sup> or if bank books were kept showing the amount received and books showing amounts and to whom paid, but no cash book;<sup>50</sup> or if a chattel mortgage or a promissory note, or a real estate transaction as entered in a blotter kept by a bankrupt as a trader, fully disclosing his indebtedness;<sup>51</sup> or a detached check may be admissible, together with the stub-book;<sup>52</sup> or a pass book is a necessary book of account.<sup>53</sup> Books of account in another business need not be kept.<sup>54</sup> Neither the accidental omission of entries in a trader's books of account,<sup>55</sup> nor the mutilation of such books, if satisfactorily explained,<sup>56</sup> nor even

44—In re Brockway, 7 N. B. R. 575, 6 Ben. 326, Fed. Cas. No. 1917; In re Garrison, 7 N. B. R. 287, Fed. Cas. No. 5254.

45—In re Simon, 201 Fed. 1004, 29 A. B. R. 808.

46—In re Bellis, 3 N. B. R. 124, 4 Ben. 53, Fed. Cas. No. 1275; In re Solomon, 2 N. B. R. 94, Fed. Cas. No. 13167; In re Newman, 2 N. B. R. 99, 3 Ben. 20, Fed. Cas. No. 10175; In re Mackay, 4 N. B. R. 17, Fed. Cas. No. 8837; In re Antisdell, 18 N. B. R. 289, Fed. Cas. No. 490.

47—In re Marcus & Scherr, 203 Fed. 29, 30 A. B. R. 176, aff'g 192 Fed. 743, 27 A. B. R. 164.

48—In re Phinney, 2 N. B. R. 1001.

49—In re Reed, 12 N. B. R. 390, Fed. Cas. No. 11639.

50—In re Marsh, 19 N. B. R. 297, Fed. Cas. No. 9109.

51—In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17885.

52—In re Brockway, 7 N. B. R. 595, 16 Ben. 326, Fed. Cas. No. 1917.

53—In re Blumenthal, 18 N. B. R. 555, Fed. Cas. No. 1576.

54—In re Friedberg, 19 N. B. R. 302, Fed. Cas. No. 5116; In re Herdic, 19 N. B. R. 385, Fed. Cas. No. 6403.

55—In re Burgess, 3 N. B. R. 47, Fed. Cas. No. 2153.

56—In re Noonan, 3 N. B. R. 63, Fed. Cas. No. 10291.

material erasures and alterations in the books, unless made with intent to conceal<sup>57</sup> the financial condition, would be ground for withholding a discharge. The books of account need not contain entries of debts previously contracted and owed at the time the bankrupt went into trade.<sup>58</sup>

The fact that accounts of a stockholder are kept under numbers instead of names of customers does not establish an intent to conceal the broker's financial condition, especially where the name of the customer can be ascertained from other records kept by the bankrupt.<sup>59</sup>

### § 1494. — Books held improper.

In the following cases, it has been held that the true condition of affairs could not be determined by a competent person, and, therefore, a proper keeping of books of account did not exist: where accounts were kept on slips which are destroyed each month;<sup>60</sup> where neither an invoice book, cash book, blotter, day book, journal or ledger was kept, but only books containing memoranda of business transactions from which no correct estimate of the condition could be made;<sup>61</sup> where no cash book was kept,<sup>62</sup> or if kept was unintelligible;<sup>63</sup> or the books did not show what moneys were expended in carrying on business and what sums were taken out for family expenses;<sup>64</sup> where the invoices of purchases, receipts or payments, bank books and canceled checks were kept, but the cash receipts were kept on a slate and daily erased;<sup>65</sup> where invoice or stock books were not kept;<sup>66</sup> where only a small memorandum book of sales was incompletely kept;<sup>67</sup> or where no record of transactions between

57—In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490.

58—In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17885.

59—In re Brown & Co., 204 Fed. 63, 30 A. B. R. 305.

60—Hammond v. Coolidge, 3 N. B. R. 71, Lowell, 371, Fed. Cas. No. 5999.

61—In re Schumpert, 8 N. B. R. 415, Fed. Cas. No. 12491.

62—In re Gay, 2 N. B. R. 114, 1 Hask. 108, Fed. Cas. No. 5279; In re Bellis, 3 N. B. R. 124, 4 Ben. 53, Fed. Cas. No.

1275; In re Littlefield, 3 N. B. R. 13, 1 Lowell, 331, Fed. Cas. No. 8398.

63—In re Mackay, 4 N. B. R. 17, Fed. Cas. No. 8838.

64—In re Anketell, 19 N. B. R. 268, Fed. Cas. No. 394.

65—In re Solomon, 2 N. B. R. 94, Fed. Cas. No. 13167.

66—In re White, 2 N. B. R. 179, Fed. Cas. No. 17532.

67—In re Newman, 2 N. B. R. 99, 3 Ben. 20, Fed. Cas. No. 10175.

partners, but only with customers was kept;<sup>68</sup> where merely a blotter and memorandum book were kept,<sup>69</sup> where purchases were not entered;<sup>70</sup> where indebtedness to relatives was not placed on the books;<sup>71</sup> or where loans made to the bankrupt were kept only in personal memorandum books, concealed from every one.<sup>72</sup>

### § 1495. — Obtaining property on credit.

By the amendment of February 5, 1903, congress provided that a discharge shall be refused where the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." The provision has no counterpart in any of the prior bankruptcy laws of this country. This provision was changed in 1910, so as to read "obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

The denial of a discharge on this ground will not be limited to the creditor from whom the credit was obtained, but any person in interest may make the objection.<sup>73</sup> The fact that the person from whom the credit was obtained had ceased to be a creditor at the time of the adjudication is immaterial,<sup>74</sup> though it is held that a creditor who has, for a valuable consideration, released the bankrupt from any claim on account of false statements made by him, cannot object to a discharge on the ground of such statements.<sup>75</sup>

The obtaining of property on a false statement before the passage of the amendatory act will bar a discharge in a proceeding commenced after the passage thereof.<sup>76</sup> While no specific

68—In re Blumenthal, 18 N. B. R. 555, Fed. Cas. No. 1576.

69—In re Bamberger, 2 N. B. R. 95.

70—In re Schachter, 170 Fed. 683, 22 A. B. R. 389.

71—In re Koelle, 171 Fed. 257, 22 A. B. R. 515.

72—Pomerantz v. Hopkins, 168 Fed. 444, 21 A. B. R. 857; In re Feldstein, 115 Fed. 259, 8 A. B. R. 160, aff'g 108 Fed. 794, 6 A. B. R. 458.

73—In re Carton & Co., 148 Fed. 63,

17 A. B. R. 343; In re Harr, 143 Fed. 421, 16 A. B. R. 213; In re Pinsker, 25 A. B. R. 494; In re Miller, 192 Fed. 730, 27 A. B. R. 606; In re Shaffer, 169 Fed. 724, 22 A. B. R. 147; Talcott v. Friend, 179 Fed. 676, 24 A. B. R. 708.

74—In re Harr, 143 Fed. 421, 16 A. B. R. 213.

75—In re Russell, 176 Fed. 253, 23 A. B. R. 850.

76—In re Scott, 126 Fed. 981, 11 A. B. R. 327.

time is fixed by the statute within which the statement must have been made and the property obtained, by analogy to other provisions of the law it is evident that congress intended that the property must have been obtained within four months of the institution of the bankruptcy proceedings.<sup>77</sup> The fact that the statement was made prior to the four-month period makes no difference, however, if property was in fact obtained on the strength of it within the four-month period.<sup>78</sup> The provision certainly does not apply, without limit of time, to any obtaining of credit, however long before bankruptcy, and irrespective of intervening transactions with the creditor.<sup>79</sup>

The insertion of the word "money" in the amendment does not change the law, money having been held to be property within the meaning thereof.<sup>80</sup>

Under the original amendment of 1903, the relation of debtor and creditor must have existed between the bankrupt and the party from whom the property was obtained. Accordingly the obtaining of a surety or indemnity bond was held not an obtaining of credit within the meaning of the act.<sup>81</sup> Under the amendment of 1910, the bankrupt must have (1) "obtained money or property (2) on credit, (3) upon a materially false statement (4) in writing, (5) made by him (6) to any person or his representative, (7) for the purpose of obtaining credit (not money or property) from such person." Obviously the credit must be obtained from any person to whom the representations are made, and false statements made to a surety company whereby it is induced to execute an indemnity bond under the conditions of which money is advanced by a third person to the bankrupt, will be held to have been made "for the purpose of obtaining credit." <sup>82</sup>

The written statement need not be delivered by the bankrupt to the person extending credit; it is sufficient that the statement be delivered to an agent of the bankrupt and its contents com-

77—*In re Terens*, 172 Fed. 938, 22 A. B. R. 895. *Contra*, *In re Simon*, 201 Fed. 1004, 29 A. B. R. 808.

78—*In re Terens*, 172 Fed. 938, 22 A. B. R. 895.

79—*In re O'Callaghan*, 199 Fed. 662, 29 A. B. R. 304.

80—*Petition of Louisville National Bank*, 19 A. B. R. 309, *rev'g* 19 A. B. R. 41.

81—*In re Tanner*, 192 Fed. 572, 27 A. B. R. 615.

82—*In re Dunfee*, 206 Fed. 745, 30 A. B. R. 721.

municated to the person extending credit,<sup>83</sup> or that the statement be prepared by an agent acting within the scope of his authority and delivered by him.<sup>84</sup>

Under the language of the section as it was prior to the amendment of 1910, the false statement had to be made with the intent of obtaining such credit as it was planned at the time to afford a basis for, and the objecting creditor was required to establish: first, that the bankrupt obtained property on credit, and, second, that he made to the person from whom he obtained it a materially false statement, in writing, for the purpose of obtaining the property.<sup>85</sup> The false statement must have been made to the creditor from whom the property was obtained or to his agent or to some person with the intent, purpose and expectation of its communication to the creditor from whom the property was obtained and with the purpose of acquiring the same. A statement made generally where it was not expected or was not the purpose that it should be communicated to the creditor was not such as would operate as to defeat the discharge. So, a false statement made in confidence to a commercial agency merely for the purpose of obtaining a favorable rating could not ordinarily be used as a bar to a discharge.<sup>86</sup>

Under the language as amended, the word "such" has been omitted and the section would seem to apply to any false statement which had to do with the extension of credit affecting the bankruptcy proceeding.<sup>87</sup>

The creditor must have relied upon the statement in extending credit, and the statement must have been the proximate cause of the extension of credit, and a discharge will not ordinarily be refused where the credit was extended long after the making thereof.<sup>88</sup> The statement need not, however, have been

83—In re Dresser, 146 Fed. 383, 16 A. B. R. 561.

84—In re Schwartz & Co., 201 Fed. 166, 28 A. B. R. 670.

85—In re Shaffer, 169 Fed. 724, 22 A. B. R. 147; In re Allendorf, 129 Fed. 981, 12 A. B. R. 320.

86—Novick v. Reed & Co., 192 Fed. 20, 27 A. B. R. 521; In re Russell, 176 Fed. 253, 23 A. B. R. 850; In re Foster, 186 Fed. 254, 24 A. B. R. 368; In re Napier, 23 A. B. R. 560. But see In re Kyte, 174 Fed. 867, 23 A. B. R. 414; In re Carton

& Co., 148 Fed. 63, 17 A. B. R. 343; In re Pincus, 147 Fed. 621, 17 A. B. R. 331; In re Augspurger, 181 Fed. 174, 25 A. B. R. 83.

87—In re Puschkin, 183 Fed. 882, 25 A. B. R. 742.

88—In re O'Callaghan, 199 Fed. 662, 29 A. B. R. 304; In re Sabsevit, 197 Fed. 109, 28 A. B. R. 623; In re Braverman, 199 Fed. 863, 28 A. B. R. 513; In re Shaffer, 169 Fed. 724, 22 A. B. R. 147; In re Allendorf, 129 Fed. 981, 12 A. B. R. 320; In re Kaplan, 141 Fed. 463, 15

the sole inducing cause in obtaining the goods, it being sufficient that it had a material influence in securing goods, and that the creditor would not have made the sale but for it.<sup>89</sup> It is immaterial that an independent investigation to a certain extent was made with regard to the statement.<sup>90</sup> The statement to a commercial agency must be regarded as a continuing one, and unless recalled, is entitled for a reasonable time to be relied upon.<sup>91</sup>

It is immaterial that at the time of bankruptcy the amount owing the creditor was less than at the time the false statement was made, it appearing that payments were applied to purchases made before the making of the statement and that subsequent purchases were made on credit.<sup>92</sup> So, where the bankrupt gave the creditor a statement of financial condition which by express agreement, was to remain binding unless changed by written authority of the bankrupt, the fact that some sales made subsequently thereto had been paid in full, will not prevent the creditor from urging the falsity of such statement as a bar.<sup>93</sup>

The statement must have been knowingly and intentionally false, or made recklessly without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain property upon credit.<sup>94</sup> It is not necessary, however, that the entire statement be false. If one item be materially false the discharge will be refused.<sup>95</sup> The fact that the creditor desiring a

A. B. R. 534; *In re Cotton & Preston*, 183 Fed. 181, 25 A. B. R. 517.

89—*In re Savarese*, 209 Fed. 830, 31 A. B. R. 758; *In re Kyte*, 174 Fed. 867, 23 A. B. R. 414.

90—*In re Kyte*, 174 Fed. 867, 23 A. B. R. 414.

91—*In re Kyte*, 174 Fed. 867, 23 A. B. R. 414.

92—*In re Arenson*, 195 Fed. 609, 28 A. B. R. 113.

93—*Ragan, Malone & Co. v. Cotton & Preston*, 200 Fed. 546, 29 A. B. R. 597.

94—*In re O'Callaghan*, 199 Fed. 662, 29 A. B. R. 304; *Gilpin v. Merchants' Nat. Bank*, 165 Fed. 607, 20 L. R. A. (N. S.) 1023, 21 A. B. R. 429, rev'g 160 Fed. 171, 20 A. B. R. 374; *Firestone v. Harvey*, 174 Fed. 574, 23 A. B. R. 468; *In re Braverman*, 199 Fed. 863, 28 A. B. R. 513; *In re Arenson*, 195 Fed. 609, 28

A. B. R. 113; *Peck Co. v. Lowenbein*, 178 Fed. 178, 24 A. B. R. 138; *Shaffer v. The Koblegard Co.*, 183 Fed. 71, 24 A. B. R. 898, aff'g 169 Fed. 724, 22 A. B. R. 147; *In re Kyte*, 174 Fed. 867, 23 A. B. R. 414; *contra*, *In re Terens*, 172 Fed. 938, 22 A. B. R. 895.

Gross inaccuracy in valuation of property—gross overvaluation—held sufficient to show that statement was fraudulent and made to obtain credit. *In re Ellerbe*, 198 Fed. 952, 29 A. B. R. 87.

95—*In re Darevski*, 171 Fed. 288, 22 A. B. R. 571.

Suppression of all indebtedness for borrowed money in statement of financial condition held to bar discharge. *In re Brenner*, 166 Fed. 930, 20 A. B. R. 644.

Failure to disclose liability for borrowed money held to bar discharge. *In re Miller*, 192 Fed. 730, 27 A. B. R. 606.

statement of the bankrupt's financial condition states that it is a mere matter of form cannot absolve the bankrupt from the consequences of making a false statement,<sup>96</sup> and if the intent in making a false statement of financial condition is fraudulent, it is immaterial that the loss occasioned to the creditor is small. It is sufficient that such creditor would not have extended the credit had he known the bankrupt's exact financial condition.<sup>97</sup>

A statement made verbally would not suffice; it must be in writing.<sup>98</sup>

False statements by a partner by means of which property is obtained on credit will bar a discharge to the partnership as well as to the partner making the statement,<sup>99</sup> but not to a partner who did not participate in the wrongful act and had no knowledge thereof.<sup>1</sup> The bankrupt will be presumed to have had an intention to deceive where he signed and delivered a statement of the condition of his firm.<sup>2</sup>

Where goods are delivered to a partnership in reliance upon a false statement made by one of the partners before the organization of the partnership, the other partner may be estopped by receipt of the goods to deny that he was a copartner at the time the false statement was made.<sup>3</sup>

Where the firm of which the bankrupt was a member had been discharged more than seven years prior to the adjudication of the bankrupt member, and it, as well as its members was guilty of fraudulent representations, the failure of the creditor to set up the same as a bar to the discharge of the firm, or to institute

96—In re Arenson, 195 Fed. 609, 28 A. B. R. 113.

97—In re Brener, 166 Fed. 930, 20 A. B. R. 644.

98—In re Chamberlain, 180 Fed. 304, 25 A. B. R. 37.

99—In re Jacobson & Perrill, 200 Fed. 812, 29 A. B. R. 603; Frank v. Michigan Paper Co., 179 Fed. 776, 24 A. B. R. 261; In re Terens, 172 Fed. 938, 22 A. B. R. 895; contra, In re Cotton & Preston, 183 Fed. 181, 25 A. B. R. 517.

1—Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 20 L. R. A. (N. S.) 785, 21 A. B. R. 457, rev'g 143 Fed. 607, 16 A. B. R. 313; In re Jacob-

son & Perrill, 200 Fed. 812, 290 A. B. R. 603; In re Cotton & Preston, 183 Fed. 181, 25 A. B. R. 517; Frank v. Michigan Paper Co., 179 Fed. 776, 30 L. R. A. (N. S.) 623, 24 A. B. R. 261.

Partner's statement to mercantile agency made for purpose of obtaining firm credit from a particular creditor held a bar to discharge of partner. In re Simon, 201 Fed. 1004, 29 A. B. R. 808.

2—In re Simon, 201 Fed. 1004, 29 A. B. R. 808.

3—In re Neyland & McKeithen, 184 Fed. 144, 24 A. B. R. 879.



suit against either of the members has been held to estop him from setting up the fraud as a bar.<sup>4</sup>

The fact that the bankrupt had on prior occasions drawn drafts on a bank when there were no funds to meet them, does not constitute a draft drawn by his agent without his knowledge or direction a false statement barring a discharge.<sup>5</sup>

While the burden is upon the objecting creditor in the first instance to prove the intent to deceive, yet, when it is shown that the bankrupt made a material statement which he knew was untrue, the burden shifts to the bankrupt to show that it was not made with intent to deceive.<sup>6</sup> The bankrupt's disclaimer of any intent to deceive is, in the absence of corroborating circumstances, entitled to little weight.<sup>7</sup> It will be presumed that the bankrupt knew his financial condition,<sup>8</sup> and that he had knowledge of the falsity of a statement prepared by his bookkeeper,<sup>9</sup> and the bankrupt's failure to disclose in a financial statement, an indebtedness owing to friends or relatives will be presumed to have been made with a fraudulent intent.<sup>10</sup>

#### § 1496. — Transfer, destruction or concealment of assets.

By the amendment of February 5, 1903, congress has definitely enacted that a discharge will be refused if the bankrupt has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors." Prior to this amendment a concealment of assets has been held to be a sufficient ground for refusing a discharge. What amounts to a concealment of assets has been frequently passed upon by the courts to the following effect, and is held to include a transfer with intent to defraud creditors. The separation of some tangible thing, money or chose in action, from the body of an insolvent debtor's estate and its secretion from those who have a right

4—In re Cason, 27 A. B. R. 903.

5—Firestone v. Harvey, 174 Fed. 574,

23 A. B. R. 468.

6—In re Arenson, 195 Fed. 609, 28 A. B. R. 113.

7—In re Arenson, 195 Fed. 609, 28 A. B. R. 113.

8—In re Augspurger, 181 Fed. 174, 25 A. B. R. 83.

9—In re Savarese, 209 Fed. 830, 31 A. B. R. 758.

10—In re Arenson, 195 Fed. 609, 28 A. B. R. 113.

to seize upon it for the payment of their debts, is, within the law, a concealment and continues such as long as the secretion remains. In such a case the property opened to creditors is decreased by just the amount thus secreted. On every occasion when it is properly the bankrupt's duty to disclose his assets, a failure knowingly to do so will be a concealment of them,<sup>11</sup> and this would be true whether the property was conveyed prior to the passage of the law or subsequent, if the bankrupt still retained a beneficial interest therein at the time of filing his petition, the concealment of title to property being as much a concealment of assets under the law as would be the actual hiding of the same.<sup>12</sup> The amount or value of the property concealed is immaterial.<sup>13</sup>

The transfer, destruction or concealment of assets prior to the four-month period is no bar to a discharge,<sup>14</sup> but the fact that the act of concealment in the first instance was more than four months prior to the petition is immaterial if the concealment is continued into the four-month period.

If a bankrupt has disposed of property belonging to him, prior to adjudication, and has the proceeds thereof in his possession or within his authority to use and appropriate subsequently, there is a continuing concealment for which he is amenable to the law, although the concealment by intent and purpose took place while he was not a bankrupt.<sup>15</sup>

There must be a concealment of assets from the trustee. A mere attempt to hinder and delay creditors is not sufficient to support the objection.<sup>16</sup>

The fact that the bankrupt schedules property after the discovery of its concealment will not relieve him from the consequences of the concealment,<sup>17</sup> nor will the tender of a conditional

11—*In re Wakefield*, 207 Fed. 180, 31 A. B. R. 42; *In re Lesser*, 108 Fed. 205, 5 A. B. R. 331.

12—*In re Jacobs & Verstandig*, 147 Fed. 797, 17 A. B. R. 470; *Citizens Bank of Salem v. De Paw Co.*, 3 N. B. N. R. 244; *In re Berner*, 2 N. B. N. R. 268; *In re Quackenbush*, 2 N. B. N. R. 964, 102 Fed. 282, 4 A. B. R. 274; *In re Fitchard*, 2 N. B. N. R. 1075, 103 Fed. 742, 4 A. B. R. 609.

13—*In re Hirshowitz*, 194 Fed. 562, 27 A. B. R. 701.

14—*In re Brumbaugh*, 128 Fed. 971, 12 A. B. R. 204; *In re Boner*, 169 Fed. 727, 22 A. B. R. 151.

15—*James v. Stone & Co.*, 181 Fed. 476, 24 A. B. R. 288, *aff'g* 175 Fed. 894, 23 A. B. R. 703; *In re Jacobs & Verstandig*, 147 Fed. 797, 17 A. B. R. 470.

16—*In re Jacobs*, 144 Fed. 868, 16 A. B. R. 482.

17—*In re Breiner*, 129 Fed. 155, 11 A. B. R. 684.

assignment of property alleged to have been fraudulently conveyed, which will necessitate the trustee's bringing an action to determine the validity of the conveyance, relieve the bankrupt from the consequences of his acts, or be considered to negative his obvious intention to conceal his property.<sup>18</sup>

The concealment of property may occur by leaving out of the schedule that which was conveyed in fraud of creditors, the act of concealment being committed at the time of omission.<sup>19</sup> A fraudulent omission and concealment may consist of the failure to include as assets the stock of goods, fixtures and materials in a store, or money derived from an accident insurance policy, or money received from cash sales and unaccounted for, or money withdrawn from the business just previous to bankruptcy, or money in the bankrupt's possession shortly before bankruptcy, or a valuable estate in remainder under a will, or assets concealed by the mode of accounting adopted, or real and personal property transferred within four months prior to the filing of the petition, without consideration and with intent to defraud creditors, or property conveyed reserving a secret trust to bankrupt;<sup>20</sup> or if bankrupt, after failing, organized a corporation, and then filed an individual petition, the court may be justified in treating the corporation as a fiction, and the sums due to it as the assets of the bankrupt.<sup>21</sup>

18—In re Doyle, 199 Fed. 247, 29 A. B. R. 102.

19—In re Wakefield, 207 Fed. 180, 31 A. B. R. 42; In re Hirshowitz, 194 Fed. 562, 27 A. B. R. 701; In re Steed, 107 Fed. 682, 6 A. B. R. 73. But see In re Hennebry, 207 Fed. 882, 31 A. B. R. 231.

20—In re Borg, 184 Fed. 640, 25 A. B. R. 189; Field v. United States, 137 Fed. 6, 14 A. B. R. 507; In re Penny, 2 N. B. N. R. 1001; In re Bernes, 3 N. B. N. R. 49, 104 Fed. 672; In re Lowenstein, 1 N. B. N. 329, 2 A. B. R. 193; In re Roy, 1 N. B. N. 526, 3 A. B. R. 37, 96 Fed. 400; In re O'Gara, 97 Fed. 932, 3 A. B. R. 349; In re Mendelsohn, 1 N. B. N. 391; In re Woods, 98 Fed. 972, 3 A. B. R. 572; In re McNamara, 1 N. B. N. 326, 1 A. B. R. 566; In re Dews, 2 N. B. N. R. 437, 101 Fed. 549, 3 A. B. R. 691; In re Skinner, 97 Fed. 190, 3 A. B. R.

163, In re Welch, 1 N. B. N. 533, 3 A. B. R. 93, 100 Fed. 65; In re Berner, 2 N. B. N. R. 268; In re Connell, 3 N. B. R. 113, Fed. Cas. No. 3110; In re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11583; In re Hussman, 2 N. B. R. 140, Fed. Cas. No. 6951; In re Quackenbush, 102 Fed. 282, 2 N. B. N. R. 964, 4 A. B. R. 274; In re Lowenstein, 106 Fed. 51, 7 A. B. R. 193; In re Becker, 106 Fed. 54, 5 A. B. R. 438; In re Holstein, 114 Fed. 794, 8 A. B. R. 147; In re DeGottardi, 114 Fed. 328, 7 A. B. R. 723; In re Grossman, 111 Fed. 507, 6 A. B. R. 510; In re Otto, 115 Fed. 860, 8 A. B. R. 305, 753; In re Bullwinkle, 111 Fed. 364, 6 A. B. R. 756; Osborne v. Perkins, 112 Fed. 127, 7 A. B. R. 250; In re Schenck, 116 Fed. 554, 8 A. B. R. 727; In re Leslie, 119 Fed. 406.

21—In re Horgan, 2 N. B. N. R. 53, 97 Fed. 319.

A discharge will be refused, if the bankrupt puts into his schedule as due a debt which is false or fictitious.<sup>22</sup>

An honest unintentional mistake of a bankrupt in failing to schedule certain creditors and debts will not preclude his discharge against scheduled creditors and debts,<sup>23</sup> but will preclude his discharge against the omitted ones,<sup>24</sup> or mere omissions and inaccuracies, which may be corrected by amendment;<sup>25</sup> or if the omission or inaccuracy is not caused by a fraudulent intent to conceal the property from his trustee, but is the result of a mistake of law or of fact,<sup>26</sup> or of an honest, though erroneous, belief that he had no available interest in the property;<sup>27</sup> or unless bankrupt's contention that the property omitted was not his is proven false and that he knew it was false,<sup>28</sup> and this is true of an omission to include an advance of a sum of money by a bankrupt to his wife, when enjoying good credit, and the return of which he never exacted.<sup>29</sup> If it be doubtful whether a specific item should go to the estate, it is not for the bankrupt to constitute himself the judge, concealing the fact, but it is his duty to disclose the transaction, that the court may determine the right.<sup>30</sup>

It is no ground for refusing a discharge if it appear that the omission complained of is of property not belonging to the bankrupt;<sup>31</sup> or a pledge turned over to the creditor, holding it, long

22—In re Heyman, 104 Fed. 677, 4 A. B. R. 735.

23—In re Taplin, 135 Fed. 861, 14 A. B. R. 360; In re Slingluff, 105 Fed. 502, 2 N. B. N. R. 1115.

24—In re Huber, 1 N. B. N. R. 431.

25—In re Slingluff, 105 Fed. 502, 2 N. B. N. R. 1115.

26—In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78; In re Blalock, 118 Fed. 679; In re Conn, 108 Fed. 525, 6 A. B. R. 217; In re Lesser, 114 Fed. 83, 8 A. B. R. 15; In re Miner, 114 Fed. 998, 8 A. B. R. 248.

27—In re Finan, 2 N. B. N. R. 872; In re Morrow, 97 Fed. 574, 3 A. B. R. 263; In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632; In re Hirsch, 96 Fed. 468, 2 A. B. R. 715; In re Bryant, 2 N. B. N. R. 1061; In re Marsh, 109 Fed. 602, 6 A. B. R. 537.

28—In re Shepherd, 2 N. B. N. R. 1070.

29—Sellers v. Bell, 94 Fed. 801, 2 A. B. R. 529.

30—In re Nelson, 179 Fed. 320, 23 A. B. R. 37; In re Gailey, 127 Fed. 538, 11 A. B. R. 539; In re Breitling, 133 Fed. 146, 13 A. B. R. 126.

31—In re Locks, 104 Fed. 783, 5 A. B. R. 136; In re Bryant, 104 Fed. 789, 2 N. B. N. R. 1061; In re Adams, 2 N. B. N. R. 1034, 104 Fed. 72, 4 A. B. R. 696; In re Fitchard, 2 N. B. N. R. 1075, 103 Fed. 742, 4 A. B. R. 609; In re Freund, 2 N. B. N. R. 236, 98 Fed. 81, 3 A. B. R. 418; In re Hirsch, 2 N. B. N. R. 137, 97 Fed. 571, 3 A. B. R. 344.

Failure of the president of a corporation to schedule corporate property will not bar his individual discharge, though the concealment was with fraudulent in-

before the bankruptcy in payment of his debt;<sup>32</sup> or a gift to one's wife made years before;<sup>33</sup> or property purchased with money obtained by surrendering insurance policies payable to one's wife;<sup>34</sup> or property transferred to his wife long before the act and purchased largely on credit and paid for with the proceeds of a business conducted as his wife's agent.<sup>35</sup> Whether stock purchased in the wife's name with money borrowed on the joint note of husband and wife is an asset of the bankrupt husband's estate can only be determined by a direct proceeding between the proper parties, and its omission from the schedules will not bar a discharge;<sup>36</sup> nor is the omission of money borrowed to pay the fees and costs of filing the petition;<sup>37</sup> nor of a trust fund in which it is doubtful if, at the time of filing the petition, the bankrupt had a vested interest;<sup>38</sup> but the contrary would be true if it was a vested interest;<sup>39</sup> nor of a lease, concerning which there is no evidence to show that the premises are worth more than the rent;<sup>40</sup> nor a watch and chain of small value, omitted by attorney's advice, and worn openly during the proceedings;<sup>41</sup> nor of an attorney's contingent fee contract<sup>42</sup> (though this would seem questionable); or of property transferred more than four months before the bankruptcy;<sup>43</sup> nor is it

tent. *Vehon v. Ullman*, 147 Fed. 694, 17 A. B. R. 435.

32—In *re Webb*, 2 N. B. N. R. 289, 98 Fed. 404, 3 A. B. R. 386; s. c. 2 N. B. N. R. 11, 3 A. B. R. 204.

33—In *re Toothaker Bros.*, 128 Fed. 187, 12 A. B. R. 99; In *re Fitchard*, 2 N. B. N. R. 1075, 103 Fed. 742, 4 A. B. R. 609; In *re Freund*, 2 N. B. N. R. 236, 98 Fed. 81, 3 A. B. R. 418; In *re House*, 2 N. B. N. R. 1099, 103 Fed. 616, 4 A. B. R. 603.

34—In *re Dews*, 1 N. B. N. 411, 96 Fed. 181, 2 A. B. R. 483.

35—In *re Locks*, 104 Fed. 783, 5 A. B. R. 136; In *re Fitchard*, 2 N. B. N. R. 1075, 103 Fed. 742, 4 A. B. R. 609.

36—*Fellows v. Freudenthal*, 102 Fed. 731, 4 A. B. R. 490.

37—*Sellers v. Bell*, 94 Fed. 801, 2 A. B. R. 529.

38—In *re Wetmore*, 102 Fed. 290, 3 N. B. N. R. 143, 4 A. B. R. 335, s. c., 99

Fed. 703, 3 A. B. R. 700; In *re Hoadley*, 2 N. B. N. R. 704, 101 Fed. 233, 3 A. B. R. 780.

39—In *re Wood*, 98 Fed. 972, 3 N. B. N. R. 141, 3 A. B. R. 572; In *re St. John*, 3 N. B. N. R. 114.

40—In *re Hirsch*, 2 N. B. N. R. 137, 97 Fed. 571, 3 A. B. R. 344.

41—In *re Bryant*, 2 N. B. N. R. 1061, 104 Fed. 789.

42—In *re McAdam*, 2 N. B. N. R. 256, 98 Fed. 409, 3 A. B. R. 417.

43—In *re Hennebry*, 207 Fed. 882, 31 A. B. R. 231; In *re Cotton & Preston*, 23 A. B. R. 586; In *re Bushnell*, 1 N. B. N. 528; In *re Webb*, 2 N. B. N. R. 11, 3 A. B. R. 204; *Fields v. Karter*, 115 Fed. 950, 8 A. B. R. 351; In *re Goodale*, 109 Fed. 783, 6 A. B. R. 493; In *re Howell*, 105 Fed. 594, 5 A. B. R. 414n.

The omission from the bankrupt's schedules of property fraudulently transferred is not alone an offense under § 29b

a good objection that the bankrupt alleged certain assets scheduled to be worthless, for such statement does not affect their real value, and bankrupt's discharge would not prevent his trustee recovering such assets.<sup>44</sup>

The omission from the schedule of a complete statement of the property owned by the bankrupt is not in itself ground for refusing a discharge;<sup>45</sup> nor is the omission of names of creditors with their knowledge and consent;<sup>46</sup> nor the name of a creditor,<sup>47</sup> unless the omission is wilful and fraudulent;<sup>48</sup> and if the grounds are false swearing, attempting to conceal property, and transferring a portion with intent to prefer, a discharge will be granted if the bankrupt had no interest therein and the transfer was without fraud.<sup>49</sup> Where there has been concealment of assets, the discharge may be made conditional upon the bankrupt using all reasonable means to discover the concealed assets,<sup>50</sup> and a discharge will not be granted where bankrupt acted as administratrix of her husband and mingled his property with hers, until she has properly accounted for hers;<sup>51</sup> or where trustee accepts a homestead allotment made years before and the property has enhanced in value in excess of the amount allowed, until there is a re-allotment;<sup>52</sup> but a wife will not be refused a discharge because her husband, to whom she left the entire conduct of the business, has committed one of the acts preventing his discharge.<sup>53</sup>

The question whether the bankrupt knowingly and fraudulently concealed his interest in property is addressed to the sound

(1) or (2) justifying the refusal of a discharge. *In re Hennebry*, 207 Fed. 882, 31 A. B. R. 231.

44—*In re Mudd*, 2 N. B. N. R. 1112, 105 Fed. 348, 5 A. B. R. 242.

45—*In re Smith*, 13 N. B. R. 256, 1 Woods, 478, Fed. Cas. No. 12995; *In re Blalock*, 118 Fed. 679; *In re Slingluff*, 2 N. B. N. R. 1115, 105 Fed. 502; *In re Miner*, 114 Fed. 998, 8 A. B. R. 248, s. c., 117 Fed. 953, 9 A. B. R. 100.

46—*In re Needham*, 2 N. B. R. 124, 1 Lowell, 309, Fed. Cas. No. 10081.

47—*In re Blalock*, 118 Fed. 679, 9 A. B. R. 266.

48—*Payne v. Able*, 4 N. B. R. 67, Fed. Cas. No. 10854.

49—*In re Penn*, 5 N. B. N. R. 288, Fed. Cas. No. 10929; *In re Smith*, 13 N. B. R. 256, 1 Woods, 478, Fed. Cas. No. 12995.

50—*In re Hyman*, 97 Fed. 195, 3 A. B. R. 169.

51—*In re Walther*, 2 A. B. R. 702, 95 Fed. 941.

52—*In re McBryde*, 3 A. B. R. 729, 2 N. B. N. R. 345, 99 Fed. 686.

53—*In re Hyman*, 97 Fed. 195, 3 A. B. R. 169; *In re Meyers*, 3 N. B. N. R. 120; *In re Meyers*, 105 Fed. 353, 5 A. B. R. 4; see "Concealment of Assets," § 1611; see *In re O'Callaghan*, 199 Fed. 662, 29 A. B. R. 304.

judicial discretion of the court.<sup>54</sup> The bankrupt's intent to hinder, delay and defraud his creditors may be inferred.<sup>55</sup>

In order to establish a fraudulent concealment it must appear that the property belonged to the bankrupt and that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed by the bankrupt as soon as prudence would permit.<sup>56</sup> It is not sufficient to show merely bankrupt's former ownership of certain goods and that he is not now able to account for them, but there must be evidence of his present possession or control of such property, or of a secret trust for his benefit in such property.<sup>57</sup>

A mere discrepancy between the extent of the bankrupt's property as given in a statement of his financial condition shortly before bankruptcy and the extent thereof as shown by his schedules is not conclusive on the question of fraudulent concealment, but the bankrupt should be given an opportunity to account for the discrepancy,<sup>58</sup> but if there is a disappearance of substantial assets, which are unlisted and unaccounted for, the burden of proof devolves upon the bankrupt to account for their disappearance.<sup>59</sup> A bankrupt cannot overthrow a *prima facie* case of concealment of assets by his mere assertion that he acted as agent for another in dealing with the property alleged to have been concealed.<sup>60</sup>

The credibility and reasonableness of the bankrupt's explanation of the disappearance of assets shown to have recently been in his possession is addressed to the discretion of the judge.<sup>61</sup> An admission by him that at the time of the filing of his petition he had money in his possession which he did not include in his schedules is sufficient to sustain the objections in the absence

54—Rule applied to an interest under a will. *Woods v. Little*, 134 Fed. 229, 13 A. B. R. 742.

55—*In re Wong*, 30 A. B. R. 125.

56—*In re Dauchy*, 130 Fed. 532, 11 A. B. R. 511; *aff'g* 122 Fed. 688, 10 A. B. R. 527.

57—*In re Kolster*, 146 Fed. 138, 17 A. B. R. 52; *In re Hoffman*, 2 N. B. N. R. 969, 102 Fed. 979, 4 A. B. R. 331; *In re Penny*, 2 N. B. N. R. 1001; *In re Berner*, 2 N. B. N. R. 268, 3 A. B. R. 325; *In re Cornell*, 97 Fed. 29, 3 A. B. R.

172; *In re Idzall*, 96 Fed. 314, 2 A. B. R. 741; *In re Crist*, 116 Fed. 1007, 9 A. B. R. 1; *Hudson v. Mercantile Nat. Bank of Pueblo, Colo.*, 119 Fed. 346, 9 A. B. R. 432.

58—*In re Boyden*, 132 Fed. 991, 13 A. B. R. 269.

59—*In re Finkelstein*, 101 Fed. 418, 2 N. B. N. R. 839, 3 A. B. R. 800.

60—*In re Diamond*, 204 Fed. 137, 30 A. B. R. 363.

61—*Seigel v. Cartel*, 164 Fed. 691, 21 A. B. R. 140.

of some explanation.<sup>62</sup> So, if a bankrupt, while insolvent, conveys property to a near relative without consideration, and fails to disclose such property in his schedules, he is *prima facie* guilty of concealing assets.<sup>63</sup> A decree dismissing a suit brought by the trustee seeking to charge property inherited by the bankrupt's wife with the cost of improvements made by the bankrupt has been held conclusive that the bankrupt was not guilty of concealment of assets in not scheduling a claim for such improvements.<sup>64</sup>

### § 1497. — Fraudulent conveyances.

A fraudulent conveyance by a bankrupt is not in itself a bar to his discharge,<sup>65</sup> unless it amounts to a fraudulent concealment of assets;<sup>66</sup> nor is the fact that the bankrupt caused and permitted loss, waste and destruction of his estate and effects, and misspent and misused the same, prior to filing the petition.<sup>67</sup>

To constitute a bar the transfer must have been made within four months and with intent to hinder, delay or defraud the entire body of creditors, not merely an individual creditor. So, the transfer by the bankrupt, a broker, of the stock of a customer is not a bar to a discharge though made with the intent to defraud the customer.<sup>68</sup> A fraudulent conveyance made more than four months prior to the filing of the petition but recorded within four months thereof may bar a discharge.<sup>69</sup> A transfer may be fraudulent so as to bar a discharge, regardless of the fact that the bankrupt thinks he has a right to make it.<sup>70</sup>

62—In re Friedrich, 199 Fed. 193, 28 A. B. R. 656.

63—In re McCann, 179 Fed. 575, 24 A. B. R. 789.

64—In re Winchester, 155 Fed. 505, 19 A. B. R. 227.

65—In re Steed, 107 Fed. 682, 6 A. B. R. 73; In re Crist, 116 Fed. 1007, 9 A. B. R. 1, and cases cited.

Fraudulent transfer prior to four month period is no bar. In re Wakefield, 207 Fed. 180, 31 A. B. R. 42; In re Hennebry, 207 Fed. 882, 31 A. B. R. 231; In re Shickerling, 204 Fed. 592, 30 A. B. R. 312.

66—In re Miller, 135 Fed. 591, 14 A. B. R. 329; In re Penny, 2 N. B. N. R. 1001; In re Pierce, 102 Fed. 977, 4 A. B.

R. 489; In re Berner, 2 N. B. N. R. 268, 3 A. B. R. 325.

67—In re Boner, 169 Fed. 727, 22 A. B. R. 151; In re Rogers, 3 N. B. R. 139, 1 Lowell, 423, Fed. Cas. No. 12001.

68—In re Jacob Berry & Co., 146 Fed. 623, 15 A. B. R. 360.

69—In re McKane, 155 Fed. 674, 19 A. B. R. 103.

70—In re Julius Bros., 209 Fed. 371, 31 A. B. R. 132.

The sale of the bankrupts' assets to a corporation made up of their relatives, and the giving of the purchase price to their attorney to distribute among creditors upon condition that they compromise their debts held a fraudulent conveyance as to those creditors refusing to com-



Where a transfer of property more than four months prior to bankruptcy is charged as a concealment of assets the question of the right to a discharge should be left undetermined until the validity of the transfer is determined in the state court.<sup>71</sup> A judgment in a suit by the trustee that a transfer of property by the bankrupt was bona fide or that the transfer was fraudulent is conclusive on the question of the concealment of such property.<sup>72</sup> While the right of creditors to oppose a bankrupt's discharge on the ground of an alleged fraudulent transaction does not depend on their having taken legal action to recover the property affected, if the evidence, on the application for discharge, is conflicting, the fact that no such effort has been made may be taken into consideration, and if the proof is evenly balanced, will warrant a decision in favor of the bankrupt.<sup>73</sup> The fraudulent nature of the conveyance must be affirmatively shown,<sup>74</sup> but when it exists it defeats his right to a discharge.<sup>75</sup>

A transfer of property in which the bankrupt merely has a special property, in the way of a lien upon it, will not bar a discharge.<sup>76</sup>

While the bankrupt's placing title to his property in his wife shortly before bankruptcy will ordinarily be held fraudulent,<sup>77</sup> the retention by the bankrupt of a secret trust in property conveyed to his wife will not be inferred alone from the fact that, since the conveyance, he has continued to live with her on the property conveyed.<sup>78</sup> An assignment by the bankrupt, acting as agent for his wife under an unrecorded power of attorney, to her of corporate stock has been held not fraudulent.<sup>79</sup>

promise their claims. In re Julius Bros., 209 Fed. 371, 31 A. B. R. 132.

71—In re Clansky, 163 Fed. 428, 20 A. B. R. 780.

72—In re Tiffany, 147 Fed. 314, 17 A. B. R. 296; In re Skinner, 3 A. B. R. 163, 97 Fed. 190; In re McGurn, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 Fed. 743.

73—In re Hirsch, 96 Fed. 468, 2 A. B. R. 715.

74—In re Howard, 180 Fed. 399, 24 A. B. R. 841; In re Ferris, 105 Fed. 356, 5 A. B. R. 246.

75—Pirvitz v. Pithan, 194 Fed. 403, 27

A. B. R. 621; In re Young, 140 Fed. 728, 15 A. B. R. 477; In re Wilcox, 109 Fed. 628, 6 A. B. R. 362; In re Schenck, 116 Fed. 554, 8 A. B. R. 727.

76—Rule applied to the transfer by a broker of the stock of a customer. In re Berry & Co., 146 Fed. 623, 15 A. B. R. 360.

77—In re Guilbert, 169 Fed. 149, 22 A. B. R. 221.

78—In re Wermuth, 179 Fed. 1009, 24 A. B. R. 785.

79—In re Hedley, 156 Fed. 314, 19 A. B. R. 409.

### § 1498. — Preferential transfers.

A payment of lawful debts is not a concealment of assets<sup>80</sup> and the giving of a voidable preference by the bankrupt is no bar to his discharge.<sup>81</sup>

### § 1499. — General assignments.

A general assignment made prior to proceedings in bankruptcy, is not a bar to a discharge.<sup>82</sup>

### § 1500. — Effect of advice of counsel.

While advice of counsel may be considered in determining whether an omission from schedules was fraudulent,<sup>83</sup> it cannot excuse violation of law, though it may mitigate the act, according to the character of the advice and circumstances under which it was given. To absolve the bankrupt from the charge of making a false oath or of designedly concealing his property, the facts must be fully and in good faith stated to counsel, and the act charged done innocently, and believing he had been correctly advised.<sup>84</sup>

If a bankrupt fairly presents a matter to his attorney relative to the scheduling of property and is advised that it is not such property as should properly be scheduled in bankruptcy, such advice, where honestly given, however erroneous, tends to deprive the false oath of its element of wilfulness and fraud, and the conviction of the bankrupt of the crime of perjury under such circumstances, could not be maintained.<sup>85</sup> Hence unless it

80—In re Mintzer, 197 Fed. 647, 28 A. B. R. 743.

81—In re McLellan, 204 Fed. 482, 30 A. B. R. 325; In re Marcus & Scherr, 203 Fed. 29, 30 A. B. R. 176, aff'g 192 Fed. 743, 27 A. B. R. 164; In re Doyle, 199 Fed. 247, 29 A. B. R. 102; In re Maher, 144 Fed. 649, 16 A. B. R. 340, aff'g 15 A. B. R. 786; In re Bouck, 199 Fed. 453, 28 A. B. R. 378; In re Mintzer, 197 Fed. 647, 28 A. B. R. 743; In re Friedrich, 199 Fed. 193, 28 A. B. R. 656; In re Brown, 140 Fed. 383, 15 A. B. R. 350.

82—In re Pierce, 3 N. B. R. 61, Fed. Cas. No. 11141.

83—Woods v. Little, 134 Fed. 229, 13 A. B. R. 742.

84—In re Remmers, 173 Fed. 484, 23

A. B. R. 78; In re Breitling, 133 Fed. 146, 13 A. B. R. 126.

85—In re Kyte, 174 Fed. 867, 23 A. B. R. 414; In re Alleman, 162 Fed. 693, 20 A. B. R. 745; In re Headley, 2 N. B. N. R. 684; In re Shenberger, 2 N. B. N. R. 783, 102 Fed. 978, 4 A. B. R. 489; In re Berner, 2 N. B. N. R. 268; U. S. v. Connor, 3 McLean, 573; In re Hirsch, 96 Fed. 468, 2 A. B. R. 715; In re Cohn, 1 N. B. N. 330, 1 A. B. R. 655; In re De Leeuw, 2 N. B. N. R. 267, 3 A. B. R. 418, 98 Fed. 408, In re Bushnell, 1 N. B. N. 528; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Bryant, 2 N. B. N. R. 1061; In re Hussman, 2 N. B. R. 140, Fed. Cas. No. 6951; In re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11583; In re

is shown that bankrupt knowingly made a false oath, the discharge will not be denied.

**§ 1501. — Omission of non-dischargeable debts.**

The fact that a debt which is not released by a discharge is not scheduled, would not operate as a bar to a discharge, as the right to a discharge and its effect when granted are different things.<sup>86</sup>

**§ 1502. — Former discharge.**

By the amendment of February 5, 1903, a discharge will be refused if the bankrupt has in a voluntary proceeding been granted a discharge in bankruptcy within six years. The amendment affects all pending proceedings,<sup>87</sup> and all proceedings commenced after its enactment, and is not unconstitutional because it may affect proceedings against one who had been adjudged a bankrupt in voluntary proceedings prior to its passage.<sup>88</sup>

The granting of a discharge in an involuntary proceeding will have no effect upon a subsequent discharge in either voluntary or involuntary proceedings.<sup>89</sup> While the effect of the amendment is to bar a discharge in either voluntary or involuntary proceedings if within six years prior thereto the bankrupt in a voluntary proceeding has been granted a discharge,<sup>90</sup> the fact

Goodfellow, 3 N. B. R. 114, 1 Lowell, 510, Fed. Cas. No. 5336; In re Rainsford, 5 N. B. R. 381, 1 N. B. R. 114, 2 Ben. 349; contra, In re Stoddard, 114 Fed. 486, 7 A. B. R. 762; In re Weisenberg & Co., 131 Fed. 517, 12 A. B. R. 417.

86—In re Carmichael, 96 Fed. 594, 2 A. B. R. 815; In re Lieber, 2 N. B. N. R. 31, 3 A. B. R. 217; In re Thomas, 1 N. B. N. 329, 1 A. B. R. 515, 92 Fed. 912; In re Black, 97 Fed. 493, 4 A. B. R. 471 in note; In re Peacock, 2 N. B. N. R. 758, 4 A. B. R. 136, 101 Fed. 560; In re Bashford, 2 N. B. R. 26, Fed. Cas. No. 1090; In re Rosenfield, 1 N. B. R. 161, Fed. Cas. No. 12058; In re Clark, 2 N. B. R. 44, Fed. Cas. No. 2844; In re Elliott, 2 N. B. R. 44, Fed. Cas. No. 4391; In re Wright, 2 N. B. R. 57, 2 Ben. 509, Fed. Cas. No. 18065; In re Doody, 2 N. B. R. 74, Fed. Cas. No. 3995; In re

Stokes, 2 N. B. R. 76, Fed. Cas. No. 13476; In re Tracy, 2 N. B. R. 98, Fed. Cas. No. 14124; In re Rhutassel, 1 N. B. N. 572, 2 A. B. R. 697, 96 Fed. 597; In re Tinker, 2 N. B. N. R. 391, 99 Fed. 79, 3 A. B. R. 580.

87—In re Neely, 134 Fed. 667, 12 A. B. R. 407.

88—In re Carleton, 131 Fed. 146, 12 A. B. R. 475.

89—In re Neeley, 134 Fed. 667, 12 A. B. R. 407.

Prior discharge held to have been entered in voluntary proceedings where involuntary and voluntary petitions were filed on same day, but proceedings on the involuntary petition were dropped. In re Lachenmaier, 203 Fed. 32, 29 A. B. R. 325.

90—In re Neely, 134 Fed. 667, 12 A. B. R. 407.

that the bankrupt has been adjudged a voluntary bankrupt will not prevent voluntary or involuntary proceedings from being instituted at any time.<sup>91</sup>

The six-year period runs from the date of the discharge in the voluntary proceeding to the date of judicial action upon the application for the next discharge. There must accordingly be a full period of six years between the granting of the discharge in the voluntary proceeding and the date of the second discharge, whether in a voluntary or involuntary proceeding. The fact that the petition in bankruptcy in the second proceeding has been filed prior to the expiration of the six years would not bar the granting of the discharge if six years had elapsed at the time judicial action was taken on the discharge in the subsequent proceeding.<sup>92</sup> In one case, it has been held that the six-year period should be computed from the time of granting the first discharge to the filing of the application for the second discharge, rather than to the time of the judicial action thereon. This interpretation of the law would prevent a bankrupt from applying for a discharge within the six years, and then by delaying the hearing upon his second application nevertheless obtaining a discharge.<sup>93</sup>

Where in prior proceedings the discharge was not in form refused but the petition therefor was dismissed because of the bankrupt's failure to prosecute and appear for examination, the bankrupt may be granted a qualified discharge which is not to apply to debts provable in the prior proceedings.<sup>94</sup> Where a discharge is refused as to certain debts which were provable in a former proceeding in which no discharge was granted, the order of discharge may be so drawn as to except from its operation such debts.<sup>95</sup>

A partnership will not be denied a discharge because one of its

91—In re Little, 137 Fed. 521, 13 A. B. R. 640.

92—In re Smith, 155 Fed. 688, 19 A. B. R. 64; In re Jordan, 142 Fed. 292, 15 A. B. R. 449; In re Adolph Haase, 155 Fed. 553, 17 A. B. R. 528; In re Little, 137 Fed. 521, 13 A. B. R. 640.

93—In re Dunphy, 206 Fed. 680, 30 A. B. R. 760.

94—Pollett v. Cosel, 179 Fed. 488, 30 L. R. A. (N. S.) 1164, 24 A. B. R. 678.

Failure of partner to apply for discharge in proceedings in which he as well as the firm were adjudicated held a bar to discharge in second proceeding as to debts existing and provable in first. In re Springer, 199 Fed. 294, 29 A. B. R. 96.

95—Bacon v. Buffalo Cold Storage Co., 193 Fed. 34, 27 A. B. R. 736.

members was a member of another partnership which has been adjudged within the six-year period.<sup>96</sup>

A bankrupt who was refused a discharge under the act of 1867 is not estopped from applying for a discharge under the present act for the same debts and on the same facts.<sup>97</sup>

### § 1503. — Contumacy.

By the amendment of February 5, 1903, a discharge will be refused if "in the course of the proceedings in bankruptcy, the bankrupt refuses to obey any lawful order of or to answer any material question approved by the court." Section 7 defines the duties of the bankrupt. The purpose of this provision is intended to effect a compliance with the requirements and duties imposed upon him, and where he has been guilty of disobedience, a discharge will be refused. His refusal must, however, have been either to obey a direct order of the court or to answer a material question approved by the court; that is, the order must emanate from the court and the materiality of the question he refuses to answer must have been passed upon and approved by the court.<sup>98</sup> This of course would apply to an order of the referee as well as of the court of bankruptcy itself. While it is true that the bankrupt may decline to answer any lawful question which may have a tendency to incriminate him, without subjecting himself to punishment, congress doubtless intended by this provision to provide for such contingency. In order, therefore, to avail himself of the privileges of a discharge as given by the statute, the bankrupt must have answered any material question propounded and if he claims his constitutional privilege to decline to answer because it might have a tendency to incriminate him, it would nevertheless operate as a bar to his discharge.<sup>99</sup> The bankrupt may be denied a discharge because of his refusal to answer questions on his examination though the referee has not certified the objections to the questions to the court,<sup>1</sup> and though at a subse-

<sup>96</sup>—In re Neyland & McKeithen, 184 Fed. 144, 24 A. B. R. 879.

<sup>97</sup>—In re Herrman, 2 N. B. N. R. 905, 102 Fed. 753, 4 A. B. R. 139.

<sup>98</sup>—In re Levin, 113 Fed. 498, 6 A. B. R. 743.

<sup>99</sup>—In re Dresser, 146 Fed. 383, 16 A. B. R. 561; In re Schwartz & Co., 201 Fed. 166, 28 A. B. R. 670.

1—In re Weinreb, 153 Fed. 363, 18 A. B. R. 387.

quent hearing the bankrupt signifies his willingness to answer,<sup>2</sup> or actually answers<sup>3</sup> the questions.

The mere fact that testimony is evasive or disingenuous or disrespectful is not a ground for barring a discharge<sup>4</sup> but it is a material consideration in determining his credibility when testifying as to what became of certain property.<sup>5</sup>

#### § 1504. — *Res adjudicata.*

An order refusing to confirm a composition on the ground that it is not for the best interests of creditors is not *res adjudicata* as to right to a subsequent discharge.<sup>6</sup>

#### § 1505. Refusal of discharge—Effect.

An order dismissing an application for a discharge is in substance an order denying discharge, and cannot be questioned except by an appeal.<sup>7</sup>

A judgment refusing discharge may award costs to the objecting creditors.<sup>8</sup>

After a discharge has been refused a creditor may institute and prosecute any action against the bankrupt as to after-acquired property which he might have instituted and prosecuted but for the adjudication in bankruptcy.<sup>9</sup>

#### § 1506. Application for rehearing.

In view of the provisions of the act<sup>10</sup> for the revocation of a discharge, it is questionable if any other attack can be made on it, if once granted; but, in case of refusal to grant a discharge, an application to rehear may be made, but, if no new questions of fact or law be presented, and it appears the refusal was justified by the showing of concealment of assets, the application will be denied.<sup>11</sup> A creditor's petition to reopen the case because of the discovery of additional proofs will be denied where not seasonably made.<sup>12</sup>

2—In re Weinreb, 153 Fed. 363, 18 A. B. R. 387.

3—In re Schwartz & Co., 201 Fed. 166, 28 A. B. R. 670.

4—In re Hamilton, 133 Fed. 823, 13 A. B. R. 333; In re Fanning, 155 Fed. 701, 19 A. B. R. 55; In re Cohen, 149 Fed. 908, 18 A. B. R. 84.

5—In re Leslie, 119 Fed. 406.

6—In re McVoy Hardware Co., 200 Fed. 949, 29 A. B. R. 322.

7—In re Semons, 140 Fed. 989, 15 A. B. R. 822.

8—In re Young, 140 Fed. 728, 15 A. B. R. 477.

9—In re Barton's Estate, 144 Fed. 540, 16 A. B. R. 569.

10—Section 15a, Act of 1898.

11—In re Quackenbush, 2 N. B. N. R. 1020.

12—Kentucky Nat. Bank of Louisville v. Carley, 127 Fed. 686, 12 A. B. R. 119.

**§ 1507. Amendment of decree.**

A decree granting a discharge will not be amended where over a year has elapsed since the entry thereof and no actual fraud of the bankrupt is shown.<sup>13</sup> The order for a discharge may be amended so as to discharge a bankrupt from his liabilities as a partner, as well as from his individual debts.<sup>14</sup>

**§ 1508. Revocation and impeachment of a discharge.****§ 1509. — Jurisdiction.**

The court of bankruptcy has power to recall a final decree granting a discharge on application,<sup>15</sup> and its jurisdiction in this respect is exclusive.<sup>16</sup> The effect of this is to prevent the validity of a discharge being called into question in suits brought against the bankrupt, causing unnecessary labor and offering opportunity for different decisions on the same point.

A discharge cannot be revoked in a suit brought in the district court under its general equitable jurisdiction and not under the bankruptcy act.<sup>17</sup>

**§ 1510. — Grounds.**

The act of 1898 provides that a discharge may be revoked "if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."<sup>18</sup> Not-

13—*In re Cuthbertson*, 202 Fed. 266, 29 A. B. R. 823.

14—*In re Diamond*, 149 Fed. 407, 17 A. B. R. 563.

15—*In re Pfaffinger*, 19 A. B. R. 309, rev'g 154 Fed. 528, 19 A. B. R. 41; *In re McKee*, 165 Fed. 269, 21 A. B. R. 306; *In re Ives*, 111 Fed. 495, 7 A. B. R. 692.

16—*Commercial Bank of Manchester v. Buckner*, 20 How. 108, 15 L. ed. 862; *Corey v. Ripley*, 4 N. B. R. 163; *Alston v. Robinett*, 9 N. B. R. 74; *Nicholas v. Murray*, 18 N. B. R. 469, 5 Sawy. 320, Fed. Cas. No. 10223; these cases being equally applicable to the present as to the former acts.

17—*Atlantic Dynamite Co. v. Reger*, 200 Fed. 1002, 29 A. B. R. 659.

18—Section 15a, Act of 1898.

Analogous provision of Act of 1867. "Section 34. . . . That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other

withstanding the difference in the phraseology of the present act and that of 1867, the meaning of the two are practically the same. While fraud is the only ground for revoking a discharge under section 15,<sup>19</sup> courts of bankruptcy are not deprived of their usual control of their judgments by that section but may still correct their records to make them conform to the facts,<sup>20</sup> and recall a discharge granted by accident or mistake, or obtained by a fraud in the court, though such relief should be sought promptly and before others' rights intervene.<sup>21</sup> If the court overlooks specifications properly filed and grants a discharge, a motion to recall the discharge and consider the specifications may be made, and, if denied, a review may be had in the appellate court;<sup>22</sup> and, if a creditor wishes to attack a discharge, because of the fraudulent omission of his claim, he must do so on the ground of fraud in the court of bankruptcy.<sup>23</sup>

Fraud, as used in section 15, is synonymous with bad faith, and means fraud in fact, involving moral turpitude, or intentional wrong,<sup>24</sup> and, under the present act, as under the act of 1867, it must have been such as would have originally prevented the discharge had it been known in time and presented in the form of objections to the allowance of a discharge.<sup>25</sup> The fraud

of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if the court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered

in favor of the bankrupt and the validity of his discharge shall not be affected by said proceedings."

19—*In re Cuthbertson*, 202 Fed. 266, 29 A. B. R. 823.

20—*In re Dupee*, 6 N. B. R. 89, 2 Lowell, 18, Fed. Cas. No. 4183.

21—*In re Dupee*, 6 N. B. R. 89, 2 Lowell, 18, Fed. Cas. No. 4183; *Ex parte Buchstein*, 17 N. B. R. 1, 9 Ben. 215, Fed. Cas. No. 2076.

22—*In re Buchstein*, 17 N. B. R. 1, 9 Ben. 215, Fed. Cas. No. 2076.

23—*Lymond v. Barnes*, 6 N. B. R. 377; *In re Roosa*, 119 Fed. 542, 9 A. B. R. 531.

24—*In re Cuthbertson*, 202 Fed. 266, 29 A. B. R. 823.

25—*In re Griffin Bros.*, 154 Fed. 537, 19 A. B. R. 78; *In re Rainsford*, 5 N. B. R. 381, Fed. Cas. No. 11537; *In re Meyers*, 2 N. B. N. R. 669, 100 Fed. 775, 3 A. B. R. 772; *In re Dietz*, 2 N. B. N. R. 125, 3 A. B. R. 316, 97 Fed. Cas. No. 563; *Ex*



by which the discharge was obtained must have related to fraud theretofore knowingly practiced by the bankrupt. It must have been an actual fraud, such as could have been urged against the granting of the discharge.<sup>26</sup> Thus in bankrupt's application for discharge<sup>27</sup> he is required to state that he has wholly surrendered all his property and rights of property and fully complied with all the requirements of the act, which, if not true and there are grounds for refusing him a discharge, constitute a fraud in obtaining his discharge.<sup>28</sup>

If it is made to appear to the court of bankruptcy that testimony of the bankrupt in subsequent proceedings tends to show that, at the time of the bankruptcy, he had considerable property, though his verified petition stated no assets and no trustee was appointed, a hearing should be had on the question whether the discharge should not be revoked;<sup>29</sup> or if the opposition of a creditor was bought off through the procurement or privity of the bankrupt;<sup>30</sup> or, if by wilfully and fraudulently making a false schedule or affidavit, the bankrupt prevented notice to a creditor and such creditor had no actual knowledge of the proceedings;<sup>31</sup> or if credit was procured on the faith of bankrupt's ownership of property, deeds of which, through a third person to bankrupt's wife without consideration were alleged to have been burned, such deeds being afterwards recorded and the property omitted from the schedules.<sup>32</sup> Where a discharge is granted upon a hearing in which the principal creditor, who had successfully contested the right to a discharge in a former proceeding, failed to appear, the discharge may be set aside though such creditor's attorney of record had received notice of the hearing,

parte Briggs, 2 Lowell, 389, Fed. Cas. No. 1868.

26—In re Wright, 177 Fed. 578, 24 A. B. R. 437.

27—Official Form 57, § 1824, *post*.

28—In re Griffin Bros., 154 Fed. 537, 19 A. B. R. 78.

29—In re Meyers, 2 N. B. N. R. 669, 100 Fed. 775, 3 A. B. R. 772; In re Augenstein, 16 N. B. R. 252.

30—In re Luftig, 162 Fed. 322, 15 A. B. R. 773; In re Dietz, 2 N. B. N. R. 125, 3 A. B. R. 316, 97 Fed. 563; Tuz-

bury v. Miller, 19 John. 311; In re Douglas, 11 Fed. 403, 406; In re Palmer, 14 N. B. R. 437, 2 Hughes, 177, Fed. Cas. No. 10678; Blasdel v. Fowle, 120 Mass. 447; Bell v. Leggett, 7 N. Y. 176.

31—In re Roosa, 119 Fed. 542, 9 A. B. R. 531; Rayl v. Lapham, 15 N. B. R. 508; In re Herrick, 7 N. B. R. 341, Fed. Cas. No. 6419; In re Carrier, 13 N. B. R. 208, Fed. Cas. No. 2443.

32—In re Rainsford, 5 N. B. R. 381, Fed. Cas. No. 11537.

it appearing that such attorney had ceased to represent the creditor.<sup>33</sup>

A discharge will not be set aside on motion made after bankrupt has acted on the faith of it, and after the time allowed by rule of court for such motion, on the ground that the court had overlooked certain specifications;<sup>34</sup> or because a creditor with notice of the proceedings has failed to file his claim,<sup>35</sup> or in regard to a matter not barred by the discharge;<sup>36</sup> or if the requirements of the act were honestly complied with by the bankrupt, though the creditors did not have actual notice.<sup>37</sup> Nor will the court interfere merely because the creditors can produce new facts as to matters heard before the discharge was granted; or where the fraud was committed years before the bankruptcy;<sup>38</sup> or if the evidence fails to sustain charges that the creditor had no notice, that the bankrupt fraudulently omitted assets,<sup>39</sup> and admitted a false claim;<sup>40</sup> or if the trustee had knowledge of all the facts prior to the discharge, though the petitioner for revocation had not;<sup>41</sup> or if the only evidence offered is incompetent and inadmissible, having been known to the creditor before the discharge was granted;<sup>42</sup> or if the bankrupt failed to schedule a lease which was subject to forfeiture for his failure to perform its conditions, subsequently making a new contract with reference thereto, the property proving valuable after his discharge and being sold to third parties;<sup>43</sup> or because the bankrupt collected and appropriated assets which the referee erroneously decided belonged to him;<sup>44</sup> or on general averments or after bankrupt's death to allow creditors to prove their claims.<sup>45</sup>

33—In re Quackenbush, 122 App. Div. (N. Y.) 456, 19 A. B. R. 647.

34—In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, Fed. Cas. No. 2076.

35—In re Matthews, 132 Fed. 274, 13 A. B. R. 91.

36—In re Mansfield, 6 N. B. R. 388, Fed. Cas. No. 9049; In re Monroe, 114 Fed. 398, 7 A. B. R. 706.

37—In re Downing, 199 Fed. 329, 28 A. B. R. 778; Rayl v. Lapham, 15 N. B. R. 508.

38—In re Corwin, 19 N. B. R. 422, Fed. Cas. No. 3259, 1 Fed. Cas. No. 847; In re Hoover, 3 N. B. N. R. 327; In re Hoover, 105 Fed. 354, 5 A. B. R. 247.

39—In re Hansen, 107 Fed. 252, 5 A. B. R. 747.

40—In re Stetson, 3 N. B. R. 179, 4 Ben. 147, Fed. Cas. No. 13381.

41—In re Hansen, 107 Fed. 252, 5 A. B. R. 747.

42—In re Marrionneaux, 13 N. B. R. 222, 1 Woods, 37, Fed. Cas. No. 9088.

43—In re Oliver, 2 N. B. N. R. 212.

44—In re Wright, 177 Fed. 578, 24 A. B. R. 437.

45—In re McIntire, 1 N. B. R. 115, 2 Ben. 345, Fed. Cas. No. 8823; Young v. Ridenbaugh, 11 N. B. R. 563, 3 Dill. 239, Fed. Cas. No. 18173.

## § 1511. — Who may apply.

The expression "parties in interest" employed in this section includes all persons whose interests are affected by the discharge. One who acquires rights after the discharge would not be included,<sup>46</sup> nor would one whose claim is not affected by the discharge,<sup>47</sup> nor a creditor fraudulently omitted from the schedule, since his debt is not released by the discharge. It was held under the former law that a creditor, who neglected to file objections in due time and subsequently discovered fraud, might require bankrupt to take his discharge and then apply to set it aside; the knowledge of the fraud barring the right to make such application must have been available in time to present objections to the discharge.<sup>48</sup>

## § 1512. — Time for applying.

A discharge cannot be revoked after one year, which year begins to run from the date of the discharge and not from the discovery of the fraud upon which the revocation is sought,<sup>49</sup> and it is immaterial that the fraud is not discovered until after the expiration of that period. Furthermore, although the year has not expired, if the creditor has been guilty of undue laches, the discharge will not be revoked.<sup>50</sup> The court cannot set aside a discharge, in order to permit an addition of a creditor to the bankrupt's schedule, more than a year after the adjudication,<sup>51</sup> and a motion to vacate a discharge as inadvertently granted after the time allowed by rule of court for such motion, will be denied.<sup>52</sup> After a year has elapsed from the date of the discharge, a bankrupt cannot be compelled to submit to an examination for the purpose of instituting or aiding a proceeding to vacate it, nor can the application be amended to add new grounds or acts.<sup>53</sup>

46—In re Chandler, 138 Fed. 637, 14 A. B. R. 512.

47—Arrington v. Arrington, 132 Fed. 200, 13 A. B. R. 89.

48—In re Fowler, 2 Lowell, 122 Fed. Cas. No. 4999.

49—Section 15, Act of 1898.

50—In re Mauzy, 163 Fed. 900, 21 A. B. R. 59.

51—In re Hawk, 114 Fed. 916, 8 A. B. R. 71.

52—In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, Fed. Cas. No. 2076.

53—In re Wright, 177 Fed. 578, 24 A. B. R. 437; In re Shaffer, 3 N. B. R. 54, 104 Fed. 982, 4 A. B. R. 728; Mall. v. Ullrich, 37 Fed. 653; In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, Fed. Cas. No. 2076; In re Brown, 19 N. B. R. 312, Fed. Cas. No. 1983; In re Dole, 7 N. B. R. 538, Fed. Cas. No. 3965; Pickett v. McGavick, 14 N. B. R. 236; Fed. Cas. No.

As to what constitutes laches depends upon the circumstances of each case, and it has been held in one case that one month constituted laches;<sup>54</sup> in another eight months,<sup>55</sup> and in another five months,<sup>56</sup> where the court overlooked specifications filed in opposition to the discharge and no proceedings for a review were taken within the time prescribed, the bankrupt having in the meantime acted upon his discharge.<sup>57</sup> It must be made clear that there has been no laches, and this cannot be done by general averments.<sup>58</sup>

An application to revoke a discharge, which though filed immediately after the discharge, is not brought on for hearing within a reasonable time, will not be allowed.<sup>59</sup>

### § 1513. — The application.

It has been held that the power to revoke a discharge is limited and that it can only be exercised upon a petition filed, complying with the provisions of section 15a.<sup>60</sup> It would seem, however, that if the application is addressed to the court of bankruptcy in the exercise of its general powers as a court to control its own records and make them conform to the facts, or correct anything done through inadvertence or mistake or procured through fraud practiced on the court, the application might be by motion, supported, in case facts outside of the record are relied on, by affidavits. Such motion must be made within the time prescribed by the rules of court and otherwise conform thereto.

If the application is made under section 15 of the act, it must allege all jurisdictional facts.<sup>61</sup> It should allege facts showing that the petitioners are parties in interest and had provable debts against the bankrupt which were affected by the dis-

11126; *Corey v. Ripley*, 4 N. B. R. 503; *Way v. Howe*, 4 N. B. R. 677; *Alston v. Robinett*, 9 N. B. R. 74; *In re Witkowski*, 10 N. B. R. 209, Fed. Cas. No. 17920; *In re Sims*, 9 Fed. 440.

54—*In re McIntire*, 1 N. B. R. 115, 2 Ben. 345, Fed. Cas. No. 8823.

55—*In re Downing*, 199 Fed. 329, 28 A. B. R. 778.

56—*In re Murray*, 14 Blatch. 43, Fed. Cas. No. 9953.

57—*In re Buchstein*, 17 N. B. R. 1, 9 Ben. 215, Fed. Cas. No. 2076; see also *In re Hunter*, 3 McLean, 297, Fed. Cas. No. 3902; *In re Beck*, 31 Fed. 554.

58—*In re Oleson*, 110 Fed. 796, 7 A. B. R. 22.

59—*Drees v. Waldron*, 212 Fed. 93, 31 A. B. R. 722.

60-61—*In re Cuthbertson*, 202 Fed. 206, 29 A. B. R. 823.

charge,<sup>62</sup> and should be by a verified petition setting out in detail the facts constituting the alleged fraud and those showing that the actual facts did not warrant a discharge; that the knowledge of such fraud has come to the petitioners since the discharge was granted and that there has been no undue laches on their part in presenting the matter to the court; and such petition must be presented within one year after the granting of the discharge.<sup>63</sup>

A petition to vacate a discharge may be amended by inserting therein an allegation that the information made the basis thereof was obtained by the petitioner after the granting of the discharge.<sup>64</sup>

#### § 1514. — Deposit to cover fees.

A petition for revocation of a discharge will be dismissed upon the petitioner's failure to make a deposit to cover fees and costs.<sup>65</sup>

#### § 1515. — Reference.

If the petition makes out a *prima facie* case, and is filed in due time by competent parties, it should be referred to a special master, the referee usually, to ascertain and report upon the facts, alleged in the petition, on due notice to the bankrupt, and on hearing such evidence as may be offered by the parties.<sup>66</sup>

#### § 1516. — Notice.

Notice of the hearing should be given the bankrupt and any other persons interested, and such notice should be reasonable though there is no definite time specified, unless by analogy the ten days' notice to creditors.<sup>67</sup> If a discharge obtained by fraud is set aside and the case referred to the referee before whom the bankrupt offers testimony to which the petitioner excepts and such exception is taken before the court, which, without any additional testimony, and without notice to counsel, passes an order vacating the decree and annulling the discharge, notice should be given to all persons affected.<sup>68</sup>

62—In *re* Chandler, 138 Fed. 637, 14 A. B. R. 512.

63—In *re* Oliver, 133 Fed. 832, 13 A. B. R. 582; In *re* Toothaker Bros., 128 Fed. 187, 12 A. B. R. 99.

64—In *re* Oliver, 133 Fed. 832, 13 A. B. R. 582.

65—In *re* Lasch, 142 Fed. 277, 15 A. B. R. 629.

66—In *re* Meyers, 2 N. B. N. R. 669, 100 Fed. 775, 3 A. B. R. 772.

67—Section 58, Act of 1898.

68—In *re* Augenstein, 16 N. B. R. 252.

**§ 1517. — Burden of proof.**

The burden is upon the petitioner to bring his case clearly within the statute,<sup>69</sup> and this though the petition fails to allege the jurisdictional facts and the bankrupt fails to demur thereto.<sup>70</sup>

**§ 1518. — Admissibility of evidence.**

Conveyances made by a bankrupt and alleged to be fraudulent, or any other acts of a bankrupt, cannot be shown in evidence, unless charged in the petition to set aside the discharge, except to show the intent of certain acts specified in such petition.<sup>71</sup>

**§ 1519. — Examination of bankrupt.**

The bankrupt may be examined after a discharge and at any time within a year of its granting for the purpose of discovering if there is reason to apply to have such discharge revoked under this section,<sup>72</sup> but not after the year has expired.<sup>73</sup>

**§ 1520. — Effect of revocation.**

The object of section 15 is to secure the utmost good faith in the procuring of a discharge. Persons acting on the faith of a discharge are protected, in case of its revocation, by applying the property acquired by the bankrupt, in addition to his estate at the time of adjudication, to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such discharge was in force, and the residue, if any, to the payment of the debts owing at the time of adjudication.<sup>74</sup> A trustee, on his appointment and qualification after a discharge is revoked, is vested with the title to all of the bankrupt's property as of the date of the final decree revoking the discharge.<sup>75</sup>

69—In re Mauzy, 163 Fed. 900, 21 A. B. R. 59.

70—In re Cuthbertson, 202 Fed. 266, 29 A. B. R. 823.

71—Tenny v. Collins, 4 N. B. R. 156, Fed. Cas. No. 13833.

72—In re Peters, 1 N. B. N. 165, 1 A.

B. R. 248; In re Heath, 7 N. B. R. 448, Fed. Cas. No. 6304.

73—In re Dole, 7 N. B. R. 538, Fed. Cas. No. 3965.

74—Section 64e, Act of 1898.

75—Section 70d, Act of 1898.

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CHAPTER XXXV  
THE DISCHARGE OF THE BANKRUPT  
PART II

THE EFFECT OF A DISCHARGE

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§ 1574. Discharge not pleadable.

§ 1575. Replication to plea of discharge.

§ 1576. Proof of discharge.

## PART II

### THE EFFECT OF A DISCHARGE

#### § 1521. In general.

The right to a discharge and the effect of a discharge on a claim are wholly distinct propositions.<sup>76</sup> The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge.<sup>77</sup>

A discharge when granted relates back to the time of the filing of the petition.<sup>78</sup> It has the same effect as the return of an execution wholly or partly unsatisfied.<sup>79</sup>

If a discharge be refused, and a second petition be filed and a discharge thereunder be obtained, the latter will be made gen-

76—*Katzenstein v. Reid, Murdock & Co.*, 41 Tex. Civ. App. 106, 16 A. B. R. 740; *Talcott v. Friend*, 179 Fed. 676, 24 A. B. R. 708; *Frank v. Michigan Paper Co.*, 179 Fed. 776, 30 L. R. A. (N. S.) 623, 24 A. B. R. 261.

77—*Katzenstein v. Reid, Murdock & Co.*, 41 Tex. Civ. App. 106, 16 A. B. R. 740; *In re Miller*, 192 Fed. 730, 27 A. B. R. 606; *In re McCarthy*, 111 Fed. 151, 7 A. B. R. 40; *In re Marshall Paper Co.*, 2 N. B. N. R. 1053, 102 Fed. 872, 4 A. B. R. 468; *In re Rhutassel*, 1 N. B. N. 572, 96 Fed. 597, 2 A. B. R. 697; *In re Thomas*, 92 Fed. 912, 1 A. B. R. 515; *In re Shepherd*, 2 N. B. N. R. 1070; *In re*

*White*, 2 N. B. N. R. 536; *In re Mussey*, 99 Fed. 71, 2 N. B. N. R. 113, 3 A. B. R. 592; *In re Tinker*, 2 N. B. N. 391, 99 Fed. 79, 3 A. B. R. 580; this distinction seems to have been overlooked by the Supreme Court in the case of *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 5 A. B. R. 829.

78—*In re Harrington*, 200 Fed. 1010, 29 A. B. R. 666; *In re Lineberry*, 183 Fed. 338, 25 A. B. R. 164; *In re Karns*, 148 Fed. 143, 16 A. B. R. 841.

79—*In re Martin*, 105 Fed. 753, 5 A. B. R. 423; *Shellington v. Howland*, 53 N. Y. 374, and cases cited; *People v. Bartlett*, 3 Hill 570.



eral, leaving its effect as to debts proved under the first petition, but not under the second, to be determined as occasion may arise.<sup>80</sup>

A discharge protects the bankrupt from the imposition of fines and penalties, or deprivation of office, place or position, by tribunals of a state, for nonpayment of debts which have been discharged.<sup>81</sup>

### § 1522. Discharge is personal.

A discharge is a personal privilege given the bankrupt in consideration of his surrendering his property; a bankruptcy proceeding is a proceeding in rem and all persons interested are regarded as parties to the proceedings, including the bankrupt and trustee, as well as the creditors, secured and unsecured, and an injunction may issue after discharge.<sup>82</sup> The discharge does not release the fraudulent grantees of the bankrupt from liability for the fraud committed by them,<sup>83</sup> but it is held that a widow of a bankrupt to whom his property has been transferred may avail herself of his discharge and plead it in her own defense.<sup>84</sup>

### § 1523. Effect upon bankruptcy proceedings.

The summary jurisdiction of the bankruptcy court over the bankrupt continues during the pendency of the proceedings, and during the year in which a discharge may be revoked, and he may be examined, notwithstanding the discharge.<sup>85</sup> The granting of the discharge does not oust the referee of his jurisdiction of the cause, it being a mere incident in the proceedings; and the cause proceeds before him until the court finally discharges the trustee.<sup>86</sup>

Although a discharge is a complete bar to a suit on a claim

80—*In re Claff*, 111 Fed. 506, 7 A. B. R. 128.

81—*In re Hicks*, 133 Fed. 739, 13 A. B. R. 654.

82—*Carter v. Hobbs*, 1 N. B. N. 191, 1 A. B. R. 215, 92 Fed. 594; *Southern Loan & Trust Company v. Benbow*, 1 N. B. N. 499, 96 Fed. 514, 3 A. B. R. 9; *In re Marshall Paper Co.*, 102 Fed. 872, 2 N. B. N. R. 1053, 4 A. B. R. 468.

83—*Moyer v. Dewey*, 103 U. S. (13

Otto) 301, 26 L. ed. 394, *Stephenson v. Bird*, 168 Ala. 363, 25 A. B. R. 909.

84—*Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931.

85—*In re Price*, 1 N. B. N. 131, 91 Fed. 635, 1 A. B. R. 419; *In re Peters*, 2 N. B. N. 165, 1 A. B. R. 248; *In re Heath*, 7 N. B. R. 448, Fed. Cas. No. 6304.

86—*In re Dole*, 7 N. B. R. 538, Fed. Cas. No. 3965.

provable in bankruptcy, the dismissal of the suit does not prejudice proceedings on it under the bankruptcy law.<sup>87</sup>

#### § 1524. Collateral attack.

The judgment of a court of competent jurisdiction cannot be collaterally attacked, but is conclusive between the parties; so a discharge in bankruptcy, until set aside or reversed, in a direct proceeding, is conclusive upon all parties to the proceeding, and cannot be attacked collaterally;<sup>88</sup> and cannot therefore be impeached, if pleaded in bar in an action for a dischargeable debt in a state court.<sup>89</sup> Opportunity is offered to contest the discharge, and, if not availed of in the mode and within the time allowed, all remedy to annul it is cut off;<sup>90</sup> but the distinction between attacking the discharge and showing that it does not affect the debt sued on, or other matter, in bar of which it is pleaded, must be kept in mind, as the latter can always be done.<sup>91</sup>

#### § 1525. Order granting discharge as *res adjudicata*.

An order confirming a composition or granting a discharge which recites that the bankrupt has not been guilty of any of the acts which would be a bar to his discharge, is not *res adjudicata* in an action by a creditor who has opposed such order, seeking to enforce a claim for damages based on the acts of the bankrupt which such creditor urged as a bar to the confirmation of the composition or the discharge. So a discharge granted against the objection of a creditor urging as an objection thereto that the bankrupt obtained property by means of a materially false statement in writing is not a bar to an action of deceit based upon such false statement.<sup>92</sup>

87—*Humble v. Carson*, 6 N. B. R. 84.

88—*Custard v. Wigderson*, 130 Wis. 412, 17 A. B. R. 337; *Rayl v. Lapham*, 15 N. B. R. 508.

89—*In re Witkowski*, 10 N. B. R. 209, Fed. Cas. No. 17920; *Alston v. Robinett*, 9 N. B. R. 74; *Corey v. Ripley*, 4 N. B. R. 163; *Howland v. Carson*, 16 N. B. R. 372.

90—*Stevens v. Brown*, 11 N. B. R. 568.

91—*In re Mussey*, 99 Fed. 71, 2 N. B. N. R. 113, 3 A. B. R. 592; *In re White*, 2 N. B. N. R. 536; *In re Tinker*, 2 N. B. N. R. 391, 99 Fed. 79, 3 A. B. R. 580; *In re Rhutassel*, 1 N. B. R. 572, 2 A. B. R. 697, 97 Fed. 597.

92—*Friend v. Talcott*, 228 U. S. 27, 57 L. ed. 718, 30 A. B. R. 31, aff'g 179 Fed. 676, 24 A. B. R. 708.

### § 1526. Effect of foreign discharge.

While a discharge is as much a release of a debt due an alien as of one due a citizen of the United States whether the alien was a party to the proceedings or not,<sup>93</sup> a bankrupt's discharge in a foreign country under a foreign bankruptcy law does not discharge a debt made in, and with reference to the laws of this country, nor bar an action on a contract made in this country.<sup>94</sup>

### § 1527. Effect upon property or wages of bankrupt.

#### § 1528. — In general.

The discharge when granted relates back to the date of the filing of the petition, and property acquired by the bankrupt, intervening the filing thereof and the granting of the discharge, cannot be appropriated to the payment of his debts.<sup>95</sup> So, an assignment of future wages executed prior to bankruptcy cannot be enforced after a discharge of the debtor, against wages earned subsequent to the filing of the petition, notwithstanding the assignment may so provide,<sup>96</sup> and where an assignment of future wages is void because in violation of statute, the fact that the bankrupt obtained the loan upon which it was based by false pretenses, will not affect his right to wages earned after the adjudication.<sup>97</sup> An employer of the bankrupt may urge the latter's discharge in an action to enforce an assignment of wages.<sup>98</sup>

The fact that under a state law a judgment for a debt which is dischargeable in bankruptcy cannot be cancelled of record until a period of one year has expired from the granting of the discharge does not entitle the creditor to enforce his judgment against property acquired or wages earned by the bankrupt sub-

93—*Pattison v. Wilbur*, 12 N. B. R. 193; *Moore v. Horton*, 32 Hun 393.

94—*In re Sheppard*, 1 N. B. R. 116, Fed. Cas. No. 12753; *M'Millan v. M'Neil*, 4 Wheat. 209, 4 L. ed. 552; *Green v. Sarmiento*, Pet. C. C. 74, 3 Wash. C. C. 17, Fed. Cas. No. 5760; *Zarega's Case*, Fed. Cas. No. 18204.

95—*In re Lineberry*, 183 Fed. 338, 25 A. B. R. 164; *In re Ludeke*, 171 Fed. 292, 22 A. B. R. 467.

96—*In re Home Discount Co.*, 147 Fed.

538, 17 A. B. R. 168; *In re West*, 128 Fed. 205, 11 A. B. R. 782; *contra*, *Citizens' Loan Ass'n v. Boston & M. Railroad*, 196 Mass. 528, 14 L. R. A. (N. S.) 1025, 124 Am. St. 584, 19 A. B. R. 650; *Mallin v. Wenham*, 209 Ill. 252, 13 A. B. R. 210; *In re Lineberry*, 183 Fed. 338, 25 A. B. R. 164.

97—*In re Home Discount Co.*, 147 Fed. 538, 17 A. B. R. 168.

98—*Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 14 A. B. R. 409.

sequent to his adjudication, though the judgment has not been cancelled of record.<sup>99</sup>

The discharge of a debtor in bankruptcy in no way precludes the trustee from recovering property of the bankrupt's estate which has been fraudulently conveyed.<sup>1</sup> Title to concealed and non-scheduled property does not revest in the bankrupt upon his discharge so as to deprive the court of jurisdiction thereof upon the reopening of the estate.<sup>2</sup>

### § 1529. — Contracts.

The bankrupt law discharges the contract, as distinguished from insolvent laws, which only liberate the person; but, while it discharges him from certain pecuniary liabilities, it does not assume to relieve him of contractual relations as such. There is nothing in the letter or policy of the law which gives to an adjudication in bankruptcy the effect of discharging executory contracts, which have not resulted in the creation of any present pecuniary liability on the part of the bankrupt.<sup>3</sup>

### § 1530. — Leases.

An adjudication or discharge in bankruptcy does not terminate a lease nor change the legal relation of landlord and tenant, unless the landlord re-enters or the trustee assumes the lease, in which case the adjudication or discharge acts like any other assignment and all liability of the tenant ceases.<sup>4</sup>

### § 1531. — Good will of bankrupt.

Where the good will of the bankrupt, a corporation, is sold, it may thereafter be enjoined from using its corporate name even though it has received a discharge.<sup>5</sup>

### § 1532. — Liens.

The bankruptcy act does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudica-

99—In re Harrington, 200 Fed. 1010, 29 A. B. R. 666.

1—Stephenson v. Bird, 168 Ala. 363, 25 A. B. R. 909.

2—Fowler v. Jenks, 90 Minn. 74, 11 A. B. R. 255.

3—In re Schiermann, 2 N. B. N. R.

118; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6837; Deford v. Hewlet, 18 N. B. R. 518.

4—In re Koester, 15 Ohio Fed. Dec. 257, 17 A. B. R. 391.

5—Myers Co. v. Tuttle, 188 Fed. 532, 26 A. B. R. 541.

tion, but only to preserve and enforce a lien in existence at the date of the adjudication. As against dischargeable debts, the bankrupt is to be protected in the enjoyment of property acquired after the adjudication unless it is affected with a lien at the time of the adjudication. Valid and existing liens on specific property or trusts therein securing a debt are not impaired by the discharge.<sup>6</sup>

A discharge in bankruptcy releases the bankrupt from a provable debt not within the excepted classes and takes away the creditor's right to proceed against him in personam, but it does not affect a lien on his property acquired more than four months before the filing of the petition provided it is otherwise valid;<sup>7</sup> or liens excepted from the operation of the act,<sup>8</sup> as a lien for wages created and preserved according to statute;<sup>9</sup> or where bank stock is delivered as security for a loan, the only thing remaining to be done being the transfer of the stock on the books of the bank issuing the stock;<sup>10</sup> or a vendor's lien where such lien is recognized by state laws;<sup>11</sup> or a mortgage lien, if the trustee fails to redeem the property, or agree with the creditors as to its value, or have it ascertained by a sale under direction of the court of bankruptcy;<sup>12</sup> or if the incumbered property does not form part of the assets in bankruptcy, though, if it afterwards comes into the possession of bankrupt, the court of bankruptcy may enforce the lien.<sup>13</sup> However, the lien of a mortgage given his wife for money forming part of her paraphernal estate, which mortgage was recorded prior to the husband's discharge as a bankrupt, is released by the discharge as far as concerns his after-acquired property and the discharge can be

6—*Evans v. Rounsaville*, 115 Ga. 684, 8 A. B. R. 236; *Stoddart v. Locke*, 9 N. B. R. 71; *Reed v. Bullington*, 11 N. B. R. 408; *Realty Co. v. Gioshio*, (Pa.) Ct. Com. Pl., 27 A. B. R. 58; *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 14 A. B. R. 409; *Newberry Shoe Co. v. Collier*, 111 Va. 288, 25 A. B. R. 130.

7—*Gregory Co. v. Cale*, 115 Minn. 508, 27 A. B. R. 131; *Philmon v. Marshall*, 116 Ga. 811, 11 A. B. R. 780; *Mallin v. Wenham*, 209 Ill. 252, 13 A. B. R. 210; *Evans v. Staalle*, 88 Minn. 253, 11 A. B. R. 182; *Bassett v. Thackara*, 72 N. J. L. 81, 16 A. B. R. 786; *In re Blumberg*, 1 N. B.

N. 259, 1 A. B. R. 633, 94 Fed. 476; *Evans v. Rounsaville*, 115 Ga. 684, 8 A. B. R. 236.

8—Section 67 of Act of 1898.

9—*In re Kerby-Denis Co.*, 1 N. B. N. 399, 2 A. B. R. 402, 95 Fed. 116, aff'g 1 N. B. N. 337, 2 A. B. R. 218, 94 Fed. 818.

10—*Bank v. Bank*, 11 N. B. R. 49.

11—*Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113.

12—*Reed v. Bullington*, 11 N. B. R. 408; *Brown v. Gibbons*, 13 N. B. R. 407.

13—*Dixon v. Barnum*, 3 Hughes 207, Fed. Cas. No. 3928.

urged by a mortgagee of such property;<sup>14</sup> and the same is true where the lien is acquired within the prohibited four months.<sup>15</sup>

A creditor, who brought an action and issued an attachment more than four months before the bankruptcy may have a special judgment against the property notwithstanding the discharge.<sup>16</sup>

### § 1533. Effect upon stockholders' or directors' liability.

By the amendatory act of February 5, 1903, it is provided that the bankruptcy of a corporation does not release its officers, directors or stockholders, as such, from any liability under the laws of a state or territory of the United States.<sup>17</sup> The discharge in bankruptcy of a corporation renders compliance with a statute requiring a judgment, against the corporation and an execution returned unsatisfied before the stockholders' liability can be enforced, unnecessary.<sup>18</sup> Notwithstanding the discharge of the corporation, a creditor may take judgment in a state court against it, in such limited form as will enable him to reap the benefit of the directors' liability, the rendering of such a judgment depending upon the authority of the state court under the local law. In such case the judgment will not be against the person or property of the bankrupt and has no other effect than to enable the plaintiff to charge the directors in accordance with the state statute.<sup>19</sup>

A stock subscriber's liability to calls on the bankruptcy of a corporation becomes a contingent liability of undetermined amount, payable when a call is made, and if such subscriber subsequently becomes bankrupt and receives a discharge he is released from such liability though the call is not made until after the discharge;<sup>20</sup> and so a shareholder in a national bank is released from his statutory individual liability to the bank's creditors, if, at the time of his discharge, their claims were provable and not merely contingent.<sup>21</sup>

14—*Fleitas v. Richardson*, 147 U. S. 550, 37 L. ed. 276, *aff'g* same *v. Mellen*, 39 Fed. 129.

15—*Ex parte Foster*, 2 Story 131, Fed. Cas. No. 4960.

16—*Ray v. Wright*, 14 N. B. R. 563; *Stoddard v. Locke*, 9 N. B. R. 73; *Deighton v. Kelsey*, 4 N. B. R. 155.

17—Section 4b; see also *In re Marshall Paper Co.*, 2 N. B. N. R. 1058, 102

Fed. 872, 4 A. B. R. 468; s. c. 1 N. B. N. 407, 2 A. B. R. 653, 95 Fed. 419; *Elsbree v. Burt*, 24 R. I. 322, 9 A. B. R. 87.

18—*Firestone Tire & Rubber Co. v. Agnew*, 194 N. Y. 165, 21 A. B. R. 292.

19—*In re Marshall Paper Co.*, *supra*; *Hill v. Harding*, 130 U. S. 699, 32 L. ed. 1083.

20—*Carey v. Mayer*, 79 Fed. 926.

21—*Richmond v. Irons*, 121 U. S. 27,

### §1534. Effect upon suits against bankrupt.

A suit to collect a debt, claim or liability from a bankrupt may be restrained until the application for a discharge has been determined, if made and prosecuted with reasonable diligence, and where the discharge would be a bar to such a suit, the creditor must go into the bankruptcy court and oppose the discharge,<sup>23</sup> and, on the application for stay, based upon the discharge, jurisdiction will be presumed, though the record is silent in this respect.<sup>24</sup> A bankrupt defendant may file a bond to dissolve an attachment, though issued more than four months before bankruptcy, and have the case continued to await his discharge.<sup>25</sup> It is obvious, however, that where a judgment is not such an one as is affected by discharge in bankruptcy, no satisfaction of the judgment will be entered on the production of the discharge, an instance of this being an attachment upon exempt property.<sup>26</sup>

In New York, a judgment against a bankrupt entered within a year after his discharge in bankruptcy upon a debt scheduled in the bankruptcy proceedings may be cancelled and discharged of record,<sup>27</sup> and this though leave to set up the discharge as a defense to the action was granted the defendant.<sup>28</sup>

Proceedings to remove a city fireman for nonpayment of debts from which he had been discharged, have been restrained.<sup>29</sup>

The disqualification of the bankrupt to testify in a suit to which he is a party as to a transaction with a deceased party is removed upon his discharge, where the debt which is the basis of the suit has been discharged thereby.<sup>30</sup>

30 L. ed. 864, rev'g *Irons v. Bk.*, 27 Fed. 591.

23—*In re Camelo*, 195 Fed. 632, 28 A. B. R. 353; *In re Archenbrow*, 11 N. B. R. 149, Fed. Cas. No. 504; *In re Rosenberg*, 2 N. B. R. 81, 3 Ben. 14, Fed. Cas. No. 12054.

24—*Hayes v. Ford*, 15 N. B. R. 569; *Frostman v. Hicks*, 15 N. B. R. 41; *Todd v. Barton*, 13 N. B. R. 197.

25—*Braley v. Boomer*, 12 N. B. R. 303; *In re Belden*, 6 N. B. R. 443, 5 Ben. 476, Fed. Cas. No. 1239; *Wood v. Hazen*, 15

N. B. R. 491; *Dingee v. Becker*, 9 N. B. R. 508, Fed. Cas. No. 3919.

26—*Robinson v. Wilson*, 14 N. B. R. 565.

27—*Walker v. Muir*, 194 N. Y. 420, 21 A. B. R. 593, aff'g 127 App. Div. (N. Y.) 163, 21 A. B. R. 278.

28—*Hussey v. Judson*, 43 Misc. (N. Y.) 370, 11 A. B. R. 521.

29—*In re Hicks*, 133 Fed. 739, 3 A. B. R. 654.

30—*Anthony v. Sturdivant*, 174 Ala. 521, 27 A. B. R. 356.

**§ 1535. Effect upon contempt proceedings.**

Contempt proceedings may be taken to punish the willful disobedience of a lawful order of the court or to secure the result that obedience of the order would have brought but for the bankrupt's disobedience, or both;<sup>31</sup> and, if they are for the failure to obey an order requiring the payment of money and the discharge will release the liability to pay the money, the bankrupt is entitled to be released.<sup>32</sup> The same rule applies in the case of fines and costs inuring to the benefit of the prosecutor;<sup>33</sup> but, if for the enforcement of an order requiring the performance of some act or duty, not affected by the discharge, he is not entitled to release;<sup>34</sup> and, of course, not, if it is to punish him, a pardon being the only relief in that case, unless release is secured under the provision as to poor debtors, the state laws relating thereto being adopted by the United States.<sup>35</sup>

**§ 1536. Release from arrest.**

A debtor arrested in a civil action prior to commencement of proceedings in bankruptcy is not entitled to be released from such arrest, upon being adjudged a bankrupt, but if the debt for which he is arrested is one affected by a discharge, he is entitled to a release from arrest.<sup>36</sup>

**§ 1537. Discovery of assets after discharge.**

Where, after his discharge and after the period when a petition to reopen or revoke the discharge had elapsed, the bankrupt discovered assets that should have been scheduled and petitions to be allowed to schedule them, only creditors who proved their claims according to the act can participate in such assets.<sup>37</sup>

**§ 1538. Revival of debt after discharge.**

The only effect of a discharge is to suspend the right of action for a debt against the debtor personally. It does not annul the

31—McCann v. Randall, 146 Mass. 181.

32—See Wagner v. U. S., 104 Fed. 133, 4 A. B. R. 596.

33—Hendryx v. Fitzpatrick, 19 Fed. 610, and cases; Jackson v. Billings, 1 Caines 252; Buffum's Case, 13 N. H. 14; People v. Craft, 7 Paige 325.

34—Spalding v. New York, 4 Hun 21.

35—Section 991, U. S. Rev. Stat.

36—Brandon Nat. Bank v. Hatch, 16 N. B. R. 468.

37—In re Shaffer, 3 N. B. N. R. 54, 104 Fed. 982, 4 A. B. R. 728.



original debt or liability of the debtor. The remedy upon the debt, and the legal, but not the moral, obligation to pay is at an end. The obligation itself is not cancelled.<sup>38</sup>

Since the discharge is personal to the bankrupt he may waive it and, since it does not destroy the debt but merely releases him from liability, that is, removes the legal obligation to pay the debt, leaving the moral obligation unaffected, such moral obligation is a sufficient consideration to support a new promise<sup>39</sup> and, if the debtor makes such promise, it may be made the foundation of a suit. The plaintiff should declare on the original promise, or debt, the new promise being a defense to a plea of discharge; otherwise, there would be no consideration to support the new promise, if the original debt was destroyed by the discharge.<sup>40</sup> A new promise is said to revive the debt,<sup>41</sup> though judgments confessed by bankrupt subsequent to his discharge for debts owing prior to the discharge have been held sufficiently supported by the old debts not to revive them but to create new ones.<sup>42</sup>

The sufficiency of a new promise to revive the debt must be determined by the local laws.<sup>43</sup> The new promise need not be in writing unless required by state law,<sup>44</sup> but it must be clear, distinct, express and unequivocal;<sup>45</sup> and not in consideration of the creditor's withdrawing his opposition to the discharge.<sup>46</sup> If the promise is based upon a condition it must be shown that the condition has been complied with.<sup>47</sup> It may be made any time after bankruptcy before or after discharge.<sup>48</sup> Unlike debts

38—*Mallin v. Wenham*, 209 Ill. 252, 13 A. B. R. 210; *Citizens' Loan Ass'n v. Boston & M. Ry.*, 196 Mass. 528, 14 L. R. A. (N. S.) 1025, 124 Am. St. 584, 19 A. B. R. 650.

39—*Gruenberg v. Treanor*, 40 Misc. (N. Y.) 232, 11 A. B. R. 776; *Anthony v. Sturdivant*, 174 Ala. 521, 27 A. B. R. 356.

40—*Gruenberg v. Treanox*, 40 Misc. (N. Y.) 232, 11 A. B. R. 776; *In re Shaffer*, 3 N. B. N. R. 54; *Mutual Res. Life Ass'n v. Beatty*, 93 Fed. 747, 2 A. B. R. 244; *Dusenbury v. Hoyt*, 10 N. B. R. 313; *In re Merriman*, 18 N. B. R. 411, Fed. Cas. No. 9479.

41—*Clausen v. Schoeneman*, 16 N. B. R. 98.

42—*Dewey v. Moyer*, 18 N. B. R. 114.

43—*Mandell & Co. v. Levy*, 47 Misc. (N. Y.) 147, 14 A. B. R. 549.

44—*Mutual Res. Life Ass'n v. Beatty*, 93 Fed. 747, 2 A. B. R. 244; *Henley v. Lanier*, 15 N. B. R. 280, 281; *Tompkins v. Hazen*, 5 A. B. R. 62.

45—*Coe v. Rosene*, 66 Wash. 73, 27 A. B. R. 175; *St. John v. Stephenson*, 19 N. B. R. 227; *Smith v. Stanchfield*, 84 Minn. 343, 7 A. B. R. 498.

46—*Austin v. Markham*, 10 N. B. R. 548.

47—*Smith v. Stanchfield*, 84 Minn. 343, 7 A. B. R. 498, and cases cited.

48—*Old Town Bank v. Parker*, 30 A. B. R. 602; *Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R.

barred by the statute of limitations, debts discharged in bankruptcy are not revived by a new promise which amounts merely to an acknowledgment, but it must be an express statement of intention to pay;<sup>49</sup> thought it may be conditional;<sup>50</sup> and the following have been held sufficient: "I will pay;" "I will settle;" "I will see that you are no loser by me;" "She shall have her pay;" "I am able and willing to pay."<sup>51</sup>

Though the new promise be void, a judgment submitted to pursuant thereto will not be set aside nor a voluntary payment be recoverable;<sup>52</sup> and as the new promise revives the debt it enures to the benefit of an indorsee as well as the payee or holder, to whom it was made.<sup>53</sup>

### § 1539. Effect of discharge upon bankrupt's co-debtors.

#### § 1540. — In general.

Section 16a of the act provides that: "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

This section is merely declaratory of existing law, it being a general rule that, while a voluntary release of one co-debtor releases the other, a release by operation of law does not do so.<sup>54</sup> A discharge in bankruptcy releases the bankrupt but does not release, discharge or affect any person liable for the same debt, or with the bankrupt, as partner, joint contractor, indorser, surety or otherwise;<sup>55</sup> but the bankrupt continues to be a neces-

493; *Knapp v. Hoyt*, 57 Iowa 591; but see *Thornton v. Nichols & Lemon*, 119 Ga. 50, 11 A. B. R. 304; *Ogden v. Redd*, 18 N. B. R. 318.

49—*Mandell & Co. v. Levy*, 47 Misc. (N. Y.) 147, 14 A. B. R. 549; *Allen v. Ferguson*, 18 Wall. 1, 21 L. ed. 854; and see, *Coe v. Rosene*, 66 Wash. 73, 27 A. B. R. 175.

50—*Randidge v. Lyman*, 124 Mass. 361; *Yates, Adm'r, v. Hollingsworth*, 5 Har. & J. 216.

51—*Cook v. Shearman*, 103 Mass. 21; *Stillwell v. Coope*, 4 Denio, 225; *Evans v. Carey*, 29 Ala. 99.

52—*Sweenie v. Sharp*, 4 Bing. 37.

53—*Way v. Sperry*, 6 Cush. 238.

54—But see *In re Benedict*, 18 A. B. R. 604.

55—*Easton Furniture Mfg. Co. v. Caminez*, 146 App. Div. (N. Y.) 436, 27 A. B. R. 29; *In re DeLong*, 1 N. B. N. 26, 1 A. B. R. 66; *The Home*, 18 N. B. R. 557, Fed. Cas. No. 6657; *In re Stevens*, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393; *In re Levy*, 1 N. B. N. 66, 2 Ben. 169, Fed. Cas. No. 8297; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. ed. 57; *In re Albrecht*, 17 N. B. R. 287, Fed. Cas. No. 145; *Knapp v. Anderson*, 15 N. B. R. 316; but see *In re Perkins*, 10 N. B. R. 529, Fed. Cas. No. 10983.

sary party in legal proceedings to enforce the liability of such others, because, unless he pleads the discharge, judgment can be taken against him.<sup>56</sup> A creditor is not required to collect what he can from bankrupt's estate, nor urge objections to discharge, although he may not assent to it.<sup>57</sup> The liability of such co-debtor, surety or guarantor, while it is not released by the discharge of the principal, will be released in proceedings in bankruptcy instituted by such co-debtor, surety or guarantor.

The discharge of a joint debtor does not prevent judgment for the full amount being taken against his co-debtor;<sup>58</sup> nor does the discharge of a joint judgment debtor prevent execution against the other judgment debtor;<sup>59</sup> nor interfere with the prosecution of proceedings supplementary to execution against such other.<sup>60</sup>

#### § 1541. — Indorsers.

An indorser is not affected by the discharge, even if the holder of the note has proved his debt in bankruptcy against the maker for the full amount as an unsecured claim, though the holder, by so doing, releases all his right to a mortgage indemnifying the indorser;<sup>61</sup> or if the holder of an accommodation note, knowing it to be such, signs a composition;<sup>62</sup> or if the holder fails to prove the note of his own motion;<sup>63</sup> but the indorser is released if the holder of a note gives an extension of time to the principal for a valuable consideration without the indorser's assent;<sup>64</sup> or if a demand note is not presented for payment for several years.<sup>65</sup>

#### § 1542. — Guarantors.

The liability of one who has guaranteed the payment of the bankrupt of rent accruing after the adjudication, is not released

56—*Fellows v. Hall*, 3 McLean, 281, Fed. Cas. No. 4722; *Doggett v. Emerson*, 1 Woodb. & M. 195, Fed. Cas. No. 3962; *Goodrich v. Hunton*, 2 Woods, 137, Fed. Cas. No. 5544; *In re Ferguson*, 16 N. B. R. 530, 2 Hughs. 286, Fed. Cas. No. 4738.

57—*In re McDonald*, 14 N. B. R. 477, Fed. Cas. No. 8753.

58—*Lewis Tr. v. U. S.*, 14 N. B. R. 64, 92 U. S. (2 Otto) 618, 23 L. ed. 513.

59—*Penny v. Taylor*, 10 N. B. R. 200, Fed. Cas. No. 10957.

60—*In re DeLong*, 1 N. B. N. 26, 1 A. B. R. 66.

61—*Merchants' Nat. Bk. of Syracuse v. Comstock*, 11 N. B. R. 235.

62—*Guild v. Butler*, 16 N. B. R. 347.

63—*Nat. Bank of So. Reading v. Sawyer*, 3 N. B. N. R. 266; *Watertown Bank v. Simmons*, 131 Mass. 85.

64—*Valley Nat. Bk. v. Meyers Ass'n*, 17 N. B. R. 257, Fed. Cas. No. 5549.

65—*In re Crawford*, 5 N. B. R. 301, Fed. Cas. No. 3364.

by a discharge of the lessee, where the premises were not surrendered to the landlord upon the adjudication.<sup>66</sup>

### § 1543. — Sureties on bonds.

A surety who discharges the principal's debt, does not thereby relieve the principal from liability to pay it, but he thereby becomes subrogated to the rights of the former owner of the claim.<sup>67</sup> A discharge in bankruptcy of the principal does not release, discharge or affect a surety,<sup>68</sup> unless it prevents the happening of the event on which the surety's liability depends, in which case he would never become liable rather than be released; as in bonds in attachment suits begun within four months of the bankruptcy;<sup>69</sup> but if the attachment was begun more than four months prior to bankruptcy, suit may be prosecuted to a special judgment to charge the sureties.<sup>70</sup>

A surety on an appeal bond will be released if the bankrupt's discharge can be brought to the attention of the appellate court and prevent judgment,<sup>71</sup> but not after the judgment,<sup>72</sup> or if only what was before the lower court is cognizable above.<sup>73</sup>

66—Witthaus v. Zimmerman, 91 App. Div. (N. Y.) 202, 11 A. B. R. 314.

67—Swarts v. Siegel, 117 Fed. 13, 8 A. B. R. 689.

68—In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, Fed. Cas. No. 13393; In re Levy, 1 N. B. R. 66, 2 Ben. 169, Fed. Cas. No. 8297; Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57; The "Home," 18 N. B. R. 557, Fed. Cas. No. 6657; In re DeLong, 1 N. B. R. 26, 1 A. B. R. 66; but see U. S. v. Throckmorton, 8 N. B. R. 309, Fed. Cas. No. 16516.

Rule applied to surety on bond of defendant in trover action. Birmingham Fertilizer Co. v. Cox & Son, 10 Ga. App. 699, 28 A. B. R. 934.

69—Wise Coal Co. v. Columbia Zinc & Lead Co., 157 Mo. App. 315, 27 A. B. R. 445; Crook-Horner Co. v. Gilpin, 112 Md. 1, 23 A. B. R. 350; Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 14 A. B. R. 15; Smith v. Steinberg, 1 N. B. R. 240; Johnson v. Collins, 12 N. B. R. 70; Braley v. Boomer, 12 N. B. R. 303; Wolf v. Stix, 99 U. S. (9 Otto) 1, 25 L. ed. 309; Hamilton v. Bryant, 14

N. B. R. 479; Bryant v. Kinyon, 127 Mich. 152, 6 A. B. R. 237; but see King v. Block Amusement Co., 126 App. Div. (N. Y.) 48, 20 A. B. R. 784.

70—National Surety Co. of New York v. Medlock, 2 Ga. App. 665, 19 A. B. R. 654; Kendrick & Roberts v. Warren Bros., 110 Md. 47; Hill v. Harding, 107 U. S. (17 Otto) 631, 27 L. ed. 493; Id. 130 U. S. 699, 32 L. ed. 1033; In re Albrecht, 17 N. B. R. 287, Fed. Cas. No. 145; Holyoke v. Adams, 10 N. B. R. 270; see In re Rosenthal, 108 Fed. 368, 5 A. B. R. 799; In re Eastern Commission & Importing Co., 129 Fed. 847, 12 A. B. R. 305.

71—Brown & Brown Coal Co. v. Antezak, 164 Mich. 110, 25 A. B. R. 898; Goyer Co. v. Jones, 79 Misc. 253, 8 A. B. R. 437; Wolf v. Stix, 99 U. S. 1, 25 L. ed. 309; see Haggerty v. Morrison, 59 Mo. 324; Jones v. Coper, 16 N. B. R. 343; Odell v. Wootten, 4 N. B. R. 46.

72—Bailey v. Reeves, 59 So. 802, 28 A. B. R. 850.

73—Knapp v. Anderson, 15 N. B. R. 316.

A surety on a bond conditioned on a surrender of the principal before a breach, will be released if no breach has occurred, though not after breach;<sup>74</sup> or on bonds in replevin when the trustee has the replevied articles, judgment being still obtainable to fix the sureties' liability.<sup>75</sup> If prior to the adjudication in bankruptcy a judgment has been rendered against a garnishee, a subsequent discharge of the principal debtor does not operate to discharge the garnishee.<sup>76</sup>

A discharge in bankruptcy releases a surety on a guardian's bond from liability for defaults of the guardian which occurred prior to the commencement of proceedings against the surety;<sup>77</sup> and the discharge of a co-surety releases him from the liability to contribute to his co-sureties.

In the absence of specific provision to the contrary, it has been uniformly held that debts due the sovereign are not released by a discharge in bankruptcy;<sup>78</sup> nor are they in any wise affected by a bankruptcy law;<sup>79</sup> consequently sureties on the bonds of public officers or other bonds to the United States are not released.<sup>80</sup>

### § 1544. Discharge of partnership or members.

Section 16 of the act evidently contemplates the discharge of one partner without the others, in other words, the separate discharge of one partner from partnership debts. But notwithstanding this, it seems that a partner may proceed on his individual petition for his own adjudication and discharge without reference to the other partners only in case all are insolvent and there are no partnership assets whatever;<sup>81</sup> otherwise the peti-

74—*Richardson v. McIntyre*, 4 Wash. C. C. 412; *Bennett v. Alexander*, 1 Cranch, C. C. 90.

75—See *Clemmons v. Brinn*, 36 Misc. (N. Y.) 157, 7 A. B. R. 714.

76—*Marx v. Hart*, 166 Mo. 503, 66 S. W. 260, 8 A. B. R. 438, note.

77—*Jones v. Knox*, 8 N. B. R. 559; *Reitz v. People*, 16 N. B. R. 96; *Ex parte Taylor*, 16 N. B. R. 40, 1 Hughes, 617, Fed. Cas. No. 13773; *Halliburten v. Carter*, 10 N. B. R. 359.

78—*U. S. v. Herron*, 20 Wall. 251, 21 L. ed. 275; *Attorney-General v. Alston*, 2 Mod. 248; *U. S. v. King*, Wall. C. C.

R. 18; *U. S. v. Knight*, 14 Pet. 301, 315, 10 L. ed. 465; *Bank v. U. S.*, 19 Wall. 227, 239, 22 L. ed. 80; *U. S. v. Hoar*, 2 Mason, 311.

79—*Lewis v. U. S.*, 92 U. S. (2 Otto) 618, 23 L. ed. 513.

80—*U. S. v. Herron*, 20 Wall. 251, 21 L. ed. 275; but see *U. S. v. Throckmorton*, 8 N. B. R. 309, Fed. Cas. No. 16516.

81—*Dodge v. Kaufman*, 46 Misc. (N. Y.) 248, 15 A. B. R. 542; *In re Hirsch*, 2 N. B. R. 137, 3 A. B. R. 344, 97 Fed. 571; *In re Meyers*, 1 N. B. R. 515, 96 Fed. 408, 2 A. B. R. 707; *In re Altman*, 1 N. B. R. 358, 1 A. B. R. 689; *In*

tion should aver individual indebtedness, if any, and also firm indebtedness, naming the firm and the several partners, and specifically pray for discharge from firm as well as individual debts; and be accompanied by schedules setting forth the firm debts, firm property and all other matters, required in partnership proceedings, as well as schedules of the individual property and debts. The notices of the first meeting in such case should state that firm, as well as individual creditors are notified because a discharge is sought from both classes of claims. Notice of the filing of the petition and of the creditors' meetings should be given the nonjoining partners.<sup>82</sup>

The adjudication of a partnership and the administration of partnership property in bankruptcy in no way affects the remedy which partnership creditors have against the individual partners for so much of the partnership indebtedness as exceeds partnership assets.<sup>83</sup>

The discharge of a partner discharges his liability for partnership debts, where the partnership of which he was a member has been dissolved and there are no firm assets.<sup>84</sup>

In New York a judgment obtained against a partnership will not be discharged upon the ground of a discharge in bankruptcy of a member of the partnership within a year of the entry of the judgment.<sup>85</sup>

re Abbe, 2 N. B. R. 26, Fed. Cas. No. 4; In re Marks, Fed. Cas. No. 9094; Crompton v. Conkling, 15 N. B. R. 417, Fed. Cas. No. 3408, s. c. Fed. Cas. No. 3407; In re Winkens, 2 N. B. R. 113, Fed. Cas. No. 17875; In re Downing, 3 N. B. R. 182, 1 Dill. 33, Fed. Cas. No. 4044; In re Laughlin, 96 Fed. 589, 3 A. B. R. 1; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, Fed. Cas. No. 17664; West Phil. Bk. v. Gerry, 106 N. Y. 467; In re Bidwell, 2 N. B. R. 78, Fed. Cas. No. 1392; In re Leland, 5 N. B. R. 222, 5 Ben. 168, Fed. Cas. No. 8228; In re Frear, 1 N. B. R. 201, 2 Ben. 467, Fed. Cas. No. 5074; but see Jerecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 A. B. R. 751.

82—In re Morrison, 127 Fed. 186, 11 A. B. R. 498; In re Laughlin, 96 Fed.

589, 3 A. B. R. 1; In re Freund, 1 N. B. R. 105, 1 A. B. R. 25; In re Elliott, 2 N. B. R. 350; Hudgins v. Lane, 11 N. B. R. 462, 2 Hughes, 361, Fed. Cas. No. 6827; In re Little, 1 N. B. R. 74, 2 Ben. 136, Fed. Cas. No. 8390; Corey v. Perry, 17 N. B. R. 147; In re Noonan, 10 N. B. R. 330, 3 Biss. 491, Fed. Cas. No. 10292; In re Brick, 19 N. B. R. 508.

83—In re Everybody's Grocery & Meat Market, 173 Fed. 492, 21 A. B. R. 925; In re Bertenshaw, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 19 A. B. R. 577.

84—West Philadelphia Bank v. Gerry, 106 N. Y. 467; Berry Bros. v. Sheehan, 115 App. Div. (N. Y.) 488, 17 A. B. R. 322.

85—In re Gruber, 129 App. Div. (N. Y.) 297, 21 A. B. R. 467.

## § 1545. Debts affected by discharge.

## § 1546. — In general.

A state court has jurisdiction to decide whether or not the debt is released by the discharge.<sup>86</sup>

Debts which by their nature are provable, with the exceptions noted in section 17, are released by a discharge in bankruptcy,<sup>87</sup> without regard to whether they could in fact be proved or not,<sup>88</sup> or whether by reason of the inadvertent giving of wrong addresses, the creditors received no notice and had no knowledge of the proceedings;<sup>89</sup> and a discharge is a complete bar to suit thereon, though the dismissal of such suit will not prejudice proof of the claim under the bankrupt law.<sup>90</sup> The operation of a discharge cannot be avoided on the ground that the debt due the creditor was not proved in the bankruptcy proceedings, but was proved in previous insolvency proceedings, where a discharge was refused.<sup>91</sup>

There is a distinction between provable and allowable debts. A debt may be provable without being allowable, since allowability implies both provability and validity. If for any reason the claim is improper or if there be a good defense to it, it is not allowable, although it may be provable.<sup>92</sup> Debts not provable are in no wise affected by the discharge.<sup>93</sup> Debts which may be proved are discussed in another chapter<sup>94</sup> to which reference should be made.

All liabilities other than those expressly excepted by the act are released.<sup>95</sup> Hence, after it is determined whether the debt is provable, it should be ascertained if it comes within either

86—*Stevens v. Brown*, 11 N. B. R. 568.

87—*Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 22 A. B. R. 643; *Bowen & Thomas v. Keller*, 130 Ga. 31, 22 A. B. R. 727.

88—*In re Kuffler*, 153 Fed. 667, 18 A. B. R. 587; *Cohen v. Pecharsky*, 67 Misc. (N. Y.) 72, 23 A. B. R. 754.

89—*In re Kingsley*, 1 N. B. R. 66, 1 Lowell 216, Fed. Cas. No. 7819; *Pattison v. Wilbur*, 12 N. B. R. 193.

90—*Humble v. Carson*, 6 N. B. R. 84; *Dusenbury v. Hoyt*, 10 N. B. R. 313.

91—*Dean v. Justices*, 1 N. B. R. 336, 172 Mass. 453, 2 A. B. R. 163.

92—*Williams & Co. v. U. S. Fidelity & Guaranty Co.*, 11 Ga. App. 635, 28 A. B. R. 802.

93—*Matter of New York Tunnel Co.*, 159 Fed. 688, 20 A. B. R. 25; see *Clemmons v. Brinn*, 36 Misc. (N. Y.) 157, 7 A. B. R. 714.

94—Chapter XVI.

95—*Drake v. Vernon*, 26 S. D. 354, 25 A. B. R. 69; *Katzenstein v. Reid, Murdock & Co.*, 413 Tex. Civ. App. 106, 16 A. B. R. 740.

of the exceptions mentioned in this section; and, if it does not, it is released. The exceptions are therefore to be carefully examined and their scope noted.

Debts existing under the act of 1867 and kept alive by subsequent judgments, or in fact any existing judgment, are not excepted from the operation of the present act, but will be discharged.<sup>96</sup> State statutes providing for the cancellation of released judgments on the records do not affect the operation of the discharge as a release. Failure to comply with same does not revive the judgments.<sup>97</sup>

### § 1547. — Effect of proof of claim.

Until a discharge is granted, the fact that a claim is provable, or has been proved, does not prevent its enforcement by other means and a suit may be brought on a provable claim, or prosecuted to judgment, notwithstanding the pendency of bankruptcy proceedings, in which a discharge may be granted which will release it, unless stayed by the court of bankruptcy, or the court in which it is brought; and, if no discharge is granted, a suit may be brought for the balance after the distribution of the bankrupt's estate pro rata.<sup>98</sup> A creditor is not estopped from prosecuting an action on a claim not discharged in bankruptcy, by electing to prove his claim in bankruptcy, but may receive a dividend and then sue for so much as remains unsatisfied.<sup>99</sup>

A creditor whose claim is such that he may enforce it as an obligation arising on contract, or as one in tort, is not estopped, by proving his claim in the bankruptcy proceedings as one founded on contract, from recovering damages for the tort sub-

96—*In re Herman*, 102 Fed. 753, 2 N. B. N. R. 905, 4 A. B. R. 139.

97—*New York Code Civil Proc.* § 1268 considered. *In re Peterson*, 64 Misc. (N. Y.) 217, 22 A. B. R. 549.

98—*Holland v. Martin*, 18 N. B. R. 359; *Frey v. Torrey*, 175 N. Y. 501, 8 A. B. R. 196; *Whitney v. Crafts*, 10 Mass. 23; *Dingee v. Becker*, Fed. Cas. No. 3919; *Lewensohn*, 2 N. B. N. R. 381, 99 Fed. 73; *Robinson*, 2 N. B. R. 341, Fed. Cas. No. 11939.

99—*Katzenstein v. Reid, Murdock & Co.*, 41 Tex. Civ. App. 106, 16 A. B. R. 740; *Brown v. Hannagan*, 210 Mass. 246, 27 A. B. R. 294; *Frey v. Torrey*, 175

N. Y. 501, 8 A. B. R. 196; see *In re Rundle*, 2 N. B. R. 49, Fed. Cas. No. 12138.

Proving a claim does not waive right to recover on ground that it was created by fraud and not released. *Standard Sewing Machine Co. v. Kattell*, 132 App. Div. (N. Y.) 539, 22 A. B. R. 376.

Vendor's filing a claim in bankruptcy court held not an affirmation of the sale so as to preclude an action of deceit after the bankrupt's discharge based on fraudulent representations inducing the sale. *Talcott v. Friend*, 179 Fed. 676, 24 A. B. R. 708.



sequent to the discharge in bankruptcy or the confirmation of a composition.<sup>1</sup>

By proving his claim a creditor waives any personal exemption he may have, as being out of the jurisdiction, omitted from the proceedings and without knowledge thereof or the like.<sup>2</sup>

### § 1548. — Determination of character of debt.

Prior to the amendment of 1903 the question frequently arose as to the nature of the debt as evidenced by the judgment, and while it was frequently held that the nature of the action whether for fraud or not was determined by the record, and not by any allegation or proof outside of it,<sup>3</sup> and would be conclusive as to matters before the state court for decision,<sup>4</sup> yet if it did not appear from the judgment itself, it would be sufficient if it appeared from the record of the case, and it has been held that a judgment may always be examined into to see if the fraud is such as is mentioned.<sup>5</sup>

The character of the liability as that word is used in section 17a (2) is not changed by the fact that the liability is reduced to judgment,<sup>6</sup> and for the purpose of showing that a debt upon which a judgment is based was not discharged by the bankruptcy, the plaintiff in an action on the judgment may go behind it and show the record upon which it was based.<sup>7</sup> The cause of action does not become merged in the judgment thereon, to the extent of precluding the plaintiff from showing the nature of the original debt.<sup>8</sup>

1—*Friend v. Talcott*, 229 U. S. 27, 57 L. ed. 718, 30 A. B. R. 31; *aff'g* 179 Fed. 676, 24 A. B. R. 708.

2—*Clay v. Smith*, 3 Pet. 411; *Jones v. Horsey*, 4 Md. 306; *Murray v. Roberts*, 150 Mass. 599.

3—*Louisville & N. R. Co. v. Bryant*, 149 Ky. 359, 28 A. B. R. 867; *Burnham v. Pidecock*, 58 App. Div. (N. Y.) 273, 5 A. B. R. 590; *In re Whitney*, 18 N. B. R. 563, Fed. Cas. No. 17581; *In re Paterson*, 1 N. B. R. 307, Fed. Cas. No. 10817; but see *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 3 A. B. R. 807; *In re Bullis*, 68 App. Div. (N. Y.) 508, 4 A. B. R. 238.

4—*Nichols v. Doak*, 48 Wash. 457, 22

A. B. R. 737; *Knott v. Putnam*, 107 Fed. 907, 6 A. B. R. 80.

5—*Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340, 13 A. B. R. 108; *In re Rhutassel*, 96 Fed. 597, 2 A. B. R. 697; *Flanagan v. Pearson*, 14 N. B. R. 37; *Palmer v. Hussey*, 87 N. Y. 303.

6—*Peters v. United States*, 177 Fed. 885, 24 A. B. R. 206, *rev'g* 166 Fed. 613, 22 A. B. R. 177; *Thompson v. Judy*, 169 Fed. 553, 22 A. B. R. 154.

7—*Hallagan v. Dowell*, 139 N. W. 883, 31 A. B. R. 848.

8—*Maier v. Maier*, 77 Misc. (N. Y.) 145, 28 A. B. R. 856; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390, 13 A. B. R. 1; *Packer v. Whittier*, 91 Fed. 511; *In re*

### § 1549. — Form of action.

The form of action, tort or contract, is now immaterial and the court will look behind the form to the substance and if the debt is not within the exceptions a discharge will bar the action.<sup>9</sup> It is not necessary that an action of tort be brought on a debt created by fraud, for an action of assumpsit may be brought on the debt and if the discharge be pleaded the plaintiff may reply that the debt mentioned in the judgment was created by fraud, misrepresentation, false pretenses or the like and was therefore not released, and thus show the existence of the fraud.<sup>10</sup> The burden of proving that the debt was created by false pretenses or false representations, would be on the plaintiff in such case.<sup>11</sup>

Where one by an election of remedies abandons his claim of fraud, a debt created by fraud is released.<sup>12</sup> A discharge in bankruptcy cannot be set up as a defense in an action in trover, since the issue is one of title, and not of debt. This is true, although the defendant elects to take a money verdict for damages alleged to have been sustained.<sup>13</sup>

### § 1550. — Debts created or judgments recovered after bankruptcy.

The discharge relates back to the date of the filing of the petition, and debts contracted thereafter are not released.<sup>14</sup>

A judgment recovered between the adjudication and the discharge, in a suit begun before the bankruptcy, is released by the discharge and bankrupt is entitled, on filing a certified copy

Pettis, 2 N. B. R. 17, Fed. Cas. No. 11046; Warner v. Cronkhite, 13 N. B. R. 52, Fed. Cas. No. 17180.

9—Mackel v. Rochester, 135 Fed. 904, 14 A. B. R. 429; In re Kimball, 1 N. B. R. 193, 2 Ben. 38, Fed. Cas. No. 776; Hayes v. Nash, 129 Mass. 62; Brown v. Treat, 1 Hill 225; Bickford v. Barnard, 8 Allen 314; Merrill v. Schwartz, 68 Me. 514; In re Lewensohn, 99 Fed. 73, 2 N. B. N. R. 381.

10—Mackel v. Rochester, 135 Fed. 904, 14 A. B. R. 429; Stewart v. Emerson, 8 N. B. R. 462; Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. ed. 723, 3 A. B. R. 807; In re Patterson, 1 N. B. R. 307, Fed. Cas. No. 10817; In re Bullis, 7 A. B. R. 238;

In re Thomas, 92 Fed. 912, 1 A. B. R. 515; Stokes v. Mason, 12 N. B. R. 498; but see Hagardine-McKittrick Dry Goods Co. v. Hudson, 111 Fed. 361, 6 A. B. R. 657; In re Rhutassel, 96 Fed. 597, 2 A. B. R. 697; Burnham v. Pidcock, 5 A. B. R. 42, aff'd 58 App. Div. (N. Y.) 273, 5 A. B. R. 590.

11—Sherwood v. Mitchell, 4 Den. 435.

12—Suing in conversion instead of to rescind for fraud. In re Ennis & Stoppani, 171 Fed. 755, 22 A. B. R. 679.

13—Birmingham Fertilizer Co. v. John A. Cox & Son, 10 Ga. App. 699, 28 A. B. R. 934.

14—In re Karns, 148 Fed. 143, 16 A. B. R. 841.

of the discharge, to a perpetual stay of execution;<sup>15</sup> and a suit brought after bankruptcy by an execution creditor to establish a lien on equitable assets of bankrupt is founded on the judgment which is a claim released by discharge and hence the suit is properly stayed.<sup>16</sup>

### § 1551. — Debts and taxes due the government.

In the absence of specific provision to the contrary, it has been uniformly held that debts due the sovereign are not released by a discharge in bankruptcy;<sup>17</sup> nor is it anyway bound by a bankruptcy law.<sup>18</sup> It is a general rule of interpretation that if the legislature intends to divest the sovereign power of any right, privilege, title or interest, it should so appear in express words, and where an act contains no words to express such an intent, it will be presumed that the intent does not exist.<sup>19</sup> Under the act of 1867, a claimant who gave bond for the delivery to him of property seized by the government and, on a decree in favor of the government, set up a discharge in bankruptcy, was held out released;<sup>20</sup> but under the act of 1841 a discharge was held to release a debt due the United States for customs dues.<sup>21</sup> While there is some dissimilarity between the act of 1867 and the present one with reference to the debts not affected by a discharge, and it might be argued under this general rule of interpretation, and following the decisions under the act of 1867, that debts due the United States are not released by the discharge, although the same may only be a liability as surety for the faithful performance of duty by a public officer,<sup>22</sup> yet under that equally well known maxim *expressio unius est exclusio alterius*, the fact that congress specifically provided that debts due the United States as a tax only, would not be discharged, would indicate that debts of all other character are released by the dis-

- 15—*Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985; *Braman v. Snider*, 21 Fed. 871; *In re Stansfield*, 16 N. B. R. 268, 4 Sawy. 334, Fed. Cas. No. 13294.

16—*In re McNamara*, 2 N. B. N. R. 341.

17—*U. S. v. Herron*, 20 Wall. 251, 22 L. ed. 275; *Attorney General v. Alston*, 2 Modern 248; *U. S. v. King*, Wall., C. C. R. 18, Fed. Cas. No. 15536.

18—*Lewis v. United States*, 92 U. S. (2 Otto) 618, 23 L. ed. 513.

19—*United States v. Herron*, 20 Wall. 251, 22 L. ed. 275; *United States v. Knight*, 14 Pet. 301, 315, 10 L. ed. 465; *Bank v. United States*, 19 Wall. 227, 239, 22 L. ed. 80; *United States v. Hoar*, 2 Mason 311.

20—*United States v. Rob Roy*, 13 N. B. R. 235, 1 Woods 42, Fed. Cas. No. 16179.

21—*Zaugas Case*, Fed. Cas. No. 16786.

22—*United States v. Herron*, 20 Wall. 251, 22 L. ed. 275.

charge.<sup>23</sup> Taxes due the United States, state, county, district or municipality in which the bankrupt resides are not released, but must be paid in advance of dividends to creditors.<sup>24</sup> This accords with the general rule that governmental revenues are not allowed to be tampered with lest it interfere with the performance of the important public duties with which such governing body is charged; but it should be noted that the taxes included within the exception of this section are confined to the state, county, district and municipality in which bankrupt resides. This is not to be considered, however, as limiting the general lien for taxes on property wherever situated, and which is borne out by section 64a, which makes all taxes payable in advance of dividends. Whether or not any tax or assessment in the nature of a tax is within the meaning of the word "taxes" as used in this section is to be determined by the laws imposing the same, and where, for instance, the highest court in a state has held that the "mulet tax" is not a tax though the legislature called it so in the statute, such decision must be followed.<sup>25</sup>

### § 1552. — Alimony and support.

Prior to the amendment of February 5, 1903, much diversity of opinion existed with relation to the dischargeability of alimony which had accrued prior to the filing of the petition. Some courts held that where the liability might be modified by the court which decreed the alimony, it was not released,<sup>26</sup> while others took the position that where it was fixed, certain and determined and in the nature of a judgment, it would be released.<sup>27</sup> The supreme court has held, however, that the amendment of 1903 excepting all liabilities for alimony due or

23—In re Alderson, 3 A. B. R. 544, 98 Fed. 588.

24—Section 64a, Act of 1898.

25—In re Ott, 1 N. B. N. 571, 2 A. B. R. 637, 95 Fed. 274.

26—In re Nowell, 3 A. B. R. 837, 99 Fed. 931; In re Smith, 1 N. B. N. 471, 3 A. B. R. 67; In re Shepard, 97 Fed. 187, 5 A. B. R. 857; In re Anderson, 97 Fed. 321, 5 A. B. R. 858; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 5 A. B. R. 829; Maisner v. Maisner, 62 App. Div. (N. Y.) 286, 6 A. B. R. 295; Turner v. Turner, 108 Fed. 785, 6 A. B.

R. 289; Young v. Young, 35 Misc. (N. Y.) 335, 7 A. B. R. 171; In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7966; In re Garrett, 11 N. B. R. 483, 2 Hughes 235, Fed. Cas. No. 5252; Barclay v. Barclay, 2 N. B. N. R. 552; but see In re Challoner, 2 N. B. N. R. 105, 3 A. B. R. 442, 98 Fed. 82.

27—In re Houston, 1 N. B. N. 305, 2 A. B. R. 107, 94 Fed. 119; In re Van Orden, 1 N. B. N. 475, 2 A. B. R. 801, 96 Fed. 86; Fite v. Fite, 110 Ky. 197, 5 A. B. R. 461.

to become due, or for maintenance or support of wife or child from the operation of a discharge was merely declaratory of the law as it existed theretofore, and that a liability for arrears for alimony or support was not discharged although the decree granting it could not be modified by the court rendering it.<sup>28</sup> The amendment settles all doubt and provides that alimony whether due or to become due is not released by the discharge.<sup>29</sup>

A judgment based upon a foreign judgment of divorce under which alimony is due is more than a mere money judgment, and is to be treated as an ordinary judgment for alimony.<sup>30</sup>

The provision exempting liabilities for maintenance or support of wife or child refers only to the common-law liability and liability under bonds given for such support. It does not refer to liabilities for goods purchased by the bankrupt and used by his wife or child,<sup>31</sup> or to a debt incurred for services rendered by a physician to the bankrupt's wife or children while the normal relation of husband and wife existed.<sup>32</sup>

### § 1553. — Attorney's claim.

A claim for legal services is discharged though such services were obtained by false and fraudulent representations,<sup>33</sup> or were rendered in contemplation of bankruptcy.<sup>34</sup> Counsel employed by the bankrupt prior to the bankruptcy to carry on a suit at their own expense for a contingent fee of one-half are entitled to such one-half though the recovery is after the bankrupt's discharge.<sup>35</sup>

### § 1554. — Bonds and recognizances.

A bond given by bankrupt to secure the release of a lien which is valid under the bankrupt act, takes the place of such

28—*Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390, 13 A. B. R. 1; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 10 A. B. R. 139 decided under original act.

29—*Maier v. Maier*, 77 Misc. (N. Y.) 145, 28 A. B. R. 856; *Craine v. Craine*, 19 A. B. R. 76; *In re Hubbard*, 98 Fed. 710, 3 A. B. R. 528; *In re Baker*, 1 N. B. N. 547, 3 A. B. R. 101, 96 Fed. 954; *In re Cotton*, Fed. Cas. No. 3269; *Hawes v. Cooksey*, 13 Ohio 242.

30—*In re Williams*, 31 A. B. R. 717; *contra*, *In re Williams Estate*, 118 N. Y. S. 562, 23 A. B. R. 394.

31—*Schellenberg v. Mullaney*, 112 App. Div. (N. Y.) 384, 16 A. B. R. 542.

32—*In re Ostrander*, 139 Fed. 592, 15 A. B. R. 96.

33—*Gleason v. Thaw*, 196 Fed. 359, 28 A. B. R. 473; s. c., 185 Fed. 345, 34 L. R. A. (N. S.) 894, 25 A. B. R. 782, *aff'd* 180 Fed. 419, 24 A. B. R. 759; *Gleason v. O'Mara*, 180 Fed. 417, 24 A. B. R. 832.

34—*In re Blum*, 193 Fed. 304, 28 A. B. R. 60.

35—*Maybin v. Raymond*, 15 N. B. R. 353, Fed. Cas. No. 9338.

lien and is not released by the discharge, as where to dissolve an attachment against him, issued more than four months before the bankruptcy proceedings, the bankrupt gives a bond;<sup>36</sup> nor if the bankrupt's liability on such bond does not become fixed by the happening of the contingency named until after the filing of the petition.<sup>37</sup> Nor does a discharge release the bankrupt from liability as surety on a bond for the faithful performance of duty by a public officer;<sup>38</sup> nor on a bond given to secure the delivery of goods seized by the government;<sup>39</sup> but where a principal is released from a debt by his discharge in bankruptcy, he will also be released from his contingent liability to his surety for the same debt.<sup>40</sup>

A discharge released the bankrupt's liability on a bond given on his arrest, and conditioned that he will apply for the benefit of the state insolvent laws,<sup>41</sup> or on a recognizance given by him upon his arrest upon an execution issued on a judgment, unless the debt is non-dischargeable.<sup>42</sup>

### § 1555. — Costs.

Costs taxable against an involuntary bankrupt who was at the time the petition was filed against him plaintiff in an action which passes to the trustee and which, after notice, he declines to prosecute, and taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt,<sup>43</sup> are provable claims and released by a discharge; as must be any costs or expenses connected with a provable debt since the incident falls with the principal. Costs incurred by a

36—*Holyoke v. Adams*, 10 N. B. R. 270; *In re Albrecht*, 17 N. B. R. 287, Fed. Cas. No. 145; *Hill v. Harding*, 130 U. S. 699, 32 L. ed. 1083, 9 S. Ct. 725; contra, *Hamilton v. Bryant*, 14 N. B. R. 479.

37—*Eastman v. Hibbard*, 13 N. B. R. 360.

38—*U. S. v. Herron*, 9 N. B. R. 535, 20 Wall. 251, 22 L. ed. 275; but see *U. S. v. Throckmorton*, 8 N. B. R. 309, Fed. Cas. No. 16516.

39—*U. S. v. Rob Roy*, 13 N. B. R. 235, 1 Woods 42, Fed. Cas. No. 16179.

40—*Halliburton v. Carter*, 10 N. B. R. 359.

A surety bond, executed by a surety company, to be delivered to another to enable the bankrupt, the principal therein, to obtain money from such other, is not property within the meaning of § 17 (2) and the claim of the surety is dischargeable though it was induced to execute the bond through fraudulent representations of the bankrupt. *In re Dunfee*, 206 Fed. 745, 30 A. B. R. 721.

41—*Hubert v. Horter*, 14 N. B. R. 430.

42—*In re Colaluca*, 133 Fed. 255, 13 A. B. R. 292.

43—Section 63a, Act of 1898.

surety for bankrupt in attempting to resist payment cannot be recovered against the discharged principal though the surety could only prove for the original amount in the creditor's name.<sup>44</sup> In an action which was commenced prior to the filing of the petition in bankruptcy, the costs taxed against a bankrupt after the filing of the petition, not being provable are not discharged.<sup>45</sup>

A judgment for costs awarded a defendant in an action for slander has been held not released.<sup>46</sup>

### § 1556. — Executory contracts.—Covenants.

A discharge in bankruptcy does not affect the bankrupt's contractual liabilities beyond releasing him from personal liability for such as had accrued prior to the bankruptcy, or if the trustee deems such contract to be beneficial to the estate and assumes it, in which case he assumes liability and the bankrupt is released, but otherwise not.<sup>47</sup> The bankrupt is released by his discharge from the breach of a covenant which occurred prior to his discharge, if the same result in a provable liability,<sup>48</sup> but if he sells land prior to his bankruptcy with a covenant of title, he remains liable therein after the discharge,<sup>49</sup> but in the case where there is an unrelinquished dower right, and the husband of the person having the inchoate right of dower is living, there is no provable claim and it is not released.<sup>50</sup>

Liability under an agreement to purchase stock at a date subsequent to the adjudication is not provable and hence not discharged,<sup>51</sup> and a claim against bankrupt for refusing to deliver a certificate of its stock has been held not dischargeable, the claimant having delivered a certificate of stock to it with a request that it issue a new one.<sup>52</sup>

44—Section 57i, Act of 1898; *Fisher v. Tift*, 127 Mass. 313; see *Aiken, Lambert v. Haskins*, 48 App. Div. (N. Y.) 638, 6 A. B. R. 46.

45—*In re Marcus*, 104 Fed. 331, 5 A. B. R. 19; *Aiken, Lambert v. Haskins*, 48 App. Div. (N. Y.) 638, 6 A. B. R. 46.

46—*Drake v. Vernon*, 26 S. Dak. 354, 25 A. B. R. 69.

47—*In re Schiermann*, 2 N. B. N. R. 188; *contra*, *In re Jefferson*, 1 N. B. N. 288, 2 A. B. R. 206, 93 Fed. 948.

48—*Williams v. Harkins*, 15 N. B. R. 34.

49—*In re Burton*, 29 Fed. 637.

50—*Riggin v. Magwire*, 8 N. B. R. 484, 15 Wall. 549, 21 L. ed. 232.

51—*Phenix Nat. Park Bank v. Waterbury*, 197 N. Y. 161, 23 A. B. R. 250, *aff'g* 123 App. Div. (N. Y.) 453, 20 A. B. R. 140.

52—*In re Clipper Mfg. Co.*, 179 Fed. 843, 24 A. B. R. 683.

# § 1557. — Fraud, embezzlement, misappropriation, and defalcation.

By the act of 1898 judgments in actions for fraud or obtaining property by false pretenses or false representations were not released by the discharge. By the amendment of 1903 both the terms "judgment" and "fraud" are omitted so that unless the fraudulently contracted liability grows out of a fraud committed by the bankrupt while acting as an officer or as a fiduciary, or is a liability for obtaining property by false pretenses or false representation, it is discharged whether reduced to judgment or not.<sup>53</sup>

To bring a debt within the exception as to debts created by the bankrupt's fraud, embezzlement or defalcation while acting as an officer or in any fiduciary capacity, the fraud must be positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without bad faith or immorality;<sup>54</sup> and must occur against the party toward whom the bankrupt held the fiduciary relation,<sup>55</sup> and must exist in the creation of the debt, as subsequent fraudulent conduct is insufficient.<sup>56</sup> If the debt be created in fraud, it is immaterial, for instance, that the fraud consists in false statements by only one member of a firm, especially if the firm reaps the benefit.<sup>57</sup> If the original debt arose in contract and the fraud was but an incident of the debt and not its creative power, the debt is merged in the judgment and the bankrupt released thereafter.<sup>58</sup>

The exemption of debts created by bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity applies only to a person who was already an officer or a fiduciary when the debt was created, and not to one created under circumstances in which trust or confi-

53—*Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 12 A. B. R. 659, rev'g 201 Ill. 581; *Smith & Wallace Co. v. Lambert*, 69 N. J. L. 487, 11 A. B. R. 252.

54—*In re Floyd*, *Crawford & Co.*, 15 A. B. R. 277; *Louisville & N. R. Co. v. Bryant*, 149 Ky. 359, 28 A. B. R. 867; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248; *Noble v. Hammond*, 129 U. S. 65, 32 L. ed. 621; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931; *Ames v. Moir*,

138 U. S. 306, 34 L. ed. 951; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 3 A. B. R. 807.

55—*Inge v. Stillwell*, 88 Kan. 33, 28 A. B. R. 892.

56—*U. S. v. Rob Roy*, 13 N. B. R. 235, 1 Woods 42, Fed. Cas. No. 16179.

57—*Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248.

58—*Sherman v. Straus*, 10 N. B. R. 300.



dence is reposed in the debtor in the popular sense of those terms;<sup>59</sup> that is, only technical or special trusts, as contradistinguished from those which the law implies from the contract, are within the exception.<sup>60</sup> The terms "fraud," "embezzlement," "misappropriation," or "defalcation," relate and are limited to one acting as an officer or holding a fiduciary position, and it is not the defalcation only of such a person that is referred to, but it is any act of fraud, embezzlement or misappropriation as well as defalcation on his part that is not released.<sup>61</sup>

The good of the community and public policy forbid the discharge of the bankrupt from a debt incurred through fraud while acting as an officer or in a fiduciary capacity, and a debt so created, whether reduced to judgment or not, is not to be discharged in bankruptcy;<sup>62</sup> but it may be proved and dividends received on it.<sup>63</sup>

59—*Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 12 A. B. R. 659, rev'g 201 Ill. 581; *Fechter v. Postel*, 114 App. Div. (N. Y.) 776, 17 A. B. R. 316; *In re Ennis & Stoppani*, 171 Fed. 755, 22 A. B. R. 679; *In re Rogers*, 1 N. B. N. 211, 1 A. B. R. 541; *Claffin v. Eason*, 1 N. B. N. 360, 2 A. B. R. 263; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931; *Bryant v. Kinyon*, 127 Mich. 152, 6 A. B. R. 237.

60—*American Agricultural Chemical Co. v. Berry*, 110 Me. 528, 31 A. B. R. 142; *Maxwell v. Martin*, 130 App. Div. (N. Y.) 80, 22 A. B. R. 93; *Lewis v. Shaw*, 122 App. Div. (N. Y.) 96, 19 A. B. R. 866; *Karger v. Orth*, 116 Minn. 124, 27 A. B. R. 212; *Reeves v. McCracken*, 69 N. J. Eq. 203, 13 A. B. R. 680; *Bracken v. Milner*, 104 Fed. 522, 5 A. B. R. 23; *Gee v. Gee*, 84 Minn. 384, 7 A. B. R. 500; *Neal v. Clark*, 95 U. S. 704, 24 L. ed. 586; *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565; *In re Benedict*, 37 Misc. (N. Y.) 230, 8 A. B. R. 463; *Noble v. Hammond*, 129 U. S. 65, 32 L. ed. 621; *Keim v. Graff*, 17 N. B. R. 319, Fed. Cas. No. 7650.

61—*Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 18 A. B. R. 121, aff'g 183 N. Y. 267, 15 A. B. R. 179; *Barrett v. Prince*, 143 Fed. 302, 16 A. B. R. 64; *In re Bullis*, 68 App. Div. (N. Y.) 508,

7 A. B. R. 238; *Morse v. Kaufman*, 100 Va. 218, 7 A. B. R. 549; but see *Western Union Cold Storage Co. v. Hurd*, 116 Fed. 442, 8 A. B. R. 633; *contra*, *Frey v. Torrey*, 36 Misc. (N. Y.) 216, 8 A. B. R. 196.

62—*In re Thomas*, 1 N. B. N. 329, 1 A. B. R. 515, 92 Fed. 912; *In re Lieber*, 2 N. B. N. R. 21, 3 A. B. R. 217; *In re Bradford*, 2 N. B. R. 26, Fed. Cas. No. 1090; *In re Clarke*, 2 N. B. R. 44, Fed. Cas. No. 2844; *In re Doody*, 2 N. B. R. 74, Fed. Cas. No. 3995; *In re Rathbone*, Fed. Cas. No. 11580; *In re Rosenfield*, 1 N. B. R. 161, Fed. Cas. No. 12058; *In re Stokes*, 2 N. B. R. 76, Fed. Cas. No. 13476; *In re Talman*, 1 N. B. R. 122, 2 Ben. 348, Fed. Cas. No. 13739; *Neal v. Clark*, 95 U. S. (5 Otto) 704, 24 L. ed. 586; *Howland v. Carson*, 16 N. B. R. 372; *In re Patterson*, 1 N. B. R. 58, 2 Ben. 155, Fed. Cas. No. 10817; *In re Pettis*, 2 N. B. R. 16, Fed. Cas. No. 11046; *In re Robinson*, 2 N. B. R. 108, 6 Blatch. 253, Fed. Cas. No. 11939; *In re Stokes*, 2 N. B. R. 76, Fed. Cas. No. 13476; *In re Wright*, 2 N. B. R. 14, Fed. Cas. No. 18070; *Libbey v. Strasburger*, 17 N. B. R. 468; *Brown v. Hannagan*, 210 Mass. 246, 27 A. B. R. 294.

63—*Brown v. Hannagan*, 210 Mass. 246, 27 A. B. R. 294; *Strang v. Brad-*

A naked bailee under an express agreement to keep safely the money bailed and pay it over on request,<sup>64</sup> or a pledgor holding goods as a bailee,<sup>65</sup> is not acting in a fiduciary capacity. So a creditor who holds collateral for his own security, is not a trustee, and, a failure to deliver it up being a breach of contract and not a breach of trust, a discharge releases the claim arising from his appropriation to his own use of such securities.<sup>66</sup>

The implied trust relation existing between partners, under which their liabilities to each other must be determined, does not bring their affairs within the definition of the excepted term "fiduciary,"<sup>67</sup> but a surviving partner, with whom his deceased partner has deposited his share of the capital of the partnership, holds such sum as a fiduciary within the meaning of the act.<sup>68</sup>

The relation between a stock broker and a customer on an open account, is not fiduciary and the former's liability for conversion of the latter's stock is released,<sup>69</sup> unless the conversion is deliberate and intentional under circumstances amounting to larceny.<sup>70</sup>

A debt is within the exception where the bankrupt while acting as agent for the creditor converted to his own use money of the creditor received as agent;<sup>71</sup> but is a debt created by an agent's failure to pay over moneys entrusted to him to loan and

ner, 114 U. S. 555, 29 L. ed. 248; *Wil-mot v. Mudge*, 103 U. S. (13 Otto) 217, 26 L. ed. 536; *In re Wright*, 2 N. B. R. 14, Fed. Cas. No. 18070; *In re Robinson*, 2 N. B. R. 108, 6 Blatch. 253, Fed. Cas. No. 11939; *In re Rosenberg*, 2 N. B. R. 81, 3 Ben. 14, Fed. Cas. No. 12054; *In re Nigel*, 2 N. B. R. 481, Fed. Cas. No. 9536.

64—*Lewis v. Shaw*, 122 App. Div. (N. Y.) 96, 19 A. B. R. 866.

65—*In re Toklas Bros.*, 201 Fed. 377, 29 A. B. R. 709.

66—*Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565; *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362.

67—*Inge v. Stillwell*, 88 Kan. 33, 28 A. B. R. 892; *Karger v. Orth*, 116 Minn. 124, 27 A. B. R. 212; *Gee v. Gee*, 84 Minn. 384, 7 A. B. R. 500.

68—*Haggerty v. Badkin*, 72 N. J. Eq. 473, 18 A. B. R. 302.

69—*Crawford v. Burke*, 195 U. S. 176,

49 L. ed. 147, 12 A. B. R. 659, rev'g 201 Ill. 581; *In re Ennis & Stoppani*, 171 Fed. 755, 22 A. B. R. 679; *Clark v. Milliken*, 70 Misc. (N. Y.) 492, 25 A. B. R. 680; *In re Floyd, Crawford & Co.*, 15 A. B. R. 277; *In re Gaylord*, 113 Fed. 131, 7 A. B. R. 577; *Wood v. Fisk*, 141 N. Y. S. 342, 31 A. B. R. 824.

70—*Kavanaugh v. McIntyre*, 74 Misc. (N. Y.) 222, 27 A. B. R. 279.

71—*Williams v. Virginia-Carolina Chemical Co.*, 62 So. 755, 31 A. B. R. 64; *In re Adler*, 152 Fed. 422, 18 A. B. R. 240; *In re Hale*, 161 Fed. 387, 20 A. B. R. 633; *Fulton v. Hammond*, 11 Fed. 291.

Agent intrusted by his principal with beer to deliver to laborers under his supervision and collect pay therefor and turn the same over to his principal held not to have been acting in a fiduciary capacity. *In re Camelo*, 195 Fed. 632, 28 A. B. R. 353.

to receive the interest and principal of such loans and remit the same to the lender is not;<sup>72</sup> though if he takes mortgages to himself or his partner, in which latter case he caused foreclosure proceedings and purchases the property himself, it would be.<sup>73</sup> The fiduciary relation does not exist where the agent is to share in the profits, acting with the knowledge of the principal and more as a partner than an agent; or where a limited partnership is formed and one member becomes indebted to another.<sup>74</sup> A ticket agent of a railroad company is not a fiduciary and his liability for conversion of the company's money is released.<sup>75</sup>

A debt due by a bankrupt in the character of a factor or commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission and sold by him before a demand for their return is not within the exception but will be released by a discharge;<sup>76</sup> and if such debtor is arrested under a state statute he will be released on application to the court of bankruptcy,<sup>77</sup> but a factor's liability for goods unsold at the time of a demand for their return or for the proceeds thereof if they are sold subsequent to such demand is not dischargeable.<sup>78</sup> Where a produce dealer, as an accommodation, collects moneys and without fraudulent intent deposits the proceeds with his own funds and before payment is thrown into bankruptcy, such debt is not within the exception.<sup>79</sup>

The liability of an officer of a national bank for conversion

72—Bracken v. Milner, 104 Fed. 522, 5 A. B. R. 23; Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931; and see *In re Shepherd*, 2 N. B. N. R. 1070.

73—Bracken v. Milner, 104 Fed. 522, 5 A. B. R. 23.

74—Pierce v. Shipper, 19 N. B. R. 221.

75—*In re Wenman*, 153 Fed. 910, 16 A. B. R. 690.

76—American Agricultural Chemical Co. v. Berry, 110 Me. 528, 31 A. B. R. 142; Mathieu v. Goldberg, 156 Fed. 541, 19 A. B. R. 191; *In re Adler*, 152 Fed. 422, 18 A. B. R. 240; *In re Basch*, 2 N. B. N. R. 122, 3 A. B. R. 235, 97 Fed. 761, 3 A. B. R. 235; Zeperink v. Card, 11 Fed. 295; Woolsey v. Cade, 15 N. B. R. 238; Keime v. Graff, 17 N. B.

R. 319, Fed. Cas. No. 7650; Owsley v. Cobin, 15 N. B. R. 489, 2 Hughes 433, Fed. Cas. No. 10636; Chapman v. Forsyth, 2 How. 202; Knott v. Putnam, 107 Fed. 907, 6 A. B. R. 80; *In re Benedict*, 37 Misc. (N. Y.) 230, 8 A. B. R. 463; contra, *Lenke v. Booth*, 5 N. B. R. 351; Meador v. Sharpe, 4 N. B. 492; Treadwell v. Holloway, 12 N. B. R. 61; *In re Seymour*, 1 N. B. R. 29, 1 Ben. 348, Fed. Cas. No. 12684.

77—*In re Smith*, 18 N. B. R. 24, Fed. Cas. No. 12976; Grover v. Clinton, 8 N. B. R. 312, 5 Biss. 324, Fed. Cas. No. 5845.

78—Mathieu v. Goldberg, 156 Fed. 541, 19 A. B. R. 191.

79—Noble v. Hammond, 129 U. S. 65, 32 L. ed. 621.

of its funds<sup>80</sup> or debts of the bankrupt, while register of a land office, in converting to his own use money deposited by private parties to purchase public lands,<sup>81</sup> or a defalcation by a guardian,<sup>82</sup> executor or administrator would not be released;<sup>83</sup> while the obligation of the surety on a guardian's bond would be. It has been held that a city auctioneer acts in a fiduciary capacity, though in this case it should be observed that he is an officer.<sup>84</sup>

An attorney who professionally collects a debt for his client is undoubtedly acting in a fiduciary capacity;<sup>85</sup> but, if he does not act in his professional capacity, it is otherwise.<sup>86</sup>

A husband's liability to his wife for her paraphernal property under the law of Louisiana, is discharged.<sup>87</sup>

The fact that the bankrupt is a grantee in a conveyance made to defraud creditors does not make him the trustee of the grantor within the meaning of the act.<sup>88</sup> A judgment rendered against the bankrupt by a court of competent jurisdiction in a suit in which recovery is sought on the ground of his embezzlement and misappropriation of funds is conclusive upon such questions and cannot be collaterally attacked.<sup>89</sup>

### § 1558. — Fines.

Whether a fine is dischargeable depends upon whether it is provable.<sup>90</sup>

### § 1559. — Obtaining property by false pretenses or false representations.

A liability growing out of the obtaining of property by false representations or false pretenses is not released by a dis-

80—*Harper v. Rankin*, 141 Fed. 626, 15 A. B. R. 608, certiorari denied 200 U. S. 621, 50 L. ed. 624, aff'g 133 Fed. 970, 13 A. B. R. 430.

81—*Ex parte Wright*, Fed. Cas. No. 18064.

82—*Halliburton v. Carter*, 10 N. B. R. 359; *In re Maybin*, 15 N. B. R. 458, Fed. Cas. No. 9337.

83—*Brown v. Hannagan*, 210 Mass. 246, 27 A. B. R. 294; *Ex parte Taylor*, 16 N. B. R. 40, 1 Hughes 617, Fed. Cas. No. 13773.

84—*Mayor v. Walker*, 11 N. B. R. 478; *Comp. In re Lord*, Fed. Cas. No. 8501.

85—*Flanagan v. Pearson*, 14 N. B. R. 37.

86—*McAdoo v. Loomis*, 43 Tex. 227.

87—*Fleitas v. Richardson*, 147 U. S. 550, 37 L. ed. 276.

88—*Reeves v. McCracken*, 69 N. J. Eq. 203, 13 A. B. R. 680; *In re Adler*, 144 Fed. 659, 16 A. B. R. 414.

89—*Harper v. Rankin*, 141 Fed. 626, 15 A. B. R. 608, certiorari denied 200 U. S. 621, 50 L. ed. 624, aff'g 133 Fed. 970, 13 A. B. R. 430.

90—*In re Anderson*, 3 A. B. R. 544, 98 Fed. 588; but see *In re O'Donnell*, 1 N. B. N. 59. See *ante* §§ 533, 1535.

charge,<sup>91</sup> though prior to the amendment of 1903 this was only true when such liability had been reduced to judgment.<sup>92</sup> The representation need not be in writing,<sup>93</sup> but must have been as to a fact made knowingly, falsely and fraudulently, for the purpose of obtaining money or property from another and by means of which such money or property is obtained; in which event the debt is created by means of a fraud involving moral turpitude and intentional wrong.<sup>94</sup> Thus, where one obtains goods, money or property from another with a preconceived intent of not paying for them according to the terms of the agreement, and ships them at once beyond the state or transfers them beyond his control, with the intent to defraud, the liability is one which will not be discharged,<sup>95</sup> and the same is true where one obtains advances of money or goods by false and fraudulent representations, such representations not being the sole consideration, but being material and the credit not otherwise obtained.<sup>96</sup>

To bring the statute into operation it should be made to appear that property of some kind tangible or intangible was obtained by the bankrupt. The mere fact that the liability arose in consequence of his fraud is not alone sufficient; the fraud must be followed and result in a loss of property to the creditor.<sup>97</sup> Merely obtaining goods with intent not to pay for them without any representations as to ability to pay, or representations of a fact tending to induce the sale, does not constitute fraud, and in the absence of any acts or conduct tending to avoid inquiry into financial condition, does not create a liability for obtaining property by false pretenses.<sup>98</sup> A false representation by one

91—Section 17 (2), Act of 1898; *Orr Shoe Co. v. Upshaw & Powledge*, 13 Ga. App. 501, 30 A. B. R. 534; *Atlanta Skirt Mfg. Co. v. Jacobs*, 8 Ga. App. 299, 25 A. B. R. 895.

92—*Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 18 A. B. R. 121, aff'g 183 N. Y. 267, 15 A. B. R. 179; *Mackel v. Rochester*, 135 Fed. 904, 14 A. B. R. 429; *In re Cason*, 27 A. B. R. 903; *In re Lawrence*, 163 Fed. 131, 20 A. B. R. 698.

93—*Katzenstein v. Reid*, *Murdock & Co.*, 41 Tex. Civ. App. 106, 16 A. B. R. 740.

94—*Cooper Grocery Co. v. Gaddy*, 141 S. W. 825, 27 A. B. R. 422.

95—*Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951; *In re Alsberg*, 16 N. B. R. 116, Fed. Cas. No. 261; *Classen v. Schoenemaw*, 16 N. B. R. 98.

96—*Rowell v. Ricker*, 79 Vt. 552, 18 A. B. R. 651; *In re Gany*, 103 Fed. 930, 2 N. B. N. R. 1082, 4 A. B. R. 576; *In re Wright*, 2 N. B. R. 14, Fed. Cas. No. 18070; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723.

97—*Rudstrom v. Sheridan*, 122 Minn. 262, 31 A. B. R. 862; *In re Dunfee*, 206 Fed. 745, 30 A. B. R. 721.

98—*In re Nuttall*, 201 Fed. 557, 29 A. B. R. 800.

partner by means of which property was obtained by the partnership will be imputed to the other partners to the extent of preventing a discharge of their liability as to such debt.<sup>99</sup>

Where the representation or statement is made direct to the creditor or his agent, with the purpose and intent of influencing the creditor in extending credit, which representation or statement proves to be false, the debt is not released, though it is a doubtful question whether a statement made to a commercial agency for use of its subscribers, which is acted upon by the creditor as a basis for extending credit, would be such a representation if proven false as would warrant the court in holding that the debt was not released. While congress may have intended this to be the case, in the absence of an express statement to that effect, it is not believed that the debt would come within the exception, if the false representation consists merely that made to the agency, unless it be shown that the representation was with the purpose of obtaining the property out of which the liability grows.<sup>1</sup>

The liability of the bankrupt to a guarantor or surety whose signature to a note or bond was obtained through fraudulent representations, has been held not to be affected by the discharge.<sup>2</sup> Services rendered by an attorney are not property within the meaning of the section and a debt for such services is released by a discharge though fraudulently obtained.<sup>3</sup>

The question of the existence of false pretenses or representation is ordinarily for the jury.<sup>4</sup>

### § 1560. — Wilful and malicious injury to person or property.

Under the act of 1898, judgments in actions for willful and malicious injuries to the person or property of another were not released by a discharge,<sup>5</sup> but in such cases the ground of the

99—*Frank v. Michigan Paper Co.*, 179 Fed. 776, 30 L. R. A. (N. S.) 623, 24 A. B. R. 261. See also *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248; *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 18 A. B. R. 121, aff'g 183 N. Y. 267, 15 A. B. R. 179.

1—*Katzenstein v. Reid, Murdock & Co.*, 41 Tex. Civ. App. 106, 16 A. B. R. 740.

2—*Gaddy v. Witt*, 142 S. W. 926, 27

A. B. R. 457. See *In re Dunfee*, 206 Fed. 745, 30 A. B. R. 721.

3—*Gleason v. O'Mara*, 180 Fed. 417, 24 A. B. R. 832; *Gleason v. Thaw*, 185 Fed. 345, 25 A. B. R. 782, aff'g 180 Fed. 419, 24 A. B. R. 759; s. o. 196 Fed. 359, 28 A. B. R. 473.

4—*Maxwell v. Martin*, 130 App. Div. (N. Y.) 80, 22 A. B. R. 93.

5—*In re Carmichael*, 2 A. B. R. 815, 96 Fed. 594.

action and basis of the recovery was the willful and malicious injury to the person or property of the creditor. By the amendment of 1903, the mere liability for such injuries, whether reduced to judgment or not, are excepted. "Willful and malicious injury" does not necessarily involve hatred or ill will as a state of mind, but arises when the act producing the injury to person or property was wrongful, intentional, and done without just cause or excuse, under circumstances from which the law will imply malice.<sup>6</sup> The exception relates to torts and not to breaches of contract.<sup>7</sup>

A judgment of damages for negligence,<sup>8</sup> assault and battery, false imprisonment, or malicious prosecution, or the like,<sup>9</sup> is ordinarily released, but a judgment for forcible entry and detainer,<sup>10</sup> or a judgment or liability for false and malicious libel<sup>11</sup> is not. A judgment against the bankrupt for personal injuries inflicted by a dog owned by his tenant is released.<sup>12</sup>

A claim against a physician for malpractice is released unless the injury was willful. If willful in the sense of being intentional, the claim is not released.<sup>13</sup> A judgment for personal injury resulting from negligence of a druggist in selling a customer pure instead of diluted carbolic acid has been held not affected by the discharge.<sup>14</sup> On the other hand, a judgment in an action for death by wrongful act, has been held discharged where the death was caused either by the administration of

6—In re Halper, 31 A. B. R. 283; *McChristal v. Clisbee*, 190 Mass. 120, 16 A. B. R. 838; *Peters v. United States*, 177 Fed. 885, 24 A. B. R. 206, rev'g 166 Fed. 613, 22 A. B. R. 177; *Kavanaugh v. McIntyre*, 128 App. Div. (N. Y.) 722, 21 A. B. R. 327; In re Munro, 195 Fed. 817, 28 A. B. R. 369; *Hiteshue v. Jones* (Pa. Ct. Com. Pl.), 28 A. B. R. 854; and see *Flanders v. Mullin*, 80 Vt. 124, 18 A. B. R. 708.

7—*Bond v. Milliken*, 134 Iowa 447, 17 A. B. R. 811.

8—In re Wakefield, 207 Fed. 180, 31 A. B. R. 42.

9—*McChristal v. Clisbee*, 190 Mass. 120, 16 A. B. R. 838.

Judgment in action for false imprisonment, the complaint containing no allegation of malice, held released. *Johnson v. Bruckheimer*, 133 App. Div. (N. Y.)

649, 22 A. B. R. 242, rev'g 63 Misc. (N. Y.) 248, 22 A. B. R. 88.

Judgment against school teacher for assault in whipping pupil held wilful or malicious and not discharged. *Peters v. United States*, 177 Fed. 885, 24 A. B. R. 206, rev'g 166 Fed. 613, 22 A. B. R. 177.

10—In re Munro, 195 Fed. 817, 28 A. B. R. 369, on rehearing 197 Fed. 450, 28 A. B. R. 664.

11—*National Surety Co. of New York v. Medlock*, 2 Ga. App. 665, 19 A. B. R. 654; *Thompson v. Judy*, 169 Fed. 553, 22 A. B. R. 154.

12—In re Lorde, 144 Fed. 320, 16 A. B. R. 201.

13—*Flanders v. Mullin*, 80 Vt. 124, 18 A. B. R. 708.

14—In re Halper, 31 A. B. R. 283.

chloral to the deceased while intoxicated, for the purpose of quieting him, or by negligence in failing to care for him.<sup>15</sup>

A deliberate and intentional conversion of stock or its proceeds under circumstances amounting to larceny thereof is a willful injury to property<sup>16</sup> as is the wrongful and fraudulent appropriation of the money of another,<sup>17</sup> and a liability therefor is not discharged.

A liability growing out of a breach of contract to marry does not come within the excepted class of "willful and malicious injuries to the person or property of another," but is released by the discharge, even though seduction be pleaded and proven.<sup>18</sup> It has been held that a judgment for alienation of affections would not be released.<sup>19</sup>

A partner is not released by a discharge from the consequence of a willful and malicious injury to the property of another by his firm, though he did not participate in the acts causing the injury.<sup>20</sup>

### § 1561. — Seduction and criminal conversation.

Under the act of 1898, considerable question arose as to whether claims of this character came within the excepted class, but in no case was it excepted unless reduced to judgment. Thus it was held that a judgment recovered by an unmarried woman for her own seduction,<sup>21</sup> or by a father for the seduction of his child,<sup>22</sup> was one for a willful and malicious injury and not discharged, and a judgment for criminal conversation was held not to be discharged.<sup>23</sup>

15—*Tompkins v. Williams*, 137 App. Div. (N. Y.) 521, 23 A. B. R. 886.

16—*Kavanaugh v. McIntyre*, — N. Y. App. —, 31 A. B. R. 712, aff'g 74 Misc. (N. Y.) 222, 27 A. B. R. 279.

17—*Hallagan v. Dowell*, 139 N. W. 883, 31 A. B. R. 848.

18—*Bond v. Milliken*, 134 Iowa 447, 17 A. B. R. 811; *Disler v. McCauley*, 66 App. Div. (N. Y.) 42, 7 A. B. R. 138, rev'g 6 A. B. R. 491; *Finnegan v. Hall*, 6 A. B. R. 648; *In re Fife*, 109 Fed. 880, 6 A. B. R. 258; *In re McCauley*, 101 Fed. 223, 4 A. B. R. 122; *In re Sidle*, 2 N. B. R. 77, Fed. Cas. No. 12844; *contra*, *In re Warth*, 200 Fed. 408, 29 A. B. R. 210.

19—*Leicester v. Hoadley*, 66 Kan. 172, 9 A. B. R. 318.

20—*Kavanaugh v. McIntyre*, 31 A. B. R. 712, aff'g 74 Misc. (N. Y.) 222, 27 A. B. R. 279.

21—*In re Maples*, 105 Fed. 919, 5 A. B. R. 426.

22—*In re Freche*, 109 Fed. 620, 6 A. B. R. 479; *contra*, *In re Sullivan*, 1 N. B. R. 380, 2 A. B. R. 30.

23—*Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754, 11 A. B. R. 568, aff'g 62 N. E. 668, 7 A. B. R. 334; *s. c.*, 169 N. Y. 531, aff'g 65 App. Div. (N. Y.) 201, which aff'd 35 Misc. (N. Y.) 330, 6 A. B. R. 434; *contra*, *In re Tinker*, 2 N. B. R. 391, 3 A. B. R. 580, 99



By the amendment of February 5, 1903, all liabilities for maintenance or support of wife or child, or for the seduction of an unmarried female or for criminal conversation, whether reduced to judgment or not, are now excepted from the effects of the discharge.<sup>24</sup> Substantial damages awarded in an action for breach of promise and seduction will be presumed to have been awarded for the seduction in the absence of a contrary showing.<sup>25</sup>

### § 1562. — Debts barred by limitations.

Since all debts provable by nature, not within the excepted classes, are released by a discharge in bankruptcy, the fact that such a debt cannot in fact be proved because barred by the statutes of limitation does not affect the question of its release.<sup>26</sup>

Revival of debt after discharge, see ante, section 1538.

### § 1564. — Rent.

Each sum of rent is a distinct debt, there being no provision in the present act for the apportionment of rent, so that, no matter how large a portion of the installment period has transpired when the petition in bankruptcy is filed, only those installments which have become due and payable at the time of such filing are provable and released by the discharge.<sup>27</sup> The obligation to pay rent is not discharged as to the future unless the trustee elects to retain the lease as an asset,<sup>28</sup> and a landlord is entitled to collect rent from the bankrupt accruing after the adjudication.<sup>29</sup> Rent as such is an incident to and grows out of

Fed. 79, citing *In re Haensell*, 1 N. B. N. 240, 1 A. B. R. 286, 91 Fed. 355; *Livergood v. Greer*, 43 Ill. 213; *Anderson v. How*, 116 N. Y. 342; *Com. v. Williams*, 110 Mass. 401.

24—*In re Hubbard*, 98 Fed. 710, 3 A. B. R. 528; *In re Baker*, 96 Fed. 954, 3 A. B. R. 101; *In re Cotton*, Fed. Cas. No. 3269; *In re Warth*, 200 Fed. 408, 29 A. B. R. 210.

25—*In re Warth*, 200 Fed. 408, 29 A. B. R. 210.

26—*In re Kingsley*, 1 N. B. R. 66, 1 Lowell 216, Fed. Cas. No. 7819.

27—*Reed v. Phinney*, 2 N. B. N. R. 1009; *In re Frankel*, 2 N. B. N. R. 840; *In re Collignon*, 2 N. B. N. R. 660, 4

A. B. R. 250; *Bray v. Cobb*, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788; *In re Ells*, 2 N. B. N. R. 360, 3 A. B. R. 564, 98 Fed. 967; *In re Shilladay*, 1 N. B. N. 475; *In re Cronson*, 1 N. B. N. 474; *In re Goldstein*, 1 N. B. N. 422, 2 A. B. R. 603; *In re Gerson*, 1 N. B. N. 315, 2 A. B. R. 170; *In re Jefferson*, 1 N. B. N. 288, 2 A. B. R. 206, 93 Fed. 948.

28—*In re Roth & Appel*, 181 Fed. 667, 31 L. R. A. (N. S.) 270, 24 A. B. R. 588, aff'g 174 Fed. 64, 22 A. B. R. 504.

29—*In re Sapinsky & Sons*, 206 Fed. 523, 30 A. B. R. 416; *In re Ells*, 2 N. B. N. R. 360, 3 A. B. R. 564, 98 Fed. 967;

the use and occupation, and is the consideration thereof, and unaccrued rent cannot be said to be a fixed liability absolutely owing when the petition is filed, payable in the future, or indeed a debt of any kind, as the word is used in the act, being only an unmatured obligation to pay in the future (a consideration for future enjoyment and occupancy), and therefore not provable or released by a discharge.<sup>30</sup>

### § 1565. — Stockholder's liability.

See ante, section 1533.

### § 1566. — Liability as surety.

A discharge will not release a bankrupt from liability as surety where no cause of action arose until after such discharge;<sup>31</sup> nor as surety for the faithful performance of a duty as a public officer;<sup>32</sup> but, where a surety on a guardian's bond receives a discharge in bankruptcy, he is released from liability for defaults of the guardian prior to his bankruptcy;<sup>33</sup> or if one enters an appeal and becomes a bankrupt and is discharged prior to the affirmance of the judgment, his surety on the appeal is discharged in those states where the discharge can be called to the attention of the appellate court.<sup>34</sup>

### § 1567. — Liability to surety.

The liability of a bankrupt to the surety on his note or bond is ordinarily discharged.<sup>35</sup> It has been held, however, that the

In re Frankel, 2 N. B. N. R. 840; In re Mahler, 3 N. B. N. R. 39, aff'g 2 N. B. N. R. 70; Bray v. Cobb, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788; In re Arnstein, 101 Fed. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106; contra, In re Jefferson, *supra*; see In re Webb, 6 N. B. R. 302, Fed. Cas. No. 17315; Bailey v. Lock, 11 N. B. R. 271, 2 Woods 578, Fed. Cas. No. 739; In re Bleek, 12 N. B. R. 215, 8 Ben. 93, Fed. Cas. No. 1822.

30—Shapiro v. Thompson, 160 Ala. 363, 24 A. B. R. 91; In re Frankel, and cases above cited; In re Arnstein, 101 Fed. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106; In re Mahler, 2 N. B. N. R. 70; Treadwell v. Marden, 18 N. B. R. 353; contra, In re Goldstein, 1 N. B. N. 422,

2 A. B. R. 603; Bray v. Cobb, 2 N. B. N. R. 586, 100 Fed. 270, 3 A. B. R. 788.

31—Eastman v. Hibbard, 13 N. B. R. 360.

32—U. S. v. Herron, 9 N. B. R. 535, 20 Wall. 251, 22 L. ed. 275; but see U. S. v. Throckmorton, 8 N. B. R. 309, Fed. Cas. No. 16516.

33—Jones v. Knox, 8 N. B. R. 559; Reitz v. People, 16 N. B. R. 96; Ex parte Taylor, 16 N. B. R. 40, 1 Hughes 617, Fed. Cas. No. 13773.

34—Odell v. Wooten, 4 N. B. R. 46.

35—In re Dunfee, 206 Fed. 745, 30 A. B. R. 721; Halliburton v. Carter, 10 N. B. R. 359; but see Gaddy v. Witt, 142 S. W. 926, 27 A. B. R. 457.

discharge in bankruptcy will not affect the liability of the bankrupt to his surety who, after the discharge, makes a payment to the obligee in the bond, even though there was a default, where the default occurred prior to bankruptcy.<sup>36</sup>

### § 1568. — Unliquidated damages.

The act expressly provides that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate,<sup>37</sup> and accordingly would be released by a discharge. It is held, however, that a claim for unliquidated damages founded in tort, unaccompanied with contractual liability is not provable and therefore not discharged.<sup>38</sup>

### § 1569. — Unproved and unscheduled claims.

Under the act of 1867, if the court of bankruptcy had jurisdiction of the bankrupt and the subject matter, in the absence of fraud, the omission of a claim from the schedule, if not willful, and the consequent lack of notice to the creditor would not prevent the discharge barring such claim.<sup>39</sup> The present act expressly excepts from the discharge debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy, whether the omission be fraudulent or otherwise.<sup>40</sup> If the creditor had knowledge of the proceedings although not scheduled or scheduled under the wrong name or address, the debt will be discharged,<sup>41</sup> though if such knowledge did not come to the cred-

36—*Williams & Co. v. U. S. Fidelity & Guaranty Co.*, 11 Ga. App. 635, 28 A. B. R. 802.

37—Section 63b of Act of 1898.

38—Rule applied to action for wrongful death. In re *New York Tunnel Co.*, 159 Fed. 688, 20 A. B. R. 25.

39—*Lamb v. Brown*, 12 N. B. R. 522, Fed. Cas. No. 8011; *Pattison v. Wilbur*, 12 N. B. R. 193; *Heard v. Arnold*, 15 N. B. R. 543; *Thurmond v. Andrews*, 13 N. B. R. 157; *Platt v. Parker*, 13 N. B. R. 14; *Symonds v. Barnes*, 6 N. B. R. 377; *Barnes v. Moore*, 2 N. B. R. 174; *Batchelder v. Low*, 8 N. B. R. 571.

40—Section 17 (3), Act of 1898; *Schiller v. Weinstein*, 47 Misc. (N. Y.) 622, 15 A. B. R. 183; *Haack v. Theise*, 51 Misc. (N. Y.) 3, 16 A. B. R. 699; *Westheimer v. Howard*, 47 Misc. (N. Y.) 145, 14 A. B. R. 547; *Broadway Trust Co. v. Manheim*, 47 Misc. (N. Y.) 415, 14 A. B. R. 122; *Sutherland v. Lasher*, 41 Misc. (N. Y.) 349, 11 A. B. R. 780; *Kreitlein v. Ferger*, 97 N. E. 819, 28 A. B. R. 908; *Tyrrel v. Hammerstein*, 33 Misc. (N. Y.) 505, 6 A. B. R. 430; In re *Beerman*, 112 Fed. 662, 7 A. B. R. 434.

41—*Kaufman v. Schreier*, 108 App. Div. (N. Y.) 298, 17 A. B. R. 314;

itor until too late to prove his claim and thus receive a dividend equal to other creditors of a like class, he need take no part in the proceedings but may make the amount of his claim out of any property acquired by the bankrupt subsequent to the filing of the petition.<sup>42</sup> Actual notice to an agent of the creditor is sufficient,<sup>43</sup> and the knowledge of the receiver of an insolvent corporation obtained while he was cashier of a bank which was a creditor of the corporation has been held imputable to the creditors thereof seeking to enforce the bankrupt's liability as a stockholder of the corporation.<sup>44</sup>

Extreme exactness must be used in scheduling claims according to the official forms. To warrant a release the name and address of the creditor must have been stated with sufficient exactness to reasonably insure to him notice of the proceedings.<sup>45</sup> A statement of the creditor's residence in the schedules is necessary,<sup>46</sup> the giving of his office or business address being insufficient.<sup>47</sup> Where he resides in a populous city, the name of the city and street, as well as the street number, should be given.<sup>48</sup>

The want of knowledge which will excuse a bankrupt from putting the residence of his creditor in his schedules is not that which may exist without attempt to gain the information, but that which arises after reasonable effort has been made to find

Cohen v. Pinkus, 126 App. Div. (N. Y.) 792, 20 A. B. R. 787; Zimmerman v. Ketchum, 66 Kan. 98, 11 A. B. R. 190; Morrison v. Vaughan, 119 App. Div. (N. Y.) 184, 18 A. B. R. 704.

42—In re Monroe, 114 Fed. 398, 7 A. B. R. 706.

Where the scheduling of the debt or the receipt of actual notice of the bankruptcy proceedings comes to the creditor after the estate has been practically wound up and within a few days before the expiration of the year allowed for the proving of claims, the debt is not released. McCreery & Co. v. Brown, (Pa. Ct. Com. Pl.) 29 A. B. R. 238.

43—New England Advertising Co. v. Leibson, (Pa. Ct. Com. Pl.) 29 A. B. R. 62.

44—Dight v. Chapman, 44 Ore. 265, 12 A. B. R. 743.

45—Reed v. Dippel, 16 Pa. Dist. Rep. 126, 17 A. B. R. 371; In re Quackenbush, 122 App. Div. (N. Y.) 456, 19 A. B. R. 647; Murphy v. Blumenreich, 123 App. Div. (N. Y.) 645, 19 A. B. R. 910; Hazard Mfg. Co. v. Brown, (Pa. Ct. Com. Pl.) 25 A. B. R. 903.

46—Steele v. Thalmeier, 74 Ark. 518; contra, Columbia Bank v. Birkett, 174 N. Y. 112, 9 A. B. R. 481, aff'd Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 12 A. B. R. 691; and see Kreitlein v. Ferger, 97 N. E. 819, 28 A. B. R. 908.

47—McKee v. Preble, 138 N. Y. Supp. 915, 31 A. B. R. 852; Weidenfeld v. Tillinghast, 54 Misc. (N. Y.) 90, 18 A. B. R. 531.

48—Cagliostro v. Indelle, 53 Misc. (N. Y.) 44, 17 A. B. R. 685.

out.<sup>49</sup> A debt will not be discharged where the creditor's address is stated as unknown, though actually known, if the creditor is without actual notice of the proceedings.<sup>50</sup>

The erroneous spelling of a creditor's name is sufficient to prevent a release of the creditor's claim.<sup>51</sup>

An assigned claim will be discharged though scheduled in the name of the assignor, the bankrupt having no actual notice of the assignment,<sup>52</sup> but a bankrupt who schedules the name of the original payee of a note, but fails to list the name of the transferee notwithstanding he had knowledge of the fact after transfer and knew the name of the holder, would still be liable on the note, if such transferee had no knowledge of the proceedings.<sup>53</sup> Where the creditor is a partnership and the same is dissolved by the death of one of the partners, the surviving partner may be described in the schedules as the creditor.<sup>54</sup> A judgment recovered on a partnership obligation is property scheduled as a debt against an individual bankrupt partner.<sup>55</sup>

The liability of a stockholder of an insolvent corporation is discharged though it is scheduled in the name of the creditors suing to enforce the liability rather than in the name of the receiver appointed to collect and enforce the liability in their behalf.<sup>56</sup> It will be presumed that provable debts were properly scheduled, and that the claimants had notice of the bankruptcy proceedings,<sup>57</sup> and an objection that a debt was not properly scheduled must be raised in the trial court, and is unavailable if raised for the first time upon appeal.<sup>58</sup> Of course, evidence

49—Parker v. Murphy, 215 Mass. 72, 31 A. B. R. 646.

50—Miller v. Guasti, 226 U. S. 170, 57 L. ed. 173, 29 A. B. R. 201.

51—Debt of creditor by name of Custard, not discharged where debt was scheduled as that of Castard, and creditor had no notice of proceedings. In re Carton & Co., 148 Fed. 63, 17 A. B. R. 343.

52—Mueller v. Goerlitz, 53 Misc. (N. Y.) 53, 17 A. B. R. 687.

53—Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 12 A. B. R. 691, aff'g Columbia Bank v. Birkett, 174 N. Y. 112, 9 A. B. R. 481; Columbia Bank v. Birkett, 36 Misc. (N. Y.) 391, 7 A. B. R. 222.

54—Kaufman v. Schreier, 108 App. Div. (N. Y.) 298, 17 A. B. R. 314.

55—New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233.

56—Longfield v. Minnesota Sav. Bank, 95 Minn. 54, 14 A. B. R. 413.

57—In re Peterson, 137 App. Div. (N. Y.) 435, 24 A. B. R. 270; New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233; contra, Parker v. Murphy, 215 Mass. 72, 31 A. B. R. 646; Weidenfeld v. Tillinghast, 54 Misc. (N. Y.) 90, 18 A. B. R. 531.

58—Bond v. Milliken, 134 Iowa 447, 17 A. B. R. 811.

of publication where publication is made is still required. Notice by publication alone is insufficient where the bankrupt states the addresses of the creditors are unknown, unless it be shown by satisfactory proof that the same cannot be ascertained after due search.<sup>59</sup>

After a discharge has been granted, the proceedings cannot be re-opened, after expiration of a year from the adjudication, to allow the bankrupt to schedule a claim which has not been discharged, and to permit the creditor to prove his claim and so obtain a discharge therefrom.<sup>60</sup>

### § 1570. — Warehouse charges.

Warehouse charges accruing after the filing of the petition, are not released by the discharge.<sup>61</sup>

### § 1571. — Wife's debts.

The question of the effect of the husband's discharge on the wife's debts is an interesting one and turns on the point whether he is liable for them individually, or jointly with her, or whether she alone is liable. This is a question of local law. At common law the husband, at marriage, became liable for the wife's ante-nuptial debts and such as she might contract for necessities, etc., and in such case his discharge would release such debts,<sup>62</sup> but the question was raised if they were not merely suspended and would revive on her surviving him.<sup>63</sup> Where the wife has been made responsible for her debts, she remains equally so after his discharge;<sup>64</sup> and, if they can contract directly with each other, a discharge of the husband releases debts due from him to his wife, and vice versa.<sup>65</sup> The husband's discharge will not affect the wife's liability, to have her separate estate charged in equity;<sup>66</sup> and, if the wife have separate property, a court will not release her if charged in execution because of the husband's discharge.<sup>67</sup> The bankrupt's wife

59—*In re Dvorak*, 107 Fed. 76, 6 A. B. R. 66.

60—*In re Spicer*, 145 Fed. 431, 16 A. B. R. 802.

61—*Robinson v. Pesant*, 8 N. B. R. 426.

62—*Lockwood v. Salter*, 5 B. & Ad. 303.

63—*Vanderheyden v. Mallory*, 1 N. Y. 452.

64—*Mobley v. Cureton*, 6 So. Car. 49.

65—*Alling v. Eagan*, 11 Rob. (La.) 244.

66—*Hamlin v. Bridge*, 24 Me. 145.

67—*Bonner v. Bonner*, 17 Beav. 86.

cannot plead his discharge in an action for her half of community debts, where she has accepted the community.<sup>68</sup>

### § 1572. Waiver of discharge.

The discharge, as stated, merely releases the bankrupt from personal liability and must be pleaded and consequently may be waived and, if waived, cannot afterwards be relied on.<sup>69</sup>

### § 1573. Discharge must be pleaded.

A discharge must be pleaded,<sup>70</sup> and a failure so to do operates as a waiver of its benefits and renders any property in the bankrupt's possession liable to a judgment, since a court will not take judicial knowledge of a discharge, whether in a proceeding by scire facias to revive a judgment, or in an original suit.<sup>71</sup>

The question whether a judgment against one who is thereafter adjudged a bankrupt is thereby discharged is properly raised by pleading the discharge in a proceeding to enforce the judgment.<sup>72</sup> An allegation that plaintiff's claim is not one of those excepted from the effect of a discharge is a conclusion of law.<sup>73</sup>

While a discharge may be pleaded after the filing of an answer,<sup>74</sup> a delay of a year in asking for leave to plead a discharge in bar of an action commenced prior to the adjudication is sufficient cause to refuse the request, since the plea is a legal and not an equitable one.<sup>75</sup> A widow of a bankrupt to whom his property has been transferred may avail herself of his discharge and plead it in her own defense.<sup>76</sup>

A plea in abatement setting up a discharge must be sworn to,

68—Ludeling v. Felton, 17 N. B. R. 310.

69—Howe v. Noyes, 47 Misc. (N. Y.) 338, 15 A. B. R. 103; Dewey v. Moyer, 16 N. B. R. 1.

70—Friedman v. Zweiffer, 74 Misc. (N. Y.) 448, 27 A. B. R. 412; Broadway Trust Co. v. Manheim, 47 Misc. (N. Y.) 415, 14 A. B. R. 122; In re Rhutassel, 1 N. B. N. 572, 2 A. B. R. 697, 96 Fed. 597; In re Shaffer, 3 N. B. N. R. 54.

71—Revere Copper Co. v. Dimock, 19 N. B. R. 372; Dewey, 16 N. B. R. 1; Jenks v. Opp, 12 N. B. R. 19; In re

Wesson, 88 Fed. 855; Cutter v. Evans, 11 N. B. R. 448.

72—Injunction restraining creditor from proceeding to enforce judgment is not proper remedy. Hellman v. Goldstone, 161 Fed. 913, 20 A. B. R. 539.

73—Standard Sewing Machine Co. v. Kattell, 132 App. Div. (N. Y.) 539, 22 A. B. R. 376.

74—Reeves v. McCracken, 69 N. J. Eq. 203, 13 A. B. R. 680.

75—Medberg v. Swan, 8 N. B. R. 537.

76—Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931.

and must set forth a copy, but, if defective, may be amended; and, if the plea is in bar, it is insufficient when the notes and bonds sued upon were given after bankruptcy.<sup>77</sup>

#### § 1574. Discharge not pleadable.

Contrasted with those cases, wherein a failure to plead a discharge waives the benefits, are those where the discharge cannot be pleaded, as where it is obtained pending an appeal, and the appellate court will consider nothing but the record;<sup>78</sup> neither can it be set up by supplemental answer where an attachment issued more than four months prior to the institution of bankruptcy proceedings was dissolved by filing a bond,<sup>79</sup> nor in a creditor's suit commenced more than four months prior to the institution of the bankruptcy proceedings, and which pertains to land never brought within the jurisdiction of the bankruptcy court.<sup>80</sup>

A complaint which alleges that the defendant did wrongfully and fraudulently embezzle and misappropriate the plaintiff's money, but does not allege that the defendant became possessed thereof in a fiduciary capacity, is sufficient to state a cause of action though the answer sets up a discharge in bankruptcy.<sup>81</sup>

#### § 1575. Replication to plea of discharge.

A special provision having been made for the revocation of a discharge, the form, the mode of attack, and the ground of fraud coming to petitioner's knowledge after the discharge was granted and that the discharge was not warranted, are exclusive; and, on a plea of a discharge in bankruptcy in bar of an action, the replication can only deny the existence of such discharge, or the identity of the person, or one of the other grounds pleadable against the judgment of a court of record.<sup>82</sup>

One suing on a contract without alleging false pretenses cannot plead that fact in reply.<sup>83</sup>

77—Beeson v. Howard, 11 N. B. R. 486; Stoll v. Wilson, 14 N. B. R. 571; contra, see Hayes v. Ford, 15 N. B. R. 569.

78—Karger v. Orth, 116 Minn. 124, 27 A. B. R. 212; Serra e Hijo v. Hoffman, 17 N. B. R. 124; Knapp v. Anderson, 15 N. B. R. 316; Treadwell v. Holway, 12 N. B. R. 61.

79—Holyoke v. Adams, 13 N. B. R. 413.

80—Flint v. Chaloupka, 78 Neb. 594, 18 A. B. R. 293.

81—Watertown Carriage Co. v. Hall, 176 N. Y. 313, 11 A. B. R. 15, aff'g 75 App. Div. (N. Y.) 201, 10 A. B. R. 23n.

82—Section 15, Act of 1898.

83—Strauch v. Flynn, 108 Minn. 313, 22 A. B. R. 246.



**§ 1576. Proof of discharge.**

A certificate of discharge in bankruptcy, signed by the judge, and attested by the clerk under the seal of the court, is the means by which the bankrupt is to prove and have the benefit of his discharge; and is conclusive evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made, but, being personal to the bankrupt, is not conclusive evidence in favor of other parties seeking to use it.<sup>84</sup> Since it is conclusive of the regularity of the proceedings, it can only be attacked in the court granting it upon proper proceedings.<sup>85</sup> Such certified copy will not be issued until the time granted for appeal has expired.<sup>86</sup>

The court will assume that a defendant setting up his adjudication in bankruptcy was released of all his dischargeable debts in the proceeding,<sup>87</sup> and the burden is upon the plaintiff to show his claim was not released.<sup>88</sup>

84—Section 21f, Act of 1898; *New York Inst. for Deaf & Dumb v. Crockett*, 117 App. Div. (N. Y.) 269, 17 A. B. R. 233; *Kreitlein v. Ferger*, 97 N. E. 819, 28 A. B. R. 908; *Palmer v. Hussy*, 119 U. S. 96, 30 L. ed. 362; *In re Dole*, 9 N. B. R. 193, 11 Blatchf. 499, Fed. Cas. No. 3964; *Miller v. Chandler*, 17 N. B. R. 251; *Dewey v. Moyer*, 18 N. B. R. 114; *In re Jones*, 6 N. B. R. 386, Fed. Cas. No. 7449; *In re Dean*, 3 N. B. R. 188, Fed. Cas. No. 3701; *contra*, *In re Heath*, 7 N. B. R. 448, Fed. Cas. No. 6304.

85—*In re Witkowski*, 10 N. B. R. 209, Fed. Cas. No. 17920.

86—*In re Hirsch*, 96 Fed. 468, 2 A. B. R. 715.

87—*Craine v. Craine*, 19 A. B. R. 76.

88—*In re Peterson*, 64 Misc. (N. Y.) 217, 22 A. B. R. 549.

In an action on a judgment in which a discharge in bankruptcy is pleaded as a defense, the burden is on the plaintiff to show the ground of liability, and that it was not discharged. *Hallagan v. Dowell*, 139 N. W. 883, 31 A. B. R. 848.

## CHAPTER XXXVI

### CONTEMPTS

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#### § 1577. Nature and classes of contempt.

It has been uniformly held that a contempt of court or its orders is an offense against the United States <sup>1</sup> within no limited

1—In *re Mulee*, 7 Blatchf. 24; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Dixon's Case*, 3 Op. Atty. Genl. 623; *Rowan's Case*, 4 Op. Atty. Genl. 58; *Drayton & Sear's Case*, 5 Op. Atty. Genl. 579; *Ex parte Fisk*, 113 U. S. 713, 718, 28 L. ed. 1117; *Goodrich v. U. S.*, 42 Fed. 392. See *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393.

or restricted sense, but in the general sense of a crime.<sup>2</sup> Even when a charge of contempt of court does not involve facts constituting another criminal offense, it is, nevertheless, criminal rather than civil in its nature.<sup>3</sup>

Contempt may be said to be of two classes—civil and criminal. Civil contempts are those quasi contempts which consist in failing to do that which the contemnor is ordered by the court to do for the advantage or benefit of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court, or of its process, or which disturb the administration of justice, or tend to bring the court in disrepute, such as disorderly conduct, insulting behavior in the presence, or immediate vicinity, of the court, or acts of violence which interrupt its proceedings, also disobedience or resistance of the process of the court, the interference with property in the custody of the law, misconduct of officers of the court, and the like.<sup>4</sup>

As was said in the case of *Indianapolis Water Company v. American Strawboard Company*,<sup>5</sup> that broadly considered, contempts may be classified as “direct” and “constructive.” Those which are committed within the presence of the court, while sitting judicially, or so near as to interfere with or interrupt its orderly course of procedure, are direct contempts, which are usually punished in a summary manner, without evidence, upon view and personal knowledge of the deciding judge.<sup>6</sup> Contempts are constructive when they are committed not in the presence of the court, but tend by their operation to interrupt, obstruct, embarrass, or prevent the due and orderly administration of justice. Constructive contempts may be distributed into two general classes, namely: First, those wherein the contemptuous acts primarily affect public rights or the due administration of public justice; and, second, those which

2—*United States v. Jacobi*, 4 Amer. Law T. R. U. S. Cts. 148, 4 Blackstone 124, 279; *In re Brass Crosby*, 3 Wilson 188; *In re Williamson*, 26 Pa. St. 18; *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. ed. 354; *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853; *In re Swan*, 150 U. S. 637, 37 L. ed. 1207; *In re Acker*, 66 Fed. 290.

3—*Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412.

4—*Rapalje on Contempt*, § 21; *Ex parte Edwards*, 11 Fla. 184; *In re Watson*, 3 Lans. (N. Y.) 408; *Phillips v. Welch*, 11 Nev. 187, 190.

5—75 Fed. 972, 975.

6—*Whitten v. State*, 36 Ind. 196; *Ex parte Wright*, 65 Ind. 504; *People v. Wilson*, 64 Ill. 195; *Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412 (*Shelby, J.*).

primarily affect private rights, and only remotely and incidentally affect public rights or public justice. When the contempt consists in the failure or refusal of the party to do or refrain from doing something which he is ordered to do, or refrain from doing for the benefit or advantage of the opposite party, the proceeding is not criminal, but is civil and remedial in its nature. And in this sort of contempt the intention with which the act is committed is immaterial, except in fixing the proper nature of the punishment. The injury suffered by the complaining party is neither increased nor diminished, nor in anywise affected by the state of mind towards the court of the party doing the forbidden act. The breach consists in doing or failing to do the thing commanded, and not in the intention with which the act was done.<sup>7</sup> The exercise, therefore, of this power to punish for contempt, has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its order; and second, to compel his performance of some act or duty required of him by the court which he refuses to perform.<sup>8</sup>

### § 1578. Jurisdiction over contempts.

The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.<sup>9</sup> The authority, however, to inflict summary punishment for contempts was subsequently limited<sup>10</sup> to the cases of misbehavior in the presence of the courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the court in their official transactions and the disobedience or resistance by any such officer or by any party, juror, witness or other

7—*Refrigerating Co. v. Gillett*, 30 Fed. 683; *Toledo, A. A. & N. M. Ry. Co. v. Pa. Co.*, 54 Fed. 746, 19 L. R. A. 395; *People v. Court of Oyer and Terminer*, 101 N. Y. 245, 4 N. E. 259; *Thompson v. Railroad Co.*, (N. J. Ch.) 21 Atl. 182; *Railroad Co. v. Thompson*, (N. J. Err. and App.) 24 Atl. 544.

8—*In re Chiles*, 22 Wall. 157, 168, 22 L. ed. 819.

9—*Judiciary Act of 1789*, 1 Stat. L. 83.

10—*Act March 2, 1831*, 4 Stat. L. 487.

person to any lawful writ, process, rule, decree or command of the courts.<sup>11</sup>

The provisions in the present law specifically empowering courts of bankruptcy to "enforce obedience by the bankrupts, officers and other persons to all lawful orders, by a fine or imprisonment, or fine and imprisonment," and to punish persons for contempts before referees,<sup>12</sup> may be regarded as merely declaratory of the necessarily inherent powers already possessed by them,<sup>13</sup> and do not create a new or enlarged jurisdiction over contempts, nor confer a power to impose a punishment which might not rightly and lawfully be imposed on a similar state of facts by any other United States court.<sup>14</sup>

The power to punish contempts against the bankruptcy court, is vested solely in the judge. The referee has no jurisdiction.<sup>15</sup>

Unless regularly made parties to the proceedings and given proper notice, persons are not subject to the jurisdiction of the bankruptcy court, and will not therefore be deemed guilty of contempt of its orders unless it be shown that they have notice of such proceedings.<sup>16</sup> This is particularly true of parties in proceedings in a state court.

### § 1579. Lawful order necessary.

A bankrupt cannot be adjudged in contempt where the order, writ, or process which is disobeyed is unlawful.<sup>17</sup>

### § 1580. Violation of referee's orders.

It is not to be inferred that for a wilful disobedience of a lawful order of a referee, there is no power of punishment, and that the only course is to obtain a re-enactment of the order from the judge, for a violation of which second order, a punishment may be inflicted. The statute, which places so large a part of the details of settlement of estates in the referee's hands, evidently intended his lawful orders to have the force of orders of

11—R. S. § 725; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205.

12—Section 2 (13) (16); section 41a, Act of 1898.

13—U. S. v. *Hudson*, 7 Cranch. 32.

14—*Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393.

15—*In re Haring*, 29 A. B. R. 387, aff'g 193 Fed. 168, 27 A. B. R. 285.

16—*In re Ogles*, 1 N. B. N. 326, 93 Fed. 426, 1 A. B. R. 671.

17—Section 41a, Act of 1898; *In re Soloway & Katz*, 195 Fed. 100, 28 A. B. R. 225; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413, 7 A. B. R. 421.

the judge; and the courts will enforce such orders by contempt proceedings instituted directly on failure to obey them.<sup>18</sup>

The referee is included within the meaning of the word "court" as used in the act<sup>19</sup> and exercises the same power in a case before him as a court of bankruptcy except in matters relating to compositions and discharges<sup>20</sup> as to which he has authority to do only what the order referring the matter to him prescribes.<sup>21</sup> As has been well said, referees, within the scope of their authority, act in lieu of the court of bankruptcy and their orders are in effect the orders of the court and a violation of such orders will subject the offender to punishment as for a violation of an order of the court of bankruptcy.<sup>22</sup>

### § 1581. Failure to turn over property.

### § 1582. — In general.

A court of bankruptcy has power to order the bankrupt to pay over to his trustee money or other property belonging to his estate and found in his possession or control,<sup>23</sup> or in the possession of a third person holding as a mere bailee, or agent, of bankrupt,<sup>24</sup> while the amendment to the law extends this power even to the case of a third party holding property under an adverse claim. If he fails to obey such order, the court will punish him as for a contempt, but since the failure to obey may be followed by imprisonment, the power should be exercised with

18—In re Allen, 13 Blatch. 271; In re Gettleston, 1 N. B. R. 604; In re Speyer, 6 N. B. R. 255, Fed. Cas. No. 13239.

19—Section 1 (7), Act of 1898.

20—Section 38a (4), Act of 1898; In re Mussey, 2 N. B. N. R. 113, 99 Fed. 71, 3 A. B. R. 592.

21—G. O. XII (3).

22—In re Allen, 13 Blatch. 272; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; In re Gettleston, 1 N. B. R. 604; In re Speyer, 6 N. B. R. 255, Fed. Cas. No. 13239.

23—In re Schlesinger, 102 Fed. 117, 4 A. B. R. 361; Ripon Knitting Works v. Schreiber, 2 N. B. N. R. 899, 101 Fed. 810, 4 A. B. R. 299; In re Deuell, 100 Fed. 633, 2 N. B. R. 597, 4 A. B. R. 60; In re Rosser, 101 Fed. 562, 4 A. B. R.

153; In re McCormick, 2 N. B. N. R. 104, 3 A. B. R. 340, 97 Fed. 566; In re Tischler, 2 N. B. N. R. 549; In re Anderson, 103 Fed. 854, 4 A. B. R. 640; In re Wilson, 116 Fed. 419, 8 A. B. R. 612; In re Levin, 113 Fed. 498, 6 A. B. R. 743; In re Greenberg, 106 Fed. 496, 5 A. B. R. 840; In re Hempner, 6 N. B. R. 521, Fed. Cas. No. 7689; In re Salkey, 11 N. B. R. 423, 6 Biss. 269, Fed. Cas. No. 12253; In re Dresser, 3 N. B. R. 138, Fed. Cas. No. 4077.

24—Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224, rev'g 5 A. B. R. 176, which rev'd 3 N. B. N. R. 32, 104 Fed. 530, 4 A. B. R. 747; In re Macon Sash, Door & Lumber Co., 112 Fed. 323, 7 A. B. R. 66.

great caution, and before an order is made evidence should be required such as would convince an unprejudiced mind beyond a reasonable doubt that the bankrupt is able to comply therewith, if made.<sup>25</sup>

A delivery of property in the bankrupt's possession at the time of the filing of the petition to a person whom he asserts is his bailor, renders the bankrupt guilty,<sup>26</sup> but the failure to deliver property to an agent of the receiver who fails to show his authority does not establish such wilful defiance of the authority of the court as will justify a commitment for contempt.<sup>27</sup> A bankrupt may be punished for contempt for wilfully concealing assets,<sup>28</sup> or for neglecting to pay the trustee a sum described in his inventory as "cash on hand."<sup>29</sup>

An agent or bailee of the bankrupt who fails to deliver property of the bankrupt in his possession to the trustee may be adjudged guilty of contempt.<sup>30</sup> The power to punish for contempt will not, however, be used to punish for frauds committed by bankrupt against the law nor to coerce him or transferees to make restitution of money or property previously transferred in fraud of the law,<sup>31</sup> though the bankrupt's failure to turn over to the trustee property which was delivered to his wife on the eve of bankruptcy has been held to constitute contempt.<sup>32</sup>

25—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832; Stuart v. Reynolds, 204 Fed. 709, 29 A. B. R. 412; In re Reynolds, 190 Fed. 967, 27 A. B. R. 200; In re Adler, 170 Fed. 634, 21 A. B. R. 371; In re Anderson, 103 Fed. 854, 4 A. B. R. 640; In re Tischler, 2 N. B. N. R. 549; In re Mayer, 2 N. B. N. R. 257, 98 Fed. 839, 3 A. B. R. 533; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re De Gottardi, 114 Fed. 328, 7 A. B. R. 723. See also In re Purvine, 1 N. B. N. 326, 96 Fed. 192, 2 A. B. R. 787; In re Kuntz, 1 N. B. N. 256; In re Tudor, 1 N. B. N. 476, 96 Fed. 942, 2 N. B. R. 808; In re Oliver, 2 N. B. R. 329, 96 Fed. 85, 2 A. B. R. 783; In re Ogles, 2 N. B. R. 400; In re Pearson, 2 N. B. R. 474; In re Mooney, 15 N. B. R. 456; In re Grassler & Reichwald, 154 Fed. 478, 18 A. B. R. 694; Boyd v. Glucklich, 116 Fed. 131, 8 A. B. R. 393; Ex parte Robinson, 19 Wall. 505, 22

L. ed. 205; Wayne Knitting Mills v. Nugent, 2 N. B. N. R. 714; but see In re Speyer, 6 N. B. R. 255, Fed. Cas. No. 13239.

26—In re Potteiger, 181 Fed. 640, 24 A. B. R. 648.

27—Skubinsky v. Bodek, 172 Fed. 332, 24 L. R. A. (N. S.) 985, 22 A. B. R. 689.

28—In re Fogelman, 204 Fed. 351, 30 A. B. R. 348.

29—In re Dresser, 3 N. B. R. 138, Fed. Cas. No. 4077.

30—In re Peacock, 178 Fed. 851, 24 A. B. R. 159.

Rule applied to failure of bankrupt's son to turn over assets of bankrupt upon order of the court. In re Holland, 176 Fed. 624, 23 A. B. R. 835.

31—In re Mayer, 2 N. B. N. R. 257, 98 Fed. 839, 3 A. B. R. 533.

32—In re Eddleman, 154 Fed. 160, 19 A. B. R. 45.

The misappropriation and dissipation by the bankrupt of funds properly belonging to the estate, but which he has not been ordered to turn over, is not a contempt of court, within the meaning of Revised Statutes, section 725.<sup>33</sup>

### § 1583. — Ability to comply.

The bankrupt cannot be committed for contempt where he is unable to comply with the order requiring him to turn over assets to the trustee.<sup>34</sup> So, it has been held that irrespective of a constitutional prohibition against imprisonment for debt and of the fact that statutory methods for enforcing decrees for the payment of money have been provided, a failure to pay through absolute inability lacks the essential element of a contempt.<sup>35</sup> But the fact that the party is disabled from obeying the order is no defense, where such disability is the result of some voluntary act of his own.<sup>36</sup> The ability to comply with the order to turn over assets should be clearly and affirmatively established<sup>37</sup> by evidence removing all reasonable doubt.<sup>38</sup> Notwithstanding the fact that the bankrupt was in possession of a large amount of property shortly before bankruptcy and at the time of the adjudication is found with but a small amount, contempt proceedings are not justified unless the particular property claimed to be concealed is specifically pointed out.<sup>39</sup>

The property of the bankrupt estate, traced to the recent control or possession of the bankrupt, is presumed to remain there

33—In re Probst, 205 Fed. 512, 30 A. B. R. 600.

34—Stuart v. Reynolds, 204 Fed. 709, 29 A. B. R. 412; Boyd v. Gluecklich, 116 Fed. 131, 8 A. B. R. 393; In re Davison, 143 Fed. 673, 16 A. B. R. 337; In re Reynolds, 190 Fed. 967, 27 A. B. R. 200; Samuel v. Dodd, 142 Fed. 68, 16 A. B. R. 163; In re Cummings, 186 Fed. 1020, 26 A. B. R. 130; In re Marks, 176 Fed. 1018, 23 A. B. R. 911; In re Richards, 183 Fed. 501, 25 A. B. R. 176; In re Adler, 170 Fed. 634, 21 A. B. R. 271; American Trust Co. v. Wallis, 126 Fed. 464, 11 A. B. R. 360.

35—In re Ockershausen, 59 Hun 200; Walton v. Walton, 54 N. J. Eq. 607; Register v. State, 8 Minn. 214.

36—Ropalje on Contempts, § 18; Galland v. Galland, 44 Cal. 475; People v.

Salomon, 54 Ill. 40; Snowman v. Harford, 57 Me. 397; contra, In re Marks, 176 Fed. 1018, 23 A. B. R. 911.

37—In re Cole, 163 Fed. 180, 23 L. R. A. (N. S.) 255, 20 A. B. R. 761.

38—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832; Stuart v. Reynolds, 204 Fed. 709, 29 A. B. R. 412; In re Dickens, 175 Fed. 808, 23 A. B. R. 660; Samel v. Dodd, 142 Fed. 68, 16 A. B. R. 163; In re Mize, 172 Fed. 945, 22 A. B. R. 577; In re Switzer, 140 Fed. 976, 15 A. B. R. 468; Moody v. Cole, 148 Fed. 295, 17 A. B. R. 818; In re Goldfarb Bros., 131 Fed. 643, 12 A. B. R. 386. See also In re Rogowski, 166 Fed. 165, 21 A. B. R. 553.

39—In re Rogowski, 166 Fed. 165, 21 A. B. R. 553.



until he satisfactorily accounts for its disposition or disappearance. He cannot escape punishment for contempt by merely denying under oath that he has possession of the property.<sup>40</sup> The presumption arising from recent possession does not, however, dispense with the necessity of showing affirmatively the ability to comply.<sup>41</sup> Admissions of the receipt of property shortly before bankruptcy is admissible as a basis of calculating what should have been on hand at the commencement of the bankruptcy proceedings.<sup>42</sup> Testimony upon which the order to turn over was granted may also be considered in contempt proceedings.<sup>43</sup>

Upon the question whether the finding and order of the referee is conclusive as to ability to comply with the order at the time of its issuance, the decisions are at variance. In one line are the courts which hold that upon a motion to punish the bankrupt for contempt in failing to comply with an order to turn over assets the only questions are whether the order was made, whether the bankrupt has disobeyed same, and whether he has the present ability to comply with it and that the order itself, the time for review having expired, estops the bankrupt from denying his possession of the assets at the time the same was made.<sup>44</sup> In the other line are the courts which hold in substance that in proceedings against the bankrupt for contempt for failure to obey an order of the referee to turn over money or property, such order may be referred to and given the weight it is entitled to under all the circumstances, but the court should make a new and independent investigation, and should consider all material evidence relating to what preceded as well as what followed the referee's report, and, from such investigation and such evidence, determine whether the order of the referee was justified, whether the bankrupt's disobedience thereof was wil-

40—In re Kramer, 210 Fed. 977, 31 A. B. R. 525; Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832; In re Lasky, 163 Fed. 99, 20 A. B. R. 729; Schweer v. Brown, 130 Fed. 328, 12 A. B. R. 178; but see Samel v. Dodd, 142 Fed. 68, 16 A. B. R. 163 (opinion of Shelby, J.); Boyd v. Glucklich, 116 Fed. 131, 8 A. B. R. 393; but see In re Haring, 193 Fed. 168, 27 A. B. R. 285.

Bare denial by director of bankrupt held insufficient to overcome prima facie

case that he had assets in his possession. In re Weber Co., 200 Fed. 404, 29 A. B. R. 217.

41—Stuart v. Reynolds, 204 Fed. 709, 29 A. B. R. 421 (Shelby, J.).

42—In re Goldfarb Bros., 131 Fed. 643, 12 A. B. R. 386.

43—In re Kramer, 210 Fed. 977, 31 A. B. R. 525.

44—In re Richards, 183 Fed. 501, 25 A. B. R. 176; In re Frankel, 184 Fed. 539, 25 A. B. R. 920.

ful and contumacious and whether he has the present ability to comply therewith.<sup>45</sup>

In a recent well-considered opinion of Circuit Judge McPherson,<sup>46</sup> he outlines the method of inquiring into a bankrupt's failure to account for assets, and of punishing such failure, in the third circuit, as follows:

"When the charge is made that assets have apparently not been accounted for, the referee hears and decides the dispute in the first instance. The point of time to which the inquiry is directed is the date of bankruptcy, and the precise question is whether the bankrupt was then in possession or control of money or of goods that apparently should have come into the hands of the trustee. Being fundamental, this question needs to be examined first of all, but it neither involves the bankrupt's present ability to turn over, nor raises the question whether he should be punished for contempt—except of course as the complexity of human affairs may compel an occasional approach to these allied subjects. The two questions last referred to, therefore, do not need consideration at the first stage of the investigation. If the assets that presumably should have been in the bankrupt's possession or control at the time of bankruptcy have not been accounted for, the referee may, and probably will, draw the natural inference, and direct the bankrupt to pay the money or deliver the goods, as the case may be. If this order becomes final, either by failure to have it reviewed or by affirmance in the district court, a definite step has been taken; the proper tribunal has settled beyond future controversy that the assets described were in the bankrupt's possession or control at the time of bankruptcy.

"Then next comes the question—Are they still there? Or what has become of them? This is evidently a distinct subject, which should not be confused with the order, but should be separately treated. It will need no attention unless the bankrupt should fail to comply with the order to hand over, but failure to comply makes him presumptively liable to punishment for contempt. But only presumptively; he may have a complete answer to any attempt to punish, and in any event he cannot be

45—In re Haring, 29 A. B. R. 387, A. B. R. 787; and see In re Cole, 144 aff'g 193 Fed. 168, 27 A. B. R. 285; Fed. 392, 16 A. B. R. 302.

Moody v. Cole, 148 Fed. 295, 17 A. B. 46—In re Epstein, 206 Fed. 568, 30 R. 818; In re Goodrich, 184 Fed. 5, 25 A. B. R. 387.

punished until he has been heard. In such a hearing the inquiry is directed to the bankrupt's present ability to pay the money or deliver the goods, and unquestionably he makes a sufficient answer if he shows that he is physically unable to obey the order. If it be true that he does not now possess or control the assets, he may still be liable to the criminal law, but, except for wilful disobedience of the court's command, he cannot be confined by civil process.

"The evidence produced must therefore satisfy the judge that the bankrupt is really unable to obey; and is not merely defying the order. This presents a mere question of evidence, and if the bankrupt fails to prove that he cannot comply, he is simply in the ordinary position of a suitor that has not offered enough evidence to prove a fact, and is obliged to take the consequences of such failure."

#### § 1584. Interference with the estate.

The filing of the petition in bankruptcy constitutes a caveat and an injunction against any interference with the property of the bankrupt by persons having no liens thereon, title or claim thereto, and any wilful interference with the bankrupt estate, or attempt to injure it, to withdraw it from the custody of the court, or to conceal it constitutes a contempt.<sup>47</sup> So a seizure of the property under writs of replevin with knowledge of the bankruptcy proceedings,<sup>48</sup> or the taking of possession by attachment,<sup>49</sup> is a contempt. The fact that the petitioning creditor's claims are paid will not justify the taking possession of property of the bankrupt estate.<sup>50</sup> Where there was simply a threat, but no levy under a judgment of a state court nor other interference with the property, the sheriff would not be guilty of contempt.<sup>51</sup>

A landlord claiming title and preventing the removal of property from his property by the receiver in bankruptcy has been held not punishable for contempt in a summary proceeding.<sup>52</sup>

47—*Clay v. Waters*, 178 Fed. 385, 24 A. B. R. 293.

48—*In re Walsh Bros.*, 159 Fed. 560, 20 A. B. R. 472; *In re Wilk*, 155 Fed. 943, 19 A. B. R. 178.

49—*In re Luffy*, 156 Fed. 873, 19 A. B. R. 614.

50—*In re Luffy*, 156 Fed. 873, 19 A. B. R. 614.

51—*In re McBride*, 2 N. B. R. 345.

52—*In re Darlington*, 163 Fed. 385, 20 A. B. R. 805.

### § 1585. Disobedience of injunction.

A restraining order becomes operative upon the defendant from the time of his having notice of its issuance, regardless of the time of the formal service of notice upon him, and a violation thereof at any time thereafter is a contempt.<sup>53</sup> A creditor's failure to obey an order commanding him to stay proceedings in a state court upon his claim may be punished as a contempt.<sup>54</sup>

### § 1586. Failure to file schedules.

The bankrupt's neglect to file schedules may be punished as a contempt.<sup>55</sup>

### § 1587. Failure to produce books and records.

The court also has power to compel the production of the bankrupt's books,<sup>56</sup> or those of third parties where there is reason to believe that they will show the disposition of the bankrupt's property and affect the right of the bankrupt to a discharge which involves the exercise of a wide discretion and should not be interfered with by the appellate court unless manifestly abused, and to punish failure to obey as a contempt.<sup>57</sup> However, a lawful order to produce is a condition precedent to action committing for contempt, and an order adjudging bankrupt in contempt cannot be predicated upon an order to produce books and papers which is made without giving the bankrupt the opportunity to be heard.<sup>58</sup>

An officer of a bankrupt corporation who upon being ordered to produce papers in his possession belonging to it, is guilty of punitive contempt.<sup>59</sup> A bankrupt has been adjudged in contempt for failure to turn over checks which were returned to him upon the balancing of his bank account.<sup>60</sup>

53—Blake v. Nesbet, 144 Fed. 279, 16 A. B. R. 269.

54—In re Mustin, 165 Fed. 506, 21 A. B. R. 147.

55—In re Schulman & Goldstein, 164 Fed. 440, 20 A. B. R. 707.

56—In re Wilson, 116 Fed. 419, 8 A. B. R. 612.

57—Section 41a (3), Act of 1898; In re Morgan, 2 N. B. N. R. 233, 3 A. B. R. 253, 98 Fed. 414; In re Sorkin, 166

Fed. 831, 20 A. B. R. 637; In re Alper, 162 Fed. 207, 19 A. B. R. 612; In re Fellerman, 149 Fed. 244, 17 A. B. R. 785.

58—In re Soloway & Katz, 195 Fed. 100, 28 A. B. R. 225.

59—In re Star Spring Bed Co., 203 Fed. 640, 30 A. B. R. 208.

60—In re Herr, 182 Fed. 715, 25 A. B. R. 141.

**§ 1588. Failure to aid trustee.**

The bankrupt may be punished as in contempt for his failure to obey all lawful orders requiring him to aid the trustee in recovering unscheduled property.<sup>61</sup>

**§ 1589. Assault upon officer.**

An assault upon an officer of the court is contempt.<sup>62</sup>

**§ 1590. Failure of bankrupt to appear for examination.**

The failure to appear for examination may be punished as a contempt,<sup>63</sup> but where the bankrupt is prevented by sickness from attending as required by the referee, he is not in contempt.<sup>64</sup>

**§ 1591. Contempt of trustee.**

Failure of the trustee to file his final account in compliance with an order of the referee may render him liable for contempt.<sup>65</sup>

**§ 1592. Contempt of receivers.**

A receiver in bankruptcy may be punished for contempt for failure to obey orders of the court as where he purchases goods in excess of his authority,<sup>66</sup> or fails to pay a sum with which his account is surcharged.<sup>67</sup> The ability of the receiver to comply with the order to pay such latter sum is measured by the funds he can apply thereto, and is not limited to property or funds of the bankrupt estate.<sup>68</sup>

A receiver of a state court refusing, upon advice of counsel, to turn over the property of the bankrupt to the receiver in bankruptcy is not guilty of contempt.<sup>69</sup>

**§ 1593. Contempt of purchaser at sale.**

Inability of the receiver in bankruptcy to convey good title to property covered by a contract to purchase is a complete

61—In re Nisenson, 182 Fed. 912, 24 A. B. R. 915.

62—Ex parte O'Neal, 125 Fed. 967, 11 A. B. R. 196.

63—Section 41a (4), Act of 1898; In re Sorkin, 166 Fed. 831, 20 A. B. R. 637; In re Smith, 185 Fed. 983, 26 A. B. R. 399.

64—In re Carpenter, 1 N. B. R. 51, Fed. Cas. No. 2427.

65—O'Connor v. Sunseri, 184 Fed. 712, 26 A. B. R. 1.

66—In re Erie Lumber Co., 150 Fed. 817, 17 A. B. R. 689.

67—In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

68—In re Carlile, 199 Fed. 612, 29 A. B. R. 373.

69—In re Zeigler Co., 189 Fed. 259, 26 A. B. R. 761.

defense to the charge of contempt for failure to obey an order requiring the purchaser to carry out his contract.<sup>70</sup>

### § 1594. Contempt of attorneys.

While an attorney may under certain circumstances be punished for contempt,<sup>71</sup> yet in the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held for error in judgment.<sup>72</sup> Nor can he be held for contempt for inducing judicial action on the part of a state court directing the receiver in bankruptcy to surrender property which has come into his possession.<sup>73</sup>

An attorney who mailed a document to his client upon being ordered to produce the same has been held not guilty of contempt where he did not intend to place the same beyond the jurisdiction of the court.<sup>74</sup>

### § 1595. Contempt of witnesses.

The refusal of a witness ordered to appear and be examined concerning the acts, conduct and property of the bankrupt is a contempt and may be punished;<sup>75</sup> so where bankrupt was summoned to appear in supplementary proceedings and filed his petition and was adjudged a bankrupt between the service of the summons and the day fixed for his examination, he was held in contempt and fined, the bankruptcy proceedings not ousting the state court.<sup>76</sup>

Witnesses cannot, however, be required to attend before a referee outside the state of their residence, nor more than a hundred miles from their residence, nor until their lawful mileage and fee for one day's attendance have been paid.<sup>77</sup> The power conferred by the bankruptcy act to compel the attend-

70—In re Jungman, Inc., 186 Fed. 302, 26 A. B. R. 401.

71—Attorneys held equally responsible with their clients for seizure of property. In re Walsh Bros., 159 Fed. 560, 20 A. B. R. 472.

72—In re Watts, 190 U. S. 1, 47 L. ed. 933, 10 A. B. R. 113.

73—In re Watts, 190 U. S. 1, 47 L. ed. 933, 10 A. B. R. 113.

74—In re Johnson & Knox Lumber Co., 151 Fed. 207, 18 A. B. R. 50.

75—Section 41a (4), Act of 1898; In re Howard, 1 N. B. N. 488, 2 A. B. R. 582, 95 Fed. 415, citing In re Feinberg, 2 N. B. R. 425; In re Fay, 3 B. R. 860; In re Pioneer Paper Co., 7 N. B. R. 250; Garrison v. Markley, 7 N. B. R. 246; In re Comstock, 13 N. B. R. 193; In re Fredenberg, 1 N. B. R. 268.

76—Bank v. Graham, 1 N. B. N. 59.

77—Section 41a (4), Act of 1898; In re Johnson & Knox Lumber Co., 151 Fed. 207, 18 A. B. R. 50.

ance of witnesses is not to be considered as changing or enlarging the power of the federal courts to compel their attendance as defined in section 876 of the Revised Statutes of the United States, but is a limitation upon pre-existing rights, so that one cannot be compelled to attend a reference in bankruptcy within the state of his residence, if at a distance of more than one hundred miles therefrom. If the testimony of such witnesses is desired it must be pursuant to section 21 of the law.<sup>78</sup>

A witness is entitled<sup>79</sup> for each day's attendance in court, or before any officer pursuant to law, to one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. By the act of August 3, 1892,<sup>80</sup> witnesses in courts in Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, New Mexico, Arizona and Utah are entitled to receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance and five cents for each mile over any railroad in going to and returning from said court. But no officer of a United States court is entitled to witness fees for attending before any court or commissioner where he is officiating.<sup>81</sup>

No extra allowance can be made to an expert witness, but it is a matter for private contract between the witness and the party summoning him, and such contract will not bind the court nor will it be regarded under any circumstances unless in writing and signed by the parties.<sup>82</sup> If the referee is in the state of witness' residence within a hundred miles thereof and witness has been paid his mileage and fee as stated, he will be guilty of contempt if he wilfully disobeys any lawful order, misbehaves so as to obstruct the hearing, fails to produce any pertinent document which he has been ordered to produce or refuses to appear after being subpoenaed or to take the oath after appearing or to testify after being sworn. The examinations<sup>83</sup> are for the purpose of furnishing creditors and the officers administering the estate full information as to bankrupt's assets. A witness is guilty of contempt if he refuses to attend

78—In re Cole, 133 Fed. 414, 13 A. B. R. 300; In re Hemstreet, 117 Fed. 568, 8 A. B. R. 760.

79—Section 848, U. S. Rev. Stat.

80—1 Supp. Rev. Stat. 165.

81—Section 849, U. S. Rev. Stat.

82—In re Carolina Cooperage Co., 1 N. B. N. 534, 3 A. B. R. 154, 96 Fed. 604.

83—Section 7ag, and 21a, Act of 1898.

or obey an order made on the application of a receiver, for his examination or to produce books or documents tending to show the disposition of property purchased from the bankrupt when fraud against the purchaser is alleged;<sup>84</sup> or to attend a hearing in one city in opposition to a discharge when summoned from another;<sup>85</sup> or, on being examined as to where he obtained the money with which he purchased claims against the bankrupt and answering on cross-examination that he did not get it from the bankrupt, if he does not state where he did get it;<sup>86</sup> but he has been held not in contempt where he did not appear but filed objections declining to submit to examination until the question raised had been decided.<sup>87</sup>

Contempt may be predicated upon false swearing, or upon vague, contradictory and evasive answers,<sup>88</sup> or upon a refusal to answer,<sup>89</sup> by the bankrupt or any other witness,<sup>90</sup> whether before the court or before a special commissioner.<sup>91</sup> The bankrupt cannot, however, be held in contempt for refusal to answer questions which may tend to incriminate him, regardless of whether the proceeding is voluntary or involuntary. The filing of a voluntary petition does not amount to a waiver of the bankrupt's constitutional privilege.<sup>92</sup> If the question is of such a description that the answer may or may not incriminate the bankrupt, he can refuse to answer, but if the court is convinced that the answer to the question cannot by any possibility incrim-

84—*In re Fixen & Co.*, 1 N. B. N. 568, 2 A. B. R. 822, 96 Fed. 748.

85—*In re Woodward*, 12 N. B. R. 297, 8 Ben. 112.

86—*In re Lathrop*, 4 N. B. R. 93, Fed. Cas. No. 8106.

87—*In re Dole*, 7 N. B. R. 538, Fed. Cas. No. 3965.

88—*In re Fogelman*, 204 Fed. 351, 30 A. B. R. 348; *In re Schulman*, 167 Fed. 237, 21 A. B. R. 288, *aff'd* 177 Fed. 191, 23 A. B. R. 809; *In re Singer*, 174 Fed. 208, 23 A. B. R. 28; *In re Bronstein*, 182 Fed. 349, 24 A. B. R. 524; *In re Bick*, 155 Fed. 908, 19 A. B. R. 68; *In re Fellerman*, 149 Fed. 244, 17 A. B. R. 785.

Persistent perjury which blocks the inquiry may be treated as criminal contempt, and if a witness' conduct shows

beyond any doubt that he is refusing to tell what he knows he is in contempt of court. *United States v. Appel*, 211 Fed. 495, 31 A. B. R. 154.

89—*In re Gitkin*, 164 Fed. 71, 21 A. B. R. 113; *In re Fellerman*, 149 Fed. 244, 17 A. B. R. 785.

90—*In re Bronstein*, 182 Fed. 349, 24 A. B. R. 524.

91—*In re Bick*, 155 Fed. 908, 19 A. B. R. 68.

A witness may be punished for contempt for refusing to answer proper questions in a hearing before a referee or special master. *In re Automatic Musical Co.*, 204 Fed. 334, 30 A. B. R. 328.

92—*United States v. Goldstein*, 132 Fed. 789, 12 A. B. R. 755.



inate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer.<sup>93</sup>

The referee cannot compel a witness to answer if he refuses,<sup>94</sup> but he can certify the matter to the judge for punishment as for a contempt.<sup>95</sup>

### § 1596. Insanity as a defense.

Where it is sought to escape the consequences of contempt by a plea in confession and avoidance, such as an allegation of insanity, the burden is upon the defendant.<sup>96</sup>

### § 1597. Advice of counsel.

Reliance upon the advice of counsel cannot shield a party from the consequences of his deliberate disobedience of an order of the referee, but may be considered in mitigation of the penalty for disobedience.<sup>97</sup>

False testimony and concealment of assets, practiced deliberately and even by advice of attorneys, but without giving information as to this advice or the ones furnishing it, constitutes criminal contempt necessitating a definite punishment.<sup>98</sup>

### § 1598. Right to purge contempt.

While a bankrupt or witness may, ordinarily, purge himself of contempt by correcting his testimony before it is acted upon,<sup>99</sup> an offer to testify made after the adjournment of the examination will not purge the contempt.<sup>1</sup> While it is generally true that one accused of constructive contempt, by fully answering all the charges on his oath, is purged thereof, such answers cannot be considered conclusive evidence in case of disobedience of orders in bankruptcy, but they may be contradicted or supported

93—In re Levin, 131 Fed. 388, 11 A. B. R. 382.

94—In re Koch, 1 N. B. R. 153.

95—In re Rosenfield, 1 N. B. R. 60, Fed. Cas. No. 12059.

96—In re Cashman, 168 Fed. 1008, 21 A. B. R. 284.

97—In re Home Discount Co., 147 Fed. 538, 17 A. B. R. 168; United States v. Goldstein, 132 Fed. 789, 12 A. B. R. 755; but see In re Zeigler Co., 189 Fed. 259, 26 A. B. R. 761.

98—In re Fogelman, 204 Fed. 351, 30 A. B. R. 348.

99—In re Bronstein, 182 Fed. 349, 24 A. B. R. 524; In re Wiesebrook, 188 Fed. 757, 26 A. B. R. 745; In re Gordon, 167 Fed. 239, 21 A. B. R. 290.

1—United States v. Goldstein, 132 Fed. 789, 12 A. B. R. 755; In re Farkas, 204 Fed. 343, 30 A. B. R. 337.

by other testimony, in which event the question whether the party has purged himself is to be decided upon a careful consideration of all the evidence.<sup>2</sup>

Punishment for contempt should not be used in such a way as to prevent or delay the administration of the estate, but should include means to secure a proper carrying out of the steps in the bankruptcy proceedings as speedily as possible. So, if a person is in contempt for failure to do what the act requires him to do, he should first be allowed to purge himself of the civil contempt by doing what he ought and by putting the creditors in the position they would have been in if no contempt had occurred.<sup>3</sup>

A bankrupt may purge himself of his contempt by filing his schedules even after he is fined for contempt for failure to file them.<sup>4</sup>

A defendant who has disobeyed an injunction cannot purge himself of the contempt by going into the merits of the case to determine whether the injunction was properly granted.<sup>5</sup>

### § 1599. Practice in contempt proceedings.

### § 1600. — Powers and duties of referee and judge.

Section 41b of the act provides that "The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."<sup>6</sup> The statutory procedure must be strictly followed, and any deviation therefrom may be taken

2—See *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393, opinion of Sanborn, J.; *In re De Gottardi*, 114 Fed. 328, 7 A. B. R. 723.

3—*In re Farkas*, 204 Fed. 343, 30 A. B. R. 337.

4—*In re Schulman & Goldstein*, 164 Fed. 440, 20 A. B. R. 707.

5—*Blake v. Nesbet*, 144 Fed. 279, 16 A. B. R. 269.

6—Analogous provision of Act of 1867. "Sec. 4. . . . Provided, however, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge."

advantage of on a motion to dismiss the proceedings.<sup>7</sup> The court of bankruptcy has no authority to refer the question of the commitment of a person guilty of contempt to the discretion of the referee, since the court alone is authorized to exercise the power of commitment.<sup>8</sup>

The referee cannot punish for contempt, but when committed before him, he should enter the fact on the record and then certify the facts to the judge, who is authorized to impose punishment as for similar offenses committed before a court of bankruptcy.<sup>9</sup>

The referee has the right and it is his duty to determine judicially in the first place whether a contempt has been committed, and, if he thinks not, to refuse to certify the matter for contempt proceedings before the judge. The only recourse the aggrieved party has is by petition for revision, or exceptions to the referee's report.<sup>10</sup>

For a direct contempt, that is one occurring in the presence of the court, the court may act on its own knowledge. Where a constructive contempt, not occurring in the presence of the court, but arising out of the bankrupt's failure to comply with an order of the court, it is proper to adhere substantially to the method of criminal procedure, except in the matter of a jury trial, and the attachment or rule should be like an indictment, to the extent of giving the bankrupt an opportunity to defend by informing him of the nature of the offense charged.<sup>11</sup>

In contempt cases, and especially in those which involve the charge of another criminal charge besides the contempt, the rules of evidence applicable to civil case in reference to presumptions and the shifting of the burden of proof, do not apply; but the proceedings and the rules of evidence and presumptions of law applied in criminal cases should be observed.<sup>12</sup>

7—In re Gitkin, 164 Fed. 71, 21 A. B. R. 113; contra, *United States v. Henkel*, 185 Fed. 553, 26 A. B. R. 199.

8—*Smith v. Belford*, 106 Fed. 658, 5 A. B. R. 291.

9—Sections 2 (13) and 2 (16), Act of 1898; In re Miller, 105 Fed. 57, 5 A. B. R. 154; *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393; In re Taylor, 5 A. B. R. 184, 105 Fed. 509; In re

Romine, 138 Fed. 837, 14 A. B. R. 785; In re Haring, 193 Fed. 168, 27 A. B. R. 285; *Bank of Ravenswood v. Johnson*, 143 Fed. 463, 16 A. B. R. 206.

10—In re Romine, 138 Fed. 837, 14 A. B. R. 785.

11—*Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412.

12—*Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412.

### § 1601. — Proceedings against several bankrupts.

Two bankrupts may be proceeded against together.<sup>13</sup>

### § 1602. — The application.

A petition to punish the bankrupt as for contempt for disobedience of an order to turn over assets need not allege the bankrupt's present ability to comply with the order,<sup>14</sup> although it is held that a petition which contains no allegation that the bankrupt's failure to turn over property was wilful, nor anything to show that it was not caused by mere inability is insufficient.<sup>15</sup>

A petition charging that the bankrupt was guilty of perjury will not support a conviction under section 41a for refusal to be examined.<sup>16</sup>

### § 1603. — The hearing.

While proceedings in bankruptcy may be summary, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right after being so advised to have a reasonable time to prepare his defense and produce his witnesses; a failure to give such notice and opportunity, cannot be cured by subsequently permitting the bankrupt to introduce evidence.<sup>17</sup> A certified copy of the petition and rule to show cause should be served upon the alleged contemnor in person, and proof of service be filed with the case.<sup>18</sup>

The contempt proceedings may be commenced before the cross-examination of the bankrupt.<sup>19</sup>

The constitutional guaranty of the right to a trial by jury in all common law actions is not applicable to statutory proceedings

13—In re Fellerman, 149 Fed. 244, 17 A. B. R. 785.

14—In re Stavrahn, 174 Fed. 330, 23 A. B. R. 168.

15—In re Cole, 163 Fed. 180, 23 L. R. A. (N. S.) 255, 20 A. B. R. 761.

16—Magen v. Campbell, 186 Fed. 675, 26 A. B. R. 594.

17—In re Rosser, 101 Fed. 562, 4 A. B. R. 153; Boyd v. Gluecklich, 116 Fed. 131, 8 A. B. R. 393. See In re Pearson,

1 N. B. N. 474, 2 A. B. R. 819; In re Banzai Mfg. Co., 183 Fed. 298, 25 A. B. R. 497; In re Cole, 144 Fed. 392, 16 A. B. R. 302; In re Baum, 169 Fed. 410, 22 A. B. R. 295.

18—In re Hooks Smelting Co., 140 Fed. 991, 15 A. B. R. 834.

19—In re Schulman, 177 Fed. 191, 23 A. B. R. 809, aff'g 167 Fed. 237, 21 A. B. R. 288.

in which the court exercises the powers of a special tribunal, as when acting as a court of bankruptcy, and such court has power and jurisdiction, on the petition of the trustee without a jury trial, to punish a bankrupt or others for failure to obey an order requiring him to surrender property in his possession belonging to his estate in bankruptcy,<sup>20</sup> and the like. Punishment for contempt is a summary proceeding to be dealt with by the court in the first instance without the intervention of a jury.<sup>21</sup>

The proceedings in contempt being criminal in their nature, the commission thereof must be proved beyond a reasonable doubt.<sup>22</sup> Proof may, however, be supplied by bankrupt's admissions.<sup>23</sup>

The hearing cannot be converted into an appellate proceeding to determine the correctness of orders made by the referee after a hearing on the merits,<sup>24</sup> and where the ownership and value of the property which the party has failed to turn over has been determined in another proceeding before a special master, such questions cannot be relitigated upon a motion to punish for contempt.<sup>25</sup>

The sworn answer of the alleged contemnor is controvertible.<sup>26</sup>

### § 1604. — The order of the court.

There can be no commitment for contempt before judgment of contempt. An order requiring a trustee to file his account on or before a certain date, or in the alternative to be committed for contempt<sup>27</sup> or an order to turn over property to the trustee

20—*Ripon Knitting Works v. Schreiber*, 2 N. B. N. R. 899, 101 Fed. 810, 4 A. B. R. 299.

21—*Hendryx v. Fitzpatrick*, 19 Fed. 810; *Cooley's Const. Lim.* 6th Ed. 389; *In re Fellerman*, 149 Fed. 244, 17 A. B. R. 785; *In re Bick*, 155 Fed. 908, 19 A. B. R. 68.

22—*In re Cashman*, 168 Fed. 1008, 21 A. B. R. 284; *In re Switzer*, 140 Fed. 976, 15 A. B. R. 468; *In re Goldfarb Bros.*, 131 Fed. 643, 12 A. B. R. 386; *Samel v. Dodd*, 142 Fed. 68, 16 A. B. R. 163; *In re Dickens*, 175 Fed. 808, 23 A. B. R. 660; *In re Mize*, 172 Fed. 945, 22 A. B. R. 577.

23—*In re Goldfarb Bros.*, 131 Fed. 643, 12 A. B. R. 386; *In re Cashman*, 168 Fed. 1008, 21 A. B. R. 284.

24—*In re Home Discount Co.*, 147 Fed. 538, 17 A. B. R. 168; *In re Richards*, 183 Fed. 501, 25 A. B. R. 176; *In re Frankel*, 184 Fed. 539, 25 A. B. R. 920. But see *In re Haring*, 193 Fed. 168, 27 A. B. R. 285, and cases cited; *Moody v. Cole*, 148 Fed. 295, 17 A. B. R. 818.

25—*In re Strobel*, 163 Fed. 380, 20 A. B. R. 754.

26—*In re Fellerman*, 149 Fed. 244, 17 A. B. R. 785; *In re Lasky*, 163 Fed. 99, 20 A. B. R. 729; *Schweer v. Brown*, 130 Fed. 328, 12 A. B. R. 178. See *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393, opinion of Sanborn, J.; *In re Gottardi*, 114 Fed. 328, 7 A. B. R. 723.

27—*O'Connor v. Sunseri*, 184 Fed. 712, 26 A. B. R. 1.

which leaves the question of the bankrupt's default and his consequent contempt to be determined without further action by the court <sup>28</sup> is not a judgment of contempt upon which a commitment can be based.

Where the bankrupt is under indictment in the local courts, the bankruptcy court may postpone the making of any order in the contempt proceeding until the trial of the bankrupt in the state court.<sup>29</sup>

An order allowing the bankrupt additional time to comply with an order of the referee to turn over assets is in effect an affirmance of the order of the referee, and the court by striking out the provision in the referee's order, "that in default thereof let the above-named bankrupt be committed for contempt" does not adjudicate that the bankrupt should not be punished for contempt, but leaves such a motion to be brought on at a subsequent period, if the bankrupt does not avail himself of the opportunity to pay within the extended time.<sup>30</sup>

### § 1605. — Review of order of commitment.

While the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, was formerly not subject to review,<sup>31</sup> in some jurisdictions the power to punish has been much restricted and the right of review and appeal from such proceedings is allowed. Nor was there, in the system of federal jurisprudence, any relief against such orders, when the court had authority to make them, except through the court making the order, or by the exercise of the pardoning power. When, however, a court undertakes by its process of contempt, to impose punishment for refusal to comply with an order which it had no authority to make, the order itself, being without jurisdiction, is void, and the order of punishment is equally void. When the proceeding for contempt in such a case results in imprisonment, the proper course is to sue out a writ of habeas corpus for the discharge of the prisoner.<sup>32</sup> The inquiry cannot, however, be extended upon a writ of habeas corpus so as to

28—*In re Baum*, 169 Fed. 410, 22 A. B. R. 295.

29—*In re Hooks Smelting Co.*, 146 Fed. 336, 17 A. B. R. 141.

30—*In re Herskowitz*, 136 Fed. 950, 14 A. B. R. 86.

31—*Hays v. Fisher*, 102 U. S. (12 Otto) 121, 26 L. ed. 95; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 211.

32—*Ex parte Fisk*, 113 U. S. 713, 718, 28 L. ed. 1117; *Ex parte Rowland*, 104 U. S. (14 Otto) 604, 26 L. ed. 861.

review, as upon writ of error, any irregularities of the district court in the proceedings, or to determine, as upon appeal, the real merits of the case.<sup>33</sup>

A judgment for criminal contempt is not reviewable by appeal, and a judgment against a party for a civil contempt committed before the final decree is reviewable by appeal from the final decree only. If the contempt is committed after the final decree, the judgment is reviewable by appeal or petition to revise.<sup>34</sup>

An order adjudging the bankrupt in contempt based upon the findings of the referee will not be reversed by the appellate court in the absence of clear proof of error.<sup>35</sup>

### § 1606. Punishment for contempt.

The constitutions of most of the states contain limitations forbidding imprisonment for debt. While the federal constitution contains no such provision, section 990 of the Revised Statutes provides that there shall be no imprisonment for debt in any state on process issuing from a court of the United States, where, by the laws of such state imprisonment for debt has been or shall be abolished. Imprisonment for the violation of an order of a court to turn over money to a trustee, or to disclose the whereabouts of concealed property, cannot be considered as imprisonment for debt.<sup>36</sup>

The power of the bankruptcy courts to punish for contempt must be exercised according to the general principles governing contempt proceedings.<sup>37</sup> The rules governing the administration of the law of contempt laid down in *Gompers v. Buck Stove Co.*,<sup>38</sup> apply in bankruptcy cases.<sup>39</sup> In that decision it is said that the character and purpose of the punishment distinguish civil and criminal contempts. The punishment for a civil con-

33—*Ex parte O'Neal*, 125 Fed. 967, 11 A. B. R. 196.

34—*Clay v. Waters*, 178 Fed. 385, 24 A. B. R. 293; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393; *In re Cole*, 163 Fed. 180, 23 L. R. A. (N. S.) 255, 20 A. B. R. 761.

35—*In re Levy & Co.*, 142 Fed. 442, 15 A. B. R. 166.

36—*Schweer v. Brown*, 130 Fed. 328, 12 A. B. R. 178; *Mueller v. Nugent*,

184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224; *In re Schlesinger*, 102 Fed. 117, 4 A. B. R. 361; *Ripon Knitting Works v. Schreiber*, 101 Fed. 810, 2 N. B. N. R. 899, 4 A. B. R. 299. See *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393. But see *Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412 (*Shelby, J.*).

37—*In re Kahn*, 204 Fed. 581, 30 A. B. R. 322.

38—224 U. S. 418, 55 L. ed. 797.

39—*In re Kahn*, 204 Fed. 581, 30 A. B. R. 322.

tempt is remedial and for the benefit of the complainant in the contempt proceedings. The punishment for a criminal contempt is punitive—to vindicate the authority of the court. If imprisonment be imposed in a civil proceeding it must be coercive in its nature. The committal must stand only unless and until the defendant performs the affirmative act required by the court's order. When inflicted in a criminal proceeding it is fixed and certain as a punishment for completed disobedience of orders or for other past wrongdoing.

When the contempt consists of a violation of the order of the court, and is not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of court, or until further order of court,<sup>40</sup> the defendant being committed to the custody of the marshal until the fine has been paid, or the order obeyed.<sup>41</sup>

Where it appears that the bankrupt is unable to respond to an order to turn over assets, his commitment should not be continued indefinitely, regardless of the grossness of his fraud in disposing of his property, but his imprisonment should be limited according to circumstances.<sup>42</sup>

Where the refusal of a third person to answer a question is not a wilful contempt, a nominal fine only will be imposed.<sup>43</sup>

Upon a motion to punish the bankrupt for contempt for failure to file his schedules, the bankrupt should be fined a sufficient amount to compensate the attorneys for their trouble in making the motion, and if such fines do not prove sufficient to put a stop in the delay in filing the schedules, punishment by imprisonment may be imposed.<sup>44</sup>

The bankrupt cannot be sentenced to a fixed term of imprisonment as a punishment for contempt, in proceedings instituted by an attorney of the receiver in bankruptcy and not by the public prosecutor.<sup>45</sup> The certified copy of the proceedings of

40—In re Allen, 13 Blatchf. 271; Green v. Elgie, 8 Jurist, Part I, 187; In re Yates, 4 Johns. 317, 9 Johns. 395.

41—In re Chiles, 22 Wall. 157, 169, 22 L. ed. 819.

42—In re Karp, 196 Fed. 998, 28 A. B. R. 559; In re Taylor, 114 Fed. 607, 7 A. B. R. 410.

43—In re Lathrop, Haskins & Co., 184 Fed. 534, 24 A. B. R. 911.

44—In re Schulman & Goldstein, 164 Fed. 440, 20 A. B. R. 707.

45—In re Kahn, 204 Fed. 581, 30 A. B. R. 322.



contempt and of the attachment is sufficient to justify not only the United States attorney in making the necessary complaint, but to authorize the issuance of a warrant of arrest by the proper officer, precisely as a certified copy of an indictment would be in any other case of crime.<sup>46</sup>

### § 1607. Discharge from imprisonment.

The bankrupt may be discharged from imprisonment for failure to turn over assets to the trustee upon showing his inability to comply with the court order.<sup>47</sup>

### § 1608. Pardon of contempts.

"When a court commits a party for a contempt, its adjudication is a conviction and the commitment in consequence is execution. After a conviction and a commitment for a contempt, the court has no more power to discharge or remit the sentence than it has in the case of a conviction and commitment for any other crime or offense against the United States."<sup>48</sup> Under the constitution the President is invested with power "to grant reprieves and pardons for offenses against the United States," and the exercise of this prerogative extends as well to cases of punishment of contempt for disobedience of lawful process of a federal court as to misbehavior in its presence.<sup>49</sup> It has been held further that a "contempt of court is an offense against the state, and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon at its discretion the offender."<sup>50</sup> These observations apply only where the term at which the conviction was had has expired and by reason thereof the case has passed beyond the jurisdiction of the court. The term of the court of bankruptcy being considered as continuous from the commencement of a proceeding to the closing of an estate,<sup>51</sup> the

46—U. S. v. Jacobi, 4 Amer. Law T. Rep., U. S. Cts., 148, 151.

47—In re Cummings, 188 Fed. 767, 26 A. B. R. 477.

48—Ex parte Kearney, 7 Wheat. 38, 43, 5 L. ed. 211. See Fisher v. Hayes, 6 Fed. 63.

49—In re Mulee, 7 Blatchf. 23; Ex parte Kearney, 7 Wheat. 38, 42, 5 L. ed.

211; 3 Op. Atty. Genl. 622, 4 Id. 458, 5 Id. 579; Ex parte Fisk, 113 U. S. 713, 718, 28 L. ed. 1117.

50—State v. Sauvinct, 24 La. Ann. 119.

51—In re Ives, 113 Fed. 911, 7 A. B. R. 692; Jemison Mercantile Co., 112 Fed. 966, 7 A. B. R. 588.

court would have power and control over such matters during the pendency of the proceeding, the rule being that during the existence of the term, the court has general and full power over this as over any other kind of judgment, order or decree in either civil or criminal cases.<sup>52</sup>

The fact that a fine has been imposed as a punishment for a contempt, does not remove the case beyond the pardoning power of the President, because the amount of the fine is directed in the order imposing it to be paid to the plaintiff in the suit, towards the reimbursement of his expenses in the attachment proceedings in respect of such contempt.<sup>53</sup> If the right to the fine could be regarded as a vested private right of the plaintiff in the suit, existing in the shape of a judgment, the President might still pardon the offense and imprisonment, with the exception or saving as to the fine, in which case the fine would remain as a debt recoverable according to the appropriate legal remedies.<sup>54</sup>

52—*Fischer v. Hayes*, 6 Fed. 63; *Ex parte Lange*, 18 Wall. 163, 167, 21 L. ed. 872; *Bank of U. S. v. Moss*, 6 How. 31, 12 L. ed. 331.

53—*In re Mulee*, 7 Blatchf. 23.

54—*Drayton and Sear's Case*, 5 Op. Atty. Genl. 579.

## CHAPTER XXXVII

### CRIMES AND OFFENSES

- § 1609. Jurisdiction over offenses.
- § 1610. Exemption from prosecution.
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#### § 1609. Jurisdiction over offenses.

Courts of bankruptcy with which the circuit courts had concurrent jurisdiction prior to their abolishment,<sup>1</sup> within their respective territorial limits, have jurisdiction to arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the procedure of the United States now in force, or such as may hereafter be enacted, regulating trials for the alleged violation of the laws of the United States.<sup>2</sup> If the bankruptcy court obtains jurisdiction over violators of the act, it may enforce the provisions against them though they may be aliens.<sup>3</sup>

1—Section 23c, Act of 1898.

2—Section 2 (4), Act of 1898.

3—*Olcott v. McLean*, 14 N. B. R.

379.

### § 1610. Exemption from prosecution.

Section 7 of the act does not exempt the bankrupt from prosecution for crimes which are disclosed by his testimony. It merely protects him from the use of his testimony in such criminal proceedings.<sup>4</sup>

### § 1611. Concealment of assets.

A person who has, while a bankrupt, or after his discharge, concealed from his trustee any of the property belonging to his estate in bankruptcy is guilty of concealment of assets.<sup>5</sup> While the act does not make it a criminal offense for a person other than the bankrupt, unconnected with him in any way, to conceal the bankrupt's property from the trustee,<sup>6</sup> it is held that an officer of a bankrupt corporation may be guilty thereof if he participated in the concealment.<sup>7</sup> The offense may be committed by a corporation.<sup>8</sup>

This offense would occur where assets are secreted, falsified or mutilated.<sup>9</sup> The provision is a penal one and cannot therefore be given a retroactive effect so that to create an offense under it the act must have been committed since July 1, 1898, the date of the passage of the law.<sup>10</sup>

A conviction cannot be upheld without adjudication as a bankrupt<sup>11</sup> but where there has been an adjudication, the same cannot be attacked collaterally.<sup>12</sup> The offense is concealing from the trustee so that, if no trustee has been appointed, there can be no offense;<sup>13</sup> but if property is afterwards discovered, the proper course is to have a trustee appointed,<sup>14</sup> and then, if the

4—Burrell v. State, 194 U. S. 572, 48 L. ed. 1122, 12 A. B. R. 132, aff'g 27 Mont. 282.

5—Section 29b, Act of 1898.

6—United States v. Grodson, 164 Fed. 157, 21 A. B. R. 68; United States v. Waldman, 188 Fed. 524, 26 A. B. R. 677.

7—United States v. Freed, 179 Fed. 236, 25 A. B. R. 89; contra, United States v. Lake, 129 Fed. 499, 12 A. B. R. 270.

8—United States v. Freed, 179 Fed. 236, 25 A. B. R. 89; Cohen v. United States, 157 Fed. 651, 19 A. B. R. 8, aff'g 142 Fed. 983, 15 A. B. R. 357.

9—Section 1 (22), Act of 1898.

10—In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 Fed. 282; In re Webb, 2 N. B. N. R. 289, 3 A. B. R. 386, 98 Fed. 404, below 2 N. B. N. R. 11, 3 A. B. R. 204.

11—Gilbertson v. United States, 168 Fed. 672, 22 A. B. R. 32.

12—United States v. Freed, 179 Fed. 236, 25 A. B. R. 89.

13—In re Adams, 171 Fed. 599, 22 A. B. R. 613; In re Leszynsky, 2 N. B. N. R. 738. But see United States v. Goldstein, 132 Fed. 789, 12 A. B. R. 755.

14—In re Smith, 1 N. B. N. 532, 2 A. B. R. 190, 93 Fed. 791.

concealment continues, the offense will be committed. Demand by the trustee is not necessary, but the offense is complete when the schedule is filed.<sup>15</sup> It must be knowingly and fraudulently done;<sup>16</sup> and, if due to a mistake either in law or fact, it does not constitute the offense,<sup>17</sup> nor where property is omitted because deemed worthless or because after acquired,<sup>18</sup> or because it was not known at the time that a substantial interest existed in the property concealed;<sup>19</sup> or where the property was incumbered for more than it was worth.<sup>20</sup> The mere omission through ignorance or otherwise, to turn over property, or put it in the schedules is not an offense,<sup>21</sup> and it is not sufficient to constitute the offense that the bankrupt collects money due him at the time of the filing of the petition and applies the same to the payment of a debt, if such payment is honestly made, even though the result of such payment is to advantage a creditor.<sup>22</sup> But it is no defense that the bankrupt at the time of concealing his property did not know of the appointment of the trustee or the latter's identity.<sup>23</sup>

To constitute the offense the bankrupt must have a present interest in the property, and, if previously to the bankruptcy proceedings he has actually conveyed it away so that between

15—U. S. v. Smith, 13 N. B. R. 6, Fed. Cas. No. 16339; U. S. v. Clark, 4 N. B. R. 14.

16—United States v. Lowenstein, 126 Fed. 884, 11 A. B. R. 134; In re Taplin, 135 Fed. 861, 14 A. B. R. 360; In re Lowenstein, 1 N. B. N. 329, 2 A. B. R. 193; In re Cohn, 1 N. B. N. 330, 1 A. B. R. 655; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366, 370; In re Mendelsohn, 1 N. B. N. 391; In re Roy, 1 N. B. N. 526, 3 A. B. R. 37, 96 Fed. 400; In re Skinner, 97 Fed. 190, 3 A. B. R. 163; In re Hyman, 3 A. B. R. 169, 171, 97 Fed. 195; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 Fed. 81; In re Adams, 104 Fed. 72, 2 N. B. N. R. 1034. See also In re Hussman, 2 N. B. R. 437; In re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11583; In re Goodfellow, 3 N. B. R. 114, Fed. Cas. No. 5536; In re Rainsford, 5 N. B. R. 381, Fed. Cas. No. 11537; In re Hill, 1 N. B. R. 42, 2 Ben. 136, Fed. Cas. No. 6482.

17—In re Morrow, 3 A. B. R. 263, 97 Fed. 574; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366, 370; Huber v. Huber, 1 N. B. N. 431; In re Wilson, Fed. Cas. No. 17783; In re Boynton, 10 Fed. 277; In re Warre, 10 Fed. 377; In re Freeman, 4 N. B. R. 17, 4 Ben. 245, Fed. Cas. No. 5082.

18—In re Pearce, Fed. Cas. No. 10783; In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17885; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Todd, 112 Fed. 315, 7 A. B. R. 770.

19—In re Hirsch, 2 N. B. N. R. 137, 3 A. B. R. 344, 97 Fed. 571; In re Parker, Fed. Cas. No. 10720; In re Shoemaker, Fed. Cas. No. 12799.

20—In re Townsend, 3 Fed. 559.

21—United States v. Levinson & Kornblut, 13 A. B. R. 29.

22—United States v. Lowenstein, 126 Fed. 884, 11 A. B. R. 134.

23—United States v. Comstock, 161 Fed. 644, 20 A. B. R. 520.

him and the grantee the title has actually passed; though the conveyance might be set aside by creditors or a trustee in bankruptcy, such transfer not being merely colorable or on a secret trust for bankrupt's benefit, his failure to include it would not constitute the offense.<sup>24</sup>

A concealment prior to filing of petition continuing thereafter is sufficient to constitute the offense.<sup>25</sup> So, the intentional and fraudulent omission of property previously conveyed in fraud of creditors, whether such conveyance was prior or subsequent to the bankruptcy act, where there is a secret trust for bankrupt's benefit, is a violation of the act, because the concealment is a continuing act and is perpetuated whenever the bankrupt's duty to reveal such assets exists and is knowingly disregarded and concealment may be effected by concealment of the title as well as by hiding the property, and it is not necessary that bankrupt himself should be able to recover it, if his creditors or trustee can do so.<sup>26</sup> Also where property was concealed from the receiver of a state court and was not subsequently turned over to the trustee in bankruptcy;<sup>27</sup> or where there is a large shortage in the bankrupt's assets, or a disappearance of some, which bankrupt fails to satisfactorily explain;<sup>28</sup> but mere inability to

24—In re Cornell, 3 A. B. R. 172, 97 Fed. 29; In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 Fed. 282; In re Crenshaw, 2 A. B. R. 623, 625, 95 Fed. 632; In re Hirsch, 2 A. B. R. 715, 726, 96 Fed. 468; In re Headley, 3 A. B. R. 272, 1 N. B. N. 250, 97 Fed. 765, ref. dec. 2 N. B. N. R. 684; In re Webb, 2 N. B. N. R. 289, 3 A. B. R. 386, 98 Fed. 404, ref. dec. 2 N. B. N. R. 11, 3 A. B. R. 204; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 Fed. 81.

25—United States v. Levinson & Kornblut, 13 A. B. R. 29; Cohen v. United States, 157 Fed. 651, 19 A. B. R. 8, aff'g 142 Fed. 983, 15 A. B. R. 357; Warren v. United States, 199 Fed. 753, 43 L. R. A. (N. S.) 278, 29 A. B. R. 555.

26—In re Berner, 2 N. B. N. R. 268; In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 Fed. 282; Citizens Bank of Salem v. De Paw Co., 3 N. B. N. R. 244; In re McNamara, 2 A. B. R.

566, 579; In re Hussman, 2 N. B. R. 437; In re Rathbone, 1 N. B. R. 536, 2 N. B. R. 260, Fed. Cas. No. 11583; In re Hill, 1 N. B. R. 431, Fed. Cas. No. 6483; In re Goodridge, 2 N. B. R. 324.

27—In re Lesser, 108 Fed. 205, 5 A. B. R. 331.

28—In re Finkelstein, 2 N. B. N. R. 839, 101 Fed. 418, 3 A. B. R. 800; In re Ablowich, 2 N. B. N. R. 386, 3 A. B. R. 586, 98 Fed. 81; In re O'Gara, 3 A. B. R. 349, 97 Fed. 952; In re Schlesinger, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 Fed. 930; In re Meyers, 2 A. B. R. 707, 1 N. B. N. 515, 96 Fed. 408; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re Purvine, 1 N. B. N. 326, 2 A. B. R. 787, 96 Fed. 192; In re Rosser, 1 N. B. N. 469, 2 A. B. R. 746, 96 Fed. 308; In re Tudor, 1 N. B. N. 476, 2 A. B. R. 808, 96 Fed. 942; Ripon Knitting Works v. Schreiber, 2 N. B. N. R. 545, 101 Fed. 810, 4 A. B. R. 299; In re

give a satisfactory explanation will not make it so.<sup>29</sup> The omission of property conveyed by bankrupt to his wife for the purpose of covering it up is an offense under this provision;<sup>30</sup> but it is not for an attorney at law to omit listing contracts for contingent fees unearned;<sup>31</sup> and whether or not failure to list an interest in remainder under a will constitutes the offense depends upon whether the interest can be subjected to the claims of creditors in any way.<sup>32</sup> It is no excuse for the bankrupt to say that he omitted property from his schedules on the ground that he would be entitled to such property as an exemption.<sup>33</sup>

The amount or value of the property concealed is immaterial.<sup>34</sup> The bankrupt is none the less guilty of concealing assets because the facts and circumstances relating to the fraudulent transfer were made known to the trustee on bankrupt's examination, the essence of the offense being the placing of the property out of the trustee's reach by the bankrupt with intent to retain it for himself.<sup>35</sup>

The filing of amended schedules giving a full statement of property including that which was originally omitted, or assisting the trustee in obtaining possession of property not originally scheduled, while evidence tending to show the absence of an unlawful intent, is not a conclusive answer to a charge of concealment, and should not be considered as avoiding the consequences of the unlawful act.<sup>36</sup> The wilful and fraudulent omission by bankrupt of part of his assets from his schedules may be cause for prosecution under the act, but it is not an infamous crime as the term is used at common law and in the fifth amendment to the constitution.<sup>37</sup>

Kuntz, 1 N. B. N. 256; *In re Mendelsohn*, 1 N. B. N. 391.

29—*In re Idzall*, 2 A. B. R. 741, 96 Fed. 314.

30—*In re Skinner*, 3 A. B. R. 163, 97 Fed. 190; *In re Welch*, 1 N. B. N. 533, 3 A. B. R. 93, 100 Fed. 65; but see *In re De Leeuw*, 2 N. B. N. R. 267, 3 A. B. R. 418, 98 Fed. 408; *In re Freund*, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 Fed. 81.

31—*In re McAdam*, 2 N. B. N. R. 256, 3 A. B. R. 417, 98 Fed. 409.

32—*In re Wetmore*, 99 Fed. 703, 3 A. B. R. 700; *In re Wood*, 98 Fed. 972, 3 A. B. R. 572; *In re Baudoine*, 1 N.

B. N. 506, 3 A. B. R. 55, 96 Fed. 536; *In re Hoadley*, 2 N. B. N. R. 704, 101 Fed. 233, 3 A. B. R. 780; *In re St. John*, 3 N. B. N. R. 114.

33—*In re Royal*, 112 Fed. 135, 7 A. B. R. 106; see *In re Lemmel*, 118 Fed. 487.

34—*In re Hirshowitz*, 194 Fed. 562, 27 A. B. R. 701.

35—*In re Quackenbush*, 2 N. B. N. R. 964, 102 Fed. 282, 4 A. B. R. 274.

36—*Kern v. United States*, 169 Fed. 617, 22 A. B. R. 223; *In re Eaton*, 110 Fed. 731, 6 A. B. R. 531.

37—*U. S. v. Block*, 15 N. B. R. 325, 4 Sawy. 211, Fed. Cas. No. 14609.

A charge of fraud in the concealment of a bankrupt's estate from which the badges and indicia of fraud are deducible must be overcome by positive testimony.<sup>38</sup>

### § 1612. False oath or account.

The act expressly makes it an offense to make a false oath or account in, or in relation to any proceeding in bankruptcy.<sup>39</sup> The offense may be committed by persons other than the bankrupt.<sup>40</sup>

The same rule as to the time of making the oath applies as was stated in the preceding section of this chapter as to the concealing of assets, that is, it must have been after the passage of the act of July 1, 1898. A false oath is a wilful, deliberate, intentional falsehood; or statement of something that the person making it knows or should know is untrue, or recklessly makes, without knowing whether it is true or not,<sup>41</sup> or without having reasonable grounds for believing it to be true, in regard to a material matter;<sup>42</sup> and may be in any part of the bankruptcy proceedings,<sup>43</sup> but it must be all material to the proceedings in bankruptcy, and have some relation to the bankrupt's estate or his acts affecting his estate and be knowingly and fraudulently made.<sup>44</sup> Thus the offense is committed in making a pauper affidavit when bankrupt lives in affluence and the entire circumstance shows that he has the control of money;<sup>45</sup> or where he

38—In re Goodridge, 2 N. B. R. 105, Fed. Cas. No. 5547.

39—Section 29b (2), Act of 1898.

40—United States v. Waldman, 188 Fed. 524, 26 A. B. R. 677.

41—In re White, 1 N. B. N. 202.

42—In re Huber, 1 N. B. N. 431; In re Strouse, 2 N. B. N. R. 64; In re Bushnell, 1 N. B. N. 528; In re Lemmel, 118 Fed. 487.

43—In re Conroy, 134 Fed. 764, 14 A. B. R. 249.

False oath includes the commission of perjury in the making of schedules, or on an examination. In re Adams, 171 Fed. 599, 22 A. B. R. 613.

Indictment may be predicated upon false swearing at an examination before a special commissioner prior to the ad-

judication. United States v. Liberman, 176 Fed. 161, 23 A. B. R. 734.

An indictment for perjury may be predicated upon false swearing by the bankrupt in an examination to determine the validity of a creditor's claim. United States v. Simon, 146 Fed. 89, 17 A. B. R. 41.

False oath in proceedings for a discharge is an offense. Edelstein v. United States, 149 Fed. 636, 9 L. R. A. (N. S.) 236, 17 A. B. R. 649; In re Kretsch, 172 Fed. 523, 22 A. B. R. 284.

44—Bauman v. Feist, 107 Fed. 83, 5 A. B. R. 703.

45—In re Williams, 2 N. B. N. R. 206, but see Sellers v. Bell, 94 Fed. 801, 2 A. B. R. 529.



states in his schedule that all of his property was turned over to a state receiver, which was not true.<sup>46</sup>

The verification of schedules from which valuable property is knowingly omitted or which contains a false statement constitutes a false oath, if the omission was with fraudulent intent;<sup>47</sup> thus it would constitute a false oath for the bankrupt to state in his schedules that he has paid nothing to his attorneys for their services and had assigned no property, when he had given them an order for money due for services, but not yet payable, in payment of a past indebtedness to such attorneys;<sup>48</sup> or when he states that an indebtedness is a bona fide loan when the facts and circumstances fail to carry it out;<sup>49</sup> or where he is called upon to explain the disposition of money drawn by him from his business and adopted a method of accounting which enabled him to avoid an explanation of what he did with a large sum;<sup>50</sup> or where he produces a false and inaccurate statement of expenditures for the purpose of making a good showing as to the disposition of a sum of money.<sup>51</sup> A false oath as to the ownership of property is an offense and will prevent a discharge even though the property cannot be administered in the proceeding.<sup>52</sup>

Wherever the offense of concealing property from the trustee is committed by its omission from the schedules, or failure to disclose it on examination, there will also be a false oath; but there may be omission from the schedules which will make the oath to them false but will not constitute knowingly and fraudulently concealing property from the trustee.<sup>53</sup> A bankrupt is not guilty of making a false oath when he omits from his sworn schedule securities which are absolutely worthless,<sup>54</sup> and the omission from bankrupt's schedules of stock held by his wife which was purchased with money borrowed by her would not

46—In re Lesser, 108 Fed. 205, 5 A. B. R. 331.

47—In re Adams, 171 Fed. 599, 22 A. B. R. 613; In re Eaton, 110 Fed. 731, 6 A. B. R. 531; In re Becker, 106 Fed. 54, 5 A. B. R. 438; In re Lemmel, 118 Fed. 487; Osborne v. Perkins, 112 Fed. 127, 7 A. B. R. 250.

48—In re Lewin, 103 Fed. 852.

49—In re Kamsler, 2 N. B. N. R. 97, 97 Fed. 194.

50—In re Dews, 2 N. B. N. R. 437, 3 A. B. R. 691, 101 Fed. 549.

51—In re Dews, 2 N. B. N. R. 437, 101 Fed. 549, 3 A. B. R. 691.

52—In re Conroy, 134 Fed. 764, 14 A. B. R. 249.

53—In re Hirsch, 96 Fed. 468, 2 A. B. R. 715.

54—In re McCrea, 161 Fed. 246, 20 L. R. A. (N. S.) 246, 20 A. B. R. 412.

make the oath a false one, merely because he was employed as manager of the corporation whose stock she held;<sup>55</sup> and, where by agreement between counsel certain testimony given by bankrupt in another proceeding and claimed to be partly false was made part of the record, but bankrupt was not sworn, there is no false oath in relation to any proceeding in bankruptcy.<sup>56</sup>

The finding of a special master that the bankrupt did not commit perjury has been sustained even though the testimony was exceedingly suspicious.<sup>57</sup> Evidence that books which the bankrupt swore were destroyed by fire on a given date were in his possession several weeks after the date of the fire is sufficient to show the commission of the offense.<sup>58</sup>

The immunity afforded by section 7 subdivision 9, is no bar to a prosecution for perjury in giving testimony under the command of that section.<sup>59</sup>

The failure of the petition in bankruptcy to allege that the bankrupts were not excepted from the provisions of the act,<sup>60</sup> or the filing of an amended schedule or assisting the trustee in obtaining possession of property not originally scheduled,<sup>61</sup> cannot be set up as a defense to a prosecution for false oath.

### § 1613. Subornation of perjury.

One who suborns another to make a false oath in bankruptcy proceedings may be punished under section 5393 of the Revised Statutes.<sup>62</sup>

### § 1614. Advice of counsel as a defense.

To constitute the offense both in the case of "concealment of assets" and the "making of a false oath," it must be done knowingly and fraudulently. Hence where a bankrupt has fully and fairly laid all the facts in relation to scheduling certain

55—*Fellows v. Frendenthal*, 102 Fed. 731, 4 A. B. R. 490.

56—*In re Goldsmith*, 101 Fed. 570, 4 A. B. R. 234, 2 N. B. N. R. 1013.

57—*In re Schwartz*, 179 Fed. 767, 23 A. B. R. 37.

58—*Kovoloff v. United States*, 202 Fed. 475, 28 A. B. R. 767.

59—*Glickstein v. United States*, 222 U. S. 139, 56 L. ed. 128, 27 A. B. R. 786; *In re Gaylord*, 112 Fed. 668, 7 A. B. R. 1; *In re Goodale*, 109 Fed. 783, 6 A. B.

R. 493; *In re Dow*, 105 Fed. 889, 5 A. B. R. 405; *In re Leslie*, 119 Fed. 406; contra, *In re Marx*, 102 Fed. 676, 4 A. B. R. 521; *In re Logan*, 102 Fed. 876, 4 A. B. R. 525.

60—*Edelstein v. United States*, 149 Fed. 636, 9 L. R. A. (N. S.) 236, 17 A. B. R. 649.

61—*Kern v. United States*, 169 Fed. 617, 22 A. B. R. 223.

62—*Epstein v. United States*, 196 Fed. 354, 28 A. B. R. 561.

property before his attorney, and received advice that it is not such an asset as should properly be scheduled in bankruptcy, such advice, however erroneous, tends to deprive a "concealment of assets" or a "false oath" of the elements of "wilfulness and fraud," and, in case of a false oath, a conviction of perjury could not be maintained, and the offense under this provision would not be committed; but such advice must have been given in good faith.<sup>63</sup>

### § 1615. Presentment of false claim.

The presentment under oath of a false claim for proof against the estate of a bankrupt, or the use of such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney is expressly made an offense.<sup>64</sup>

### § 1616. Receiving property from bankrupt.

The act expressly defines the offense to be "receiving any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act;" and hence the receipt of money from a bankrupt prior to the filing of the petition, no matter what the amount or how clear the intent to defeat the act, is not an offense under the act; though the trustee may recover it by proper proceedings.<sup>65</sup> Where a bankrupt transfers mortgaged property to a mortgagee after the filing of a petition and before control is taken for the benefit of the estate, both the bankrupt and the mortgagee would be liable to punishment.<sup>66</sup>

### § 1617. Buying off opposition to discharge.

The purchase of a claim for the purpose of preventing or reducing opposition to a discharge is not an offense.<sup>67</sup>

### § 1618. Extortion.

Any person who extorts or attempts to extort any money or property from another as a consideration for acting or forbear-

63—In *re Shenberger*, 2 N. B. N. R. 783, 102 Fed. 978, 4 A. B. R. 487; In *re Headley*, 2 N. B. N. R. 684; s. c. 3 A. B. R. 272, 2 N. B. N. R. 250, 97 Fed. 765; In *re Schreck*, 3 McLean 573, Fed. Cas. No. 14847; In *re Rainsford*, 5 N. B. R. 381, Fed. Cas. No. 11537; *Hall v. Suydam*, 6 Barb. (N. Y.) 63; *Sherman v. Kortright*, 52 Barb. (N. Y.) 261; In *re*

*Wyatt*, 2 N. B. R. 84, Fed. Cas. No. 18106.

64—Section 29b (3), Act of 1898.

65—*Wayne Knitting Mills v. Nugent*, 3 N. B. N. R. 32, 104 Fed. 530.

66—In *re Arnett*, 112 Fed. 770, 7 A. B. R. 522.

67—In *re Luftig*, 162 Fed. 322, 15 A. B. R. 773.

ing to act in bankruptcy proceedings is guilty of an offense by the express provisions of the act.<sup>68</sup> The provisions of the act do not apply to a creditor who loans money to the bankrupt with which to perform a composition agreement under an agreement whereby the bankrupt is to pay such creditor's claim in full.<sup>69</sup>

### § 1619. Conspiracy.

Although section 29b requires as a principal offender a bankrupt, it is applicable not only to the bankrupt, but also to all persons who unite with the bankrupt as participants in the act which is made an offense.<sup>70</sup> A conspiracy to conceal property from the trustee may exist prior to the appointment of the trustee or the filing of the petition in bankruptcy, in which case it is punishable under section 5440 of the Revised Statutes which makes it an offense for two or more persons to conspire to commit an offense against the United States.<sup>71</sup> A corporation may be guilty of conspiring to conceal assets.<sup>72</sup> The fact that the bankrupt is not indicted is no defense to a prosecution for conspiracy.<sup>73</sup>

### § 1620. Offenses by referees.

Section 29c of the act provides that, "A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) Acted as a referee in a case in which he is directly or indirectly interested; or

(2) Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to

68—Section 29b (5), Act of 1898.

69—Zabelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 29 A. B. R. 493.

70—United States v. Young & Holland Co., 170 Fed. 110, 22 A. B. R. 484; Cohen v. United States, 157 Fed. 651, 19 A. B. R. 8, aff'g 142 Fed. 983, 15 A. B. R. 357. But see United States v. Grodson, 164 Fed. 157, 21 A. B. R. 68.

71—Alkon v. United States, 163 Fed.

810, 22 A. B. R. 489; United States v. Young & Holland Co., 170 Fed. 110, 22 A. B. R. 484; Radin v. United States, 189 Fed. 568, 25 A. B. R. 640.

72—United States v. Young & Holland Co., 170 Fed. 110, 22 A. B. R. 484.

73—Cohen v. United States, 157 Fed. 651, 19 A. B. R. 8, aff'g 142 Fed. 983, 15 A. B. R. 357.

the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do."

Section 39b of the act provides that, "Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy."<sup>74</sup>

Violations of any of these provisions, or a refusal to permit a reasonable opportunity for an inspection of the accounts and papers relating to estates by parties in interest may be tried by district courts,<sup>75</sup> and, upon conviction, the referee becomes liable to a fine and the forfeiture of his office.<sup>76</sup>

### § 1621. Offenses by trustee.

Section 29a of the act provides that "A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee." This provision is for the punishment of the trustee if he knowingly and fraudulently appropriates to his own use, embezzles, spends or unlawfully transfers any property or secretes or destroys any document belonging to a bankrupt estate which comes into his charge as such trustee, and has no reference to the bankrupt nor to anyone else.<sup>77</sup> In the event the trustee misappropriates funds, he cannot be compelled to testify, if he refuses to answer upon the ground that his answer may incriminate him.<sup>78</sup>

74—Analogous provision of act of 1867. "Sec. 3. . . . That he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

"Sec. 4. . . . No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom, nor shall he be execu-

tor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts."

75—Section 23c, Act of 1898.

76—Section 29c, Act of 1898.

77—See *In re Webb*, 2 N. B. N. R. 11, 3 A. B. R. 204.

78—*In re Smith*, 112 Fed. 509, 7 A. B. R. 213.

### § 1622. Limitations upon prosecutions.

Section 29d is absolutely prohibitive to the prosecution for an offense arising under the law, unless the indictment is found or the information is filed within one year after its commission, and such time can under no condition be extended.<sup>79</sup> The section is, however, inapplicable to a prosecution for conspiring to commit an offense under the bankruptcy act.<sup>80</sup> In case of concealment of assets the limitations commence to run from the time that a demand is made for the property thought to be concealed,<sup>81</sup> though it is held that the statute begins to run from the time of the commission of the overt acts amounting to concealment, and that mere silence and passivity on the part of the bankrupt after the alleged concealment does not make the offense a continuing one so as to stay the running of the statute.<sup>82</sup>

### § 1623. Evidence before grand jury.

The use in evidence before the grand jury of the pleadings in the bankruptcy proceedings<sup>83</sup> or the taking of the bankrupt's books by the receiver and their use before the grand jury in procuring an indictment against him<sup>84</sup> or the production of books of the bankrupt, transferred to the trustee in accordance with section 70 of the act, before the grand jury,<sup>85</sup> is not improper and is no bar to a prosecution. The use of the schedules of the bankrupt by the grand jury in determining whether to indict or not has been held a violation of section 7a (9) and to constitute grounds for the dismissal of the indictment.<sup>86</sup>

### § 1624. Indictment or information.

Offenses under the act may be prosecuted on information or indictment.<sup>87</sup> The indictment should aver scienter and all essen-

79—See *In re Webb*, 2 N. B. N. R. 11, 3 A. B. R. 204; *United States v. Phillips*, 196 Fed. 574, 27 A. B. R. 625.

80—*United States v. Comstock*, 161 Fed. 644, 20 A. B. R. 526.

81—*United States v. Phillips*, 196 Fed. 574, 27 A. B. R. 625.

82—*Warren v. United States*, 199 Fed. 753, 43 L. R. A. (N. S.) 278, 29 A. B. R. 555.

83—*United States v. Brod*, 176 Fed. 165, 23 A. B. R. 740.

84—*United States v. Halstead*, 38 App. Cas. (D. C.) 69, 27 A. B. R. 302.

85—*Johnson v. United States*, 228 U. S. 457, 57 L. ed. 919, 30 A. B. R. 14.

86—*United States v. Chambers*, 135 Fed. 1023, 13 A. B. R. 708.

87—*U. S. v. Block*, 15 N. B. R. 325, 4 Sawy. 211, Fed. Cas. No. 14609.

tial facts necessary to constitute the offense as defined in the act,<sup>88</sup> clearly and explicitly.<sup>89</sup>

The indictment is not insufficient because it fails to state what tribunal appointed the trustee named in it, or that the person appointed accepted the appointment, or gave bond, or ever qualified.<sup>90</sup>

The particular mode of concealment need not be alleged<sup>91</sup> and where the evidence is wholly circumstantial it has been held unnecessary to aver the precise details of the act of concealment.<sup>92</sup>

A concealment from the trustee after his appointment and a failure to deliver over to him upon demand any property which the bankrupt may have in his possession is an offense as of any date the concealment continues and may be charged as such in the indictment.<sup>93</sup> No allegations of ownership save that the property belonged to the estate in bankruptcy is necessary.<sup>94</sup> A charge that the accused did unlawfully, knowingly, wilfully and fraudulently conceal certain property from his trustee is sufficient without a further averment that the accused knew the property belonged to the estate.<sup>95</sup>

While the omission of the words "knowingly and fraudulently" in an indictment charging a conspiracy to conceal assets is fatal on demurrer,<sup>96</sup> the words "unlawfully, knowingly and fraudulently" sufficiently charge wrongful intent, and the omission of the word "wilful" is not fatal.<sup>97</sup> A conspiracy to conceal property from the trustee may exist prior to the appointment of the trustee. Hence it is not necessary that an indict-

88—U. S. v. Prescott, 4 N. B. N. R. 29, 2 Biss. 325, Fed. Cas. No. 16084; but see United States v. Comstock, 161 Fed. 644, 20 A. B. R. 520, holding that it is sufficient to charge the offense in the language of the statute.

89—Kovoloff v. United States, 202 Fed. 475, 28 A. B. R. 767.

90—Allegation that the person named as trustee, was "duly appointed trustee" held sufficient. Kerch v. United States, 171 Fed. 366, 22 A. B. R. 544.

91—United States v. Comstock, 161 Fed. 644, 20 A. B. R. 520.

92—In re Bellah, 116 Fed. 69, 8 A. B. R. 310.

93—United States v. Stern, 186 Fed. 854, 26 A. B. R. 110.

94—United States v. Comstock, 161 Fed. 644, 20 A. B. R. 520.

95—McNiel v. United States, 150 Fed. 82, 18 A. B. R. 18.

96—United States v. Comstock, 162 Fed. 415, 20 A. B. R. 525.

97—United States v. Comstock, 161 Fed. 644, 20 A. B. R. 520.

ment charging such conspiracy should allege the appointment of a trustee.<sup>98</sup>

An indictment against the president of a corporation for causing it to conceal assets need not allege that the corporation was one capable of being adjudged a bankrupt under section 4b, in order to show the jurisdiction of the bankruptcy court.<sup>99</sup>

An indictment charging the bankrupt with perjury under section 29b for having falsely omitted from his schedule certain of his property, must not alone allege that his deposition in that regard was false, but also that he had other property which was omitted, and which should be described, since the indictment should not alone set forth the substance of the offense, but there should be proper averments to falsify the matter wherein the perjury is assigned.<sup>1</sup> When the allegations of the indictment show the materiality of the alleged false statements, an allegation that such statements were material is superfluous.<sup>2</sup>

An indictment for perjury under section 5392 of the Revised Statutes must allege that the alleged false oath was taken wilfully.<sup>3</sup> An indictment charging a conspiracy to give false oaths which fails to state what false oaths were to be given or what the subject of the false oaths was with reasonable particularity is insufficient.<sup>4</sup>

### § 1625. Disqualification of judge.

The fact that the judge, conducting a hearing to discover assets, upon the conclusion thereof, states he is convinced that the estate has been looted by some one and directs a prosecuting officer to investigate the matter thoroughly does not disqualify

98—*Radin v. United States*, 189 Fed. 568, 25 A. B. R. 640; *Alkon v. United States*, 163 Fed. 810, 22 A. B. R. 489.

99—*United States v. Freed*, 179 Fed. 236, 25 A. B. R. 89.

1—*Bartlett v. U. S.*, 106 Fed. 884, 5 A. B. R. 678; *Markham v. U. S.*, 160 U. S. 319, 40 L. ed. 441; *U. S. v. Mann*, 95 U. S. (5 Otto) 580, 24 L. ed. 531; *contra*, *United States v. Freed*, 179 Fed. 236, 25 A. B. R. 89.

Indictment held sufficient. *Daniels v. United States*, 196 Fed. 459, 27 A. B. R. 791.

Assets charged to have been fraudulently and knowingly omitted from the schedules held to have been described with sufficient particularity. *United States v. Lake*, 129 Fed. 499, 12 A. B. R. 270.

2—*United States v. Lake*, 129 Fed. 499, 12 A. B. R. 270.

3—*United States v. Lake*, 129 Fed. 499, 12 A. B. R. 270.

4—*United States v. Waldman*, 188 Fed. 524, 26 A. B. R. 677.



him from presiding at a subsequent prosecution of an alleged offense.<sup>5</sup>

### § 1626. Jury trials.

The act provides that alleged offenses may be submitted to a jury according to the laws of the United States at the time of its passage, or such as might thereafter be enacted in relation to trials by jury.<sup>6</sup>

### § 1627. Presumptions and burden of proof.

The burden is upon the prosecution to show the concealment of assets beyond a reasonable doubt.<sup>7</sup> Proof of the concealment of any part of the property charged to have been concealed will warrant a conviction.<sup>8</sup> Where the property alleged to have been concealed was conveyed by the bankrupt by warranty deed the presumption is that the bankrupt acted legally and in good faith in making the conveyance.<sup>9</sup>

### § 1628. Evidence at the trial.

The judge may exclude evidence of facts which, though relevant to the issue, are too remote to be material.<sup>10</sup> The concealment of assets or the existence of a conspiracy to conceal assets may be proved by circumstantial evidence.<sup>11</sup>

Statements of an alleged perjurer other than those claimed to have been false as are necessary to make the charge intelligible may be introduced in evidence.<sup>12</sup>

5—*Epstein v. United States*, 196 Fed. 354, 28 A. B. R. 561.

6—Section 19e, Act of 1898; *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393.

7—*Chodowski v. United States*, 194 Fed. 858, 28 A. B. R. 62; but see *In re Leslie*, 119 Fed. 406, 9 A. B. R. 561.

8—*United States v. Stern*, 186 Fed. 854, 26 A. B. R. 110.

9—*Chodkowski v. United States*, 194 Fed. 858, 28 A. B. R. 62.

10—*Bean v. United States*, 192 Fed. 859, 27 A. B. R. 759; *Daniels v. United States*, 196 Fed. 459, 27 A. B. R. 790.

Rule applied to testimony of the bankrupt's wife that up to the time of the bankruptcy the bankrupt was paying all his creditors in the usual way. *Johnson*

*v. United States*, 170 Fed. 581, 22 A. B. R. 359.

Rule applied to evidence that attorney told bankrupt to keep open his place of business until the evening of the day on which the petition was filed. *McNiel v. United States*, 150 Fed. 82, 18 A. B. R. 18.

11—*Stern v. United States*, 193 Fed. 888, 28 A. B. R. 101; *Radin v. United States*, 189 Fed. 568, 25 A. B. R. 640; *Stern v. United States*, 193 Fed. 888, 22 A. B. R. 101; *United States v. Stern*, 186 Fed. 854, 26 A. B. R. 110; *United States v. Levinson & Kornblut*, 13 A. B. R. 29.

12—*Cameron v. United States*, 192 Fed. 548, 27 A. B. R. 657.

Section 7, clause 9, of the act provides that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding. The examination before the referee cannot be used by the prosecuting attorney in his cross examination of the bankrupt for the purpose of impeaching him.<sup>13</sup> Testimony of the trustee that he had never learned from the bankrupt that there was property belonging to him at a certain place is not objectionable as an attempt, by indirect method, to disclose the bankrupt's testimony before the referee.<sup>14</sup> It is held, however, that testimony of the bankrupt in parts of his examination other than that made the basis of the charge may be given in evidence.<sup>15</sup> The immunity found in section 7 (9) does not prevent the use of the defendant's testimony in the bankruptcy proceedings from being used against him in a prosecution for false swearing,<sup>16</sup> but testimony given in one bankruptcy proceeding, not tending to establish perjury in that proceeding, cannot be used to establish perjury in subsequent bankruptcy proceedings.<sup>17</sup>

Books of the bankrupt in possession of the receiver,<sup>18</sup> as well as books transferred to the trustee in accordance with section 70 of the act,<sup>19</sup> are admissible in a prosecution for concealment of assets or for conspiring to conceal assets. Testimony of an expert accountant based upon an examination of books which the bankrupt has delivered to his trustee is not inadmissible against him under section 7 (9).<sup>20</sup>

Prior to the act of May 7, 1910, expressly repealing section 860 of the Revised Statutes the schedules filed by the bankrupt, whether in voluntary or involuntary proceedings were inadmissible in a prosecution for concealing assets.<sup>21</sup> The repeal of that

13—*Jacobs v. United States*, 161 Fed. 694, 20 A. B. R. 550.

14—*Johnson v. United States*, 170 Fed. 581, 22 A. B. R. 359.

15—*Daniels v. United States*, 196 Fed. 459, 27 A. B. R. 790.

16—*Cameron v. United States*, 231 U. S. 710, 58 L. ed. 448, 31 A. B. R. 604, rev'g 192 Fed. 548, 27 A. B. R. 657; *United States v. Brod*, 176 Fed. 165, 23 A. B. R. 740; *Edelstein v. United States*, 149 Fed. 636, 9 L. R. A. (N. S.) 236, 17 A. B. R. 649; *Wechsler v. United States*, 158 Fed. 579, 19 A. B. R. 1, rev'g

16 A. B. R. 1; contra, *United States v. Simon*, 146 Fed. 89, 17 A. B. R. 41.

17—*Cameron v. United States*, 231 U. S. 710, 58 L. ed. 448, 31 A. B. R. 604, rev'g 192 Fed. 548, 27 A. B. R. 657.

18—*Kerrch v. United States*, 171 Fed. 366, 22 A. B. R. 544.

19—*Johnson v. United States*, 228 U. S. 457, 57 L. ed. 919, 47 L. R. A. (N. S.) 263, 30 A. B. R. 14.

20—*Ensign v. Commonwealth of Pennsylvania*, 227 U. S. 592, 57 L. ed. 658, 30 A. B. R. 408.

21—*Johnson v. U. S.*, 163 Fed. 30, 18

section cannot be given a retroactive effect.<sup>22</sup> Schedules filed by the bankrupt and testimony of an accountant based upon books turned over by the bankrupt to the trustee have been held admissible in a criminal proceeding in a state court against the bankrupt.<sup>23</sup>

Creditor's proofs of claim are inadmissible to show the purchase prior to bankruptcy of the property alleged to have been concealed.<sup>24</sup>

### § 1629. Penalties.

The penalty for false swearing is controlled by section 29 of the bankruptcy act, and not by the section 5392 of the Revised Statutes; but the fact that bankrupt, found guilty of false swearing, is sentenced under section 5392 and a punishment in excess of that provided for by the bankruptcy act is imposed does not involve an entire failure of prosecution, and in such case the appellate court may remand the cause with instructions to impose sentence under the bankruptcy act.<sup>25</sup>

### § 1630. Habeas corpus.

In any case in which the imprisonment is claimed to be in contravention of the act, the same remedy by habeas corpus may be pursued in addition to any other remedies, as in other cases of unlawful imprisonment, in which case the usual practice in habeas corpus cases will govern.

L. R. A. (N. S.) 1194, 20 A. B. R. 724;  
Cohen v. United States, 170 Fed. 715,  
22 A. B. R. 333.

22—Cameron v. United States, 231 U.  
S. 710, 58 L. ed. 448, 31 A. B. R. 604,  
rev'g 192 Fed. 548, 27 A. B. R. 657.

23—Commonwealth v. Ensign, 40 Pa.  
Super. Ct. 157, 22 A. B. R. 797.

24—Jacobs v. United States, 161 Fed.  
694, 20 A. B. R. 550.

25—Wechsler v. United States, 158  
Fed. 579, 19 A. B. R. 1, rev'g 16 A. B.  
R. 1.

## CHAPTER XXXVIII

### APPELLATE JURISDICTION

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#### § 1631. Modes of appeal provided exclusive.

Three methods of review are provided by the bankruptcy act,  
(1) a review in matter of law of all orders in bankruptcy except

those provided for in the second method;<sup>1</sup> (2) an appeal in case of orders adjudging or refusing to adjudge bankrupt; granting or denying a discharge, which is held to include granting or refusing an order confirming a composition;<sup>2</sup> or allowing or rejecting a claim of \$500 or over; and (3) an appeal in the usual way in controversies arising in bankruptcy proceedings.<sup>3</sup>

As to questions arising in the bankruptcy proceedings proper the modes of review specifically provided by the bankruptcy act are exclusive.<sup>4</sup>

Provisions in the act for appeal and for review on petition are mutually exclusive, and the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable upon writ of error and vice versa.<sup>5</sup>

### § 1632. Petition to revise and appeal in same case.

An appeal may be taken and a petition to revise filed in the same case.<sup>6</sup> This practice has been frequently followed due to the confusion as to the proper form of proceeding to employ.

Where a case before the appellate court on appeal and petition for review, is heard on the appeal, the petition will be dismissed.<sup>7</sup>

1—Section 24b, Act of 1898.

2—Section 25a, Act of 1898.

3—Section 24a, Act of 1898.

4—*Calnan Co. v. Doherty*, 224 U. S. 145, 56 L. ed. 702, 27 A. B. R. 880; *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 56 L. ed. 118, 27 A. B. R. 338; *Munsuri v. Fricker*, 222 U. S. 121, 56 L. ed. 121, 27 A. B. R. 344.

5—*Kirsner v. Taliaferro*, 202 Fed. 51, 29 A. B. R. 832; *Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 24 A. B. R. 178; *In re Friend*, 134 Fed. 778, 13 A. B. R. 595. Sections 24a and 24b are exclusive. *In re Martin*, 198 Fed. 947, 29 A. B. R. 935; *O'Dell v. Boyden*, 150 Fed. 731, 17 A. B. R. 751; *Barnes v. Pampel*, 192 Fed. 525, 27 A. B. R. 192. Sections 24b and 25a are exclusive. *In re Doyle*, 205 Fed. 543, 30 A. B. R. 58; *Adams v. Lumber Co.*, 202 Fed. 48, 29 A. B. R. 42; *In re Loving*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852; *In re Mueller*, 135 Fed. 711, 14 A. B. R. 256.

*Contra*: *Thomas v. Woods*, 173 Fed. 585, 26 L. R. A. (N. S.) 1180, 23 A. B. R.

132; *In re Holmes*, 142 Fed. 391, 15 A. B. R. 689; *In re McKenzie*, 142 Fed. 383, 15 A. B. R. 679, aff'g 132 Fed. 986, 13 A. B. R. 227. Sections 24a and 24b are cumulative. *In re Lee*, 182 Fed. 579, 25 A. B. R. 436. Sections 24b and 25a are cumulative. *Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 17 A. B. R. 609.

6—*Wells & Co. v. Sharp*, 208 Fed. 399, 31 A. B. R. 348; *Martin v. Globe Bank & Trust Co.*, 193 Fed. 841, 27 A. B. R. 545; *In re Hecox*, 164 Fed. 823, 21 A. B. R. 314; *Rode & Horn v. Phipps*, 195 Fed. 414, 27 A. B. R. 827; *Maxwell v. McDaniels*, 195 Fed. 426, 27 A. B. R. 692; *Imp. Co. v. Bradbury*, 132 U. S. 509, 515, 33 L. ed. 433; *In re Fisher*, 103 Fed. 860, 4 A. B. R. 646; *In re Worcester Co.*, 102 Fed. 808, 4 A. B. R. 496; *In re Jourdan*, 111 Fed. 726, 7 A. B. R. 186.

7—*Merchants-Laclede Nat. Bank v. Schade*, 195 Fed. 199, 27 A. B. R. 687; *Hendricks v. Webster*, 159 Fed. 927, 20 A. B. R. 112.

**§ 1633. Appeals in bankruptcy proceedings proper.****§ 1634. — In general.**

Section 25a of the act provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge, and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.<sup>8</sup>

This section applies to "bankruptcy proceedings" as such,<sup>9</sup> as appears from the specification of the cases from which it provides an appeal, and supplements the preceding provision,<sup>10</sup>

8—Analogous provisions of Act of 1867. "Sec. 8. . . . That appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars, and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from a decision of the district court to the circuit court from the same district, but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken; and no appeal shall be allowed

unless the appellant at the time of claiming the same shall give bond in man[ner] now required by law in cases of such appeals. No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs. . . .

Sec. 24. That a supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law commenced and prosecuted in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive."

9—In *re Friend*, 134 Fed. 778, 13 A. B. R. 595; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986, 11 A. B. R. 709; *Shutts v. Bank*, 2 N. B. N. R. 320, 3 A. B. R. 492, 98 Fed. 705, 709.

10—Act of 1898, § 24b.

which provides for the summary review in the matter of law of all other orders if the district courts in "bankruptcy proceedings" as such; while section 25 is confined to "appeals as in equity cases" and covers both fact and law.<sup>11</sup> "Controversies arising in bankruptcy proceedings," that is, between the trustee on one side and a stranger to the proceedings on the other, are to be reviewed in the same manner and under the same rules as other cases in the United States courts.<sup>12</sup>

### § 1635. — From whose decisions.

It should be observed that an appeal is confined to the decisions of the courts of bankruptcy. If the purpose is to secure a review of a referee's decision, the question must be certified to the judge and the appeal taken from the latter's action.

### § 1636. — Appealable cases.

An appeal lies from the district court to the circuit courts of appeal from orders adjudging a person a bankrupt;<sup>13</sup> or from an order dismissing a petition for failure to allege facts sufficient to constitute an act of bankruptcy since such order is a judgment refusing to adjudge the defendant a bankrupt;<sup>14</sup> but an order or judgment refusing to set aside an adjudication<sup>15</sup> or an order adjudging a person not adjudicated a member of an adjudicated partnership<sup>16</sup> is not appealable. A judgment granting or denying a discharge is appealable,<sup>17</sup> as is, ordinarily, an order refusing or confirming a composition, since it is the equivalent of an order of discharge.<sup>18</sup> But while the confirmation of a com-

11—*In re Friend*, 134 Fed. 778, 13 A. B. R. 595; *In re Worcester Co.*, 102 Fed. 808, 4 A. B. R. 496; *Courier Journal Co. v. Schaefer Brewing Co.*, 101 Fed. 699, 4 A. B. R. 83; *In re Richards*, 2 N. B. R. 38, 3 A. B. R. 145, 96 Fed. 935.

12—Section 24a, Act of 1898; see *post* § 1639 *et seq.*

13—*Columbia Iron Works v. National Lead Co.*, 127 Fed. 99, 64 L. R. A. 645, 11 A. B. R. 340; *Taft Co. v. Century Sav. Bank*, 141 Fed. 369, 15 A. B. R. 594; *Elliott & Co. v. Toepfner*, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50; *In re Good*, 99 Fed. 389, 3 A. B. R. 605; *Parmenter Mfg. Co. v. Stoeve*, 2 N. B. N. R. 174,

3 A. B. R. 220, 97 Fed. 330; *Simonson v. Sinsheimer*, 100 Fed. 426, 3 A. B. R. 824.

14—*Stevens v. Nave-McCord Co.*, 150 Fed. 71, 17 A. B. R. 609.

15—*B. R. Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, 206 Fed. 885, 300 B. R. 424; *Brady v. Bernard & Kittinger*, 170 Fed. 576, 22 A. B. R. 342; *Goodman v. Brenner*, 109 Fed. 481.

16—*Francis v. McNeal*, 170 Fed. 445, 22 A. B. R. 337.

17—Sec. 25a (2) Act of 1898.

18—*United States v. Hammond*, 104 Fed. 862, 4 A. B. R. 736, overruling *In re Adler*, 3 N. B. N. R. 15, 103 Fed. 444, 4 A. B. R. 583; compare *Ross v. Saun-*

position always has the effect of discharging the bankrupt, thereby giving the opposing creditors the right to appeal, an order refusing to confirm a composition on the ground that it is not for the best interests of the creditors is not a bar to a subsequent discharge and is therefore not appealable.<sup>19</sup> An order dismissing an application for discharge is reviewable by appeal,<sup>20</sup> but whether an order refusing to revoke a discharge is appealable is questionable.<sup>21</sup> An order overruling the objections made to a discharge by certain creditors is not appealable, such order not being final.<sup>22</sup>

An appeal lies from a judgment allowing or disallowing a claim of five hundred dollars or over,<sup>23</sup> notwithstanding it also settles the priority of such claim, which latter could be the subject of review;<sup>24</sup> and includes as an incident the question of the receipt of a preference which should first be surrendered,<sup>25</sup> or the question as to the rank or lien of such claim in the distribution of the estate, at least where such question is one of controverted fact and law.<sup>26</sup>

The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which appeal is specially provided by section 25. If both a demand and a lien be presented at the same time the procedure for the former dominates, the lien goes along as an incident, and the double presentation is also regarded as a step in the bankruptcy proceeding.<sup>27</sup>

ders, 105 Fed. 915, 5 A. B. R. 350; *Adler v. Hammond*, 3 N. B. N. R. 58, rev'g 3 N. B. R. 15, 103 Fed. 444, 4 A. B. R. 583; *In re Friend*, 134 Fed. 778, 13 A. B. R. 595.

19—*In re McVoy Hardware Co.*, 200 Fed. 949, 29 A. B. R. 322.

20—*In re Semons*, 140 Fed. 989, 15 A. B. R. 822.

21—See *Thompson v. Mauzy*, 174 Fed. 611, 23 A. B. R. 489.

22—*Ragan, Malone & Co. v. Cotton & Preston*, 195 Fed. 69, 28 A. B. R. 246.

23—Sec. 25b Act of 1898. *In re Eagle v. Crisp*, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 Fed. 695.

24—*In re Worcester Co.*, 102 Fed. 808, 4 A. B. R. 496. But see, *In re Doran*, 154 Fed. 467, 18 A. B. R. 760, modf'g 148 Fed. 327, 17 A. B. R. 799.

25—*Cooper v. Miller*, 203 Fed. 383, 30 A. B. R. 194.

26—*Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 18 A. B. R. 513; *Bell v. Arledge*, 192 Fed. 837, 27 A. B. R. 773; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179, 10 A. B. R. 135, aff'g 115 Fed. 937, 8 A. B. R. 382; *Burow v. Grand Lodge*, 133 Fed. 708, 13 A. B. R. 542; *In re Loring*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852; *Cunningham v. Bank*, 103 Fed. 932, 2 N. B. N. R. 689, 4 A. B. R. 192; *Courier Journal Co. v. Schaefer Br'g Co.*, 101 Fed. 699, 4 A. B. R. 183.

27—*Century Sav. Bank v. Robert Moody & Son*, 209 Fed. 775, 31 A. B. R. 586.



The provision restricting the right of appeal to judgments allowing or rejecting claims of over \$500 has been held to refer not to the amount of the original claim, but to the amount of the allowance or rejection,<sup>28</sup> but such holding seems to be contrary to the express provision of the act. In those cases in which the amount to authorize an appeal is in controversy, it may be shown by affidavit and need not appear in the pleadings.<sup>29</sup>

An order of the district court upon reconsideration of a claim which operates to restore and allow the claim as originally proved is appealable under section 25a.<sup>30</sup> A ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether petitioning creditors held "provable" claims is not a judgment allowing or rejecting a debt within the meaning of the section.<sup>31</sup>

Whether a claim which represents expenses and costs of administration is "a debt or claim" within 25a is doubtful,<sup>32</sup> but section 25a has been held not to include an appeal from an order denying allowance of attorney's fees and expenses incurred in contesting claims,<sup>33</sup> or from an order denying priority to the claim of attorney for fees.<sup>34</sup> On the other hand, the allowance of an attorney's fee included in the claim of a mortgaged creditor, who proves his claim as a secured one;<sup>35</sup> or to petitioning creditors in an involuntary case<sup>36</sup> has been held appealable.

The rejection of claims against the receiver is within the discretion of the court, and no appeal lies therefrom.<sup>37</sup>

Section 25a has no reference to independent suits to assert title to property or money as assets of the bankrupt against strangers to the proceedings,<sup>38</sup> or to summary proceedings to compel the turning over of assets,<sup>39</sup> or to an order to distribute

28—Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 14 A. B. R. 780.

29—U. S. v. Freight Ass'n, 166 U. S. 390, 41 L. ed. 1007.

30—Kiskadden v. Steinle, 203 Fed. 175, 29 A. B. R. 346.

31—Calnan Co. v. Doherty, 224 U. S. 45, 56 L. ed. 702, 27 A. B. R. 880.

32—Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 14 A. B. R. 780.

33—Ohio Valley Bank Co. v. Switzer, 53 Fed. 362, 18 A. B. R. 689.

34—In re Blanchard Shingle Co., 164 Fed. 311, 21 A. B. R. 142.

35—In re Roche, 101 Fed. 956, 4 A. B. R. 369.

36—In re Curtis, 100 Fed. 784, 4 A. B. R. 17.

37—O'Brien v. Ely, 195 Fed. 64, 28 A. B. R. 247.

38—Delta Nat. Bank v. Easterbrook, 133 Fed. 521, 13 A. B. R. 338; Boonville Nat. Bank v. Blakey, 107 Fed. 891, 6 A. B. R. 13.

39—Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832; First Nat. Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102,

a fund derived from the recovery and sale of property fraudulently conveyed by the bankrupt,<sup>40</sup> or to an interlocutory order reversing a ruling of the referee made during the bankrupt's examination, refusing to require him to produce his books;<sup>41</sup> or to an order requiring the bankrupt summarily to do certain acts, his remedy seeming to have been to refuse to do the acts and, on contempt proceedings against him, to take proper steps for their review;<sup>42</sup> or to orders or decrees in proceedings for the sale and disposition of the bankrupt's property,<sup>43</sup> or to any judgment rendered or order made by a court of bankruptcy in the administration of an estate, except the particular judgments enumerated in this section. An appeal would not lie from a judgment entered on a petition of intervention filed by a claimant of property in the hands of a trustee declaring the ownership of the intervener, and ordering restitution of the property, such judgment not being one allowing a claim within the meaning of the statutes; the "debt or claim of \$500 or over" would seem to mean a moneyed demand, the same as debt, and was used not to enlarge but to render certain.<sup>44</sup>

The section does not authorize an appeal from a decree refusing to require the trustee to account for the rental value of property,<sup>45</sup> or from an order denying partnership creditors the right to participate in the individual assets of a bankrupt partner until the individual partners have been paid.<sup>46</sup>

No appeal lies from an order appointing a receiver, but where a receiver is appointed by the same order which adjudicated the bankrupt, and such order is reversed and set aside upon the appeal, the appointment of the receiver falls with it.<sup>47</sup> When the judgment is upon the verdict of a jury it cannot be reviewed under an appeal as in an equity case, but only by writ of error.<sup>48</sup>

rev'g 125 Fed. 169, 11 A. B. R. 79; In re Rose Shoe Mfg. Co., 168 Fed. 39, 21 A. B. R. 725.

40—In re Martin, 198 Fed. 947, 29 A. B. R. 935.

41—In re Ives, 113 Fed. 911, 7 A. B. R. 692.

42—In re Fisher, 103 Fed. 860, 4 A. B. R. 646.

43—Schuler v. Hassinger, 177 Fed. 119, 24 A. B. R. 184. An order for the distribution of the proceeds of the sale of bankrupt's property held not appealable.

In re Groetzinger & Sons, 127 Fed. 124, 11 A. B. R. 467.

44—In re Whitener, 105 Fed. 180, 5 A. B. R. 198.

45—Bank of Clinton v. Kondert, 159 Fed. 703, 20 A. B. R. 178.

46—Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975, 17 A. B. R. 834, aff'g 142 Fed. 588, 16 A. B. R. 91.

47—Bauman Diamond Co. v. Hart, 192 Fed. 498, 27 A. B. R. 632.

48—In re Mueller, 135 Fed. 711, 14 A. B. R. 256. See *post*, § 1643.

**§ 1637. — Parties to the appeal.**

The general rule that any party in interest adversely affected by an appealable decision may appeal applies,<sup>49</sup> but, in its application, it must be remembered that the trustee represents the bankrupt, the estate and the creditors—the bankrupt to see that his estate is administered so as to pay his creditors as far as possible; the estate to see that it is all realized and administered to the best advantage and the creditors to enforce their rights. In the adjudication, the bankrupt and the creditors are the interested parties and creditors appearing in opposition to an involuntary petition as well as the bankrupt and petitioning creditors may appeal if the decision is adverse to their interests. If the act of bankruptcy alleged is a voluntary general assignment, the assignee may intervene and, if necessary, appeal.<sup>50</sup> Parties interested in rulings made prior to an order of dismissal may appeal from such order and thereby review the previous rulings.<sup>51</sup> The fact that contempt proceedings are pending against the officers of the bankrupt corporation does not affect the right to a review of an order adjudicating the corporation a bankrupt.<sup>52</sup>

In the granting or denying of a discharge the trustee is not interested, it being a personal privilege of the bankrupt, and so the parties in interest are the opposing creditors and the bankrupt. In the allowance of claims, all, trustee, bankrupt and creditors, are interested, though to allow each if dissatisfied to appeal, would be to multiply appeals and allow fractious creditors to delay the proceedings, and the appeal must be taken in such case by the trustee, or, if he refuses, or fails to act, the bankruptcy court may, on its own motion, if doubtful of its decision, order him to appeal, or may make such order an application of a dissatisfied party, or, in its discretion, allow such party to appeal in the name of the trustee.<sup>53</sup>

49—*Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 17 A. B. R. 609.

50—*In re Meyer*, 98 Fed. 976, 3 A. B. R. 559.

51—*Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 17 A. B. R. 609.

52—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

53—*In re Roadarmour*, 177 Fed. 379,

24 A. B. R. 49; *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 24 L. R. A. (N. S.) 184, 20 A. B. R. 40; *Chatfield v. O'Dwyer*, 101 Fed. 797, 4 A. B. R. 313; *Foreman v. Burleigh*, 109 Fed. 313, 6 A. B. R. 230; *McDaniel v. Stroud*, 106 Fed. 486, 5 A. B. R. 685; *In re Troy Woolen Co.*, 1 Blatch. 191; Fed. Cas. No. 14204; *In re Joseph*, 2 Woods, 390; Fed. Cas. No. 7532; *In re Place*, 4 N. B. R. 178,

In rejecting a claim only the particular creditor whose claim it is can appeal. It should be observed that to be appealable the order must be one allowing or rejecting a claim of \$500 or over; so that, if the claim amounts to as much as \$500, the order allowing or rejecting it will be appealable irrespective of the fact that it may be partially allowed. Such a case would be appealable by those entitled to appeal from an allowance and the party entitled to appeal from a rejection.

In an appeal by the trustee from an order allowing claims for expenses and costs of administration, he represents merely the general creditors of the estate, and the claimants are entitled to notice of the appeal and an opportunity to be heard.<sup>54</sup>

All parties concerned or interested in the appeal should be made parties,<sup>55</sup> and upon an appeal from a decree denying adjudication, the original petitioners, as well as the intervening petitioners must either join in the appeal or be severed therefrom.<sup>56</sup> While the general rule that parties against whom a joint judgment is rendered must unite in an appeal is applicable to appeals in bankruptcy proceedings,<sup>57</sup> it applies only to a joint judgment or decree against such parties. It has no application to separate judgments or decrees against such parties, though rendered at the same time and contained in the same entry.<sup>58</sup>

The fact that one was an indispensable party in the lower court does not make him an indispensable party to the appeal.<sup>59</sup> A trustee in bankruptcy who obtains possession of a fund concerning which litigation is pending and who is made a party to the suit is not a necessary party to an appeal from a judgment therein.<sup>60</sup>

### § 1638. — Scope of review.

An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, cannot confer jurisdiction upon an appellate court to consider or review decisions

8 Blatch. 302, Fed. Cas. No. 11200; In re Randall, 1 Sawy. 56, Fed. Cas. No. 11552; In re Curtis, 100 Fed. 784, 4 A. B. R. 17, rev'g 91 Fed. 737; In re Roche, 101 Fed. 956, 4 A. B. R. 369.

54—Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 14 A. B. R. 780.

55—Love v. Export Storage Co., 143 Fed. 1, 16 A. B. R. 171.

56—In re Dandridge & Pugh, 209 Fed. 838, 31 A. B. R. 15.

57—In re Dandridge & Pugh, 209 Fed. 838, 31 A. B. R. 15.

58-59-60—Love v. Export Storage Co., 143 Fed. 1, 16 A. B. R. 171.

adverse to him upon questions suggested by the assignment, or by an assignment of cross-errors, nor can he be heard on such questions. He may only be heard in support of the order, decree or judgment below. Mere assertion of error in an appellee's brief does not give the circuit court of appeals jurisdiction to review alleged error against an appellee. To review such alleged errors a cross-appeal is necessary.<sup>61</sup>

An appeal brings up the whole case and cannot be made to turn upon errors in rulings made upon the trial of a feigned issue.<sup>62</sup> Questions of fact as well as law will be decided.<sup>63</sup> While all rulings made in the proceedings are reviewable upon an appeal from a final order therein, though not appealable in themselves,<sup>64</sup> an appeal cannot be used to give a party a second trial; but only to re-examine and revise the rulings and decree.<sup>65</sup> While a ruling of the lower court which is assigned as error but which is not argued either orally or in brief will ordinarily be deemed abandoned,<sup>66</sup> the appellate court, sua sponte, will take notice of the want of jurisdiction of the lower court if the same appears by the record, and will in such case reverse a decree though the parties fail to suggest the want of jurisdiction in the bankruptcy court.<sup>67</sup>

Where the appeal is from a judgment allowing or disallowing a debt, any question of lien or priority of the debt, if allowed, may be considered upon the appeal as an incident of the debt;<sup>68</sup> but the action of the district court in allowing or disallowing a claim will not be reversed merely to preserve the claimant's

61—Board of County Com'rs v. Hurley, 169 Fed. 92, 22 A. B. R. 209; Swager v. Smith, 194 Fed. 762, 27 A. B. R. 660.

62—In re Neasmith, 147 Fed. 160, 17 A. B. R. 128.

63—In re Friend, 134 Fed. 778, 13 A. B. R. 595; In re Worcester Co., 102 Fed. 808, 4 A. B. R. 496; Courier Journal Co. v. Schaefer Brewing Co., 101 Fed. 699, 4 A. B. R. 183; In re Richards, 96 Fed. 935, 2 N. B. R. 38, 3 A. B. R. 145.

Whole case is open as in appeals in equity cases, except as to facts determined by a jury. Bernard v. Lea, 210 Fed. 583, 31 A. B. R. 436.

64—Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 17 A. B. R. 609.

65—In re Dow, 6 N. B. R. 10, Fed. Cas. No. 4036.

66—Sturdivant Bank v. Schade, 195 Fed. 188, 27 A. B. R. 673, rev'g In re Jackson Brick & Tile Co., 189 Fed. 636, 26 A. B. R. 915.

67—Taft Co. v. Century Sav. Bank, 141 Fed. 369, 15 A. B. R. 594.

68—In re Mueller, 135 Fed. 711, 14 A. B. R. 256; see also In re Worcester County, 102 Fed. 808, 4 A. B. R. 496; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 18 A. B. R. 513; Beel v. Arledge, 192 Fed. 837, 27 A. B. R. 773; Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179, 10 A. B. R. 135; Burow v. Grand Lodge, 133 Fed. 708, 13 A. B. R. 542; In re Loving,

action in the federal court in case of a possible adverse decision in the state supreme court in which he has sued concerning the validity and extent of his lien.<sup>69</sup>

Objections to the sufficiency of specifications in opposition to a discharge will not be considered, where they were not presented or passed upon by the court below.<sup>70</sup>

The finding of the court below, whether through a verdict or through a decision by the judge or chancellor, where the issue is peculiarly one of fact, as whether there was fraud, will not be disturbed unless the appellate court is clearly convinced that it is opposed to the weight of evidence, or plain and manifest error appears.<sup>71</sup> Upon an appeal from the judgment of the court below after a hearing upon the merits, the findings of the master are not binding.<sup>72</sup>

In the absence of any reference, by the judge, to the findings of fact made by the referee, it will be assumed upon appeal from the decision of the judge, that he affirmed such findings and that his decision, reversing the judgment of the referee, expresses merely his dissent from the conclusion of law.<sup>73</sup>

The appellate court will construe instructions reasonably and, if they are correct when applied to the facts submitted to the jury, will sustain them, though, if standing alone, they would be incomplete.<sup>74</sup>

### § 1639. Controversies arising in bankruptcy proceedings.

#### § 1640. — In general.

The circuit courts of appeals are invested by section 24a of the act with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases, by section 24b, with jurisdiction in equity, either interlocutory or final, to super-

224 U. S. 183, 27 A. B. R. 852; Cunningham v. German Ins. Bank, 103 Fed. 932, 2 N. B. N. R. 689, 4 A. B. R. 192; Courier Journal Co. v. Shaefer Brg. Co., 101 Fed. 699, 4 A. B. R. 183.

69—The Gregory Co. v. Bristol, 191 Fed. 31, 26 A. B. R. 938.

70—Osborne v. Perkins, 112 Fed. 127, 7 A. B. R. 250.

71—Osborne v. Perkins, 112 Fed. 127,

7 A. B. R. 250; Hussey v. Richardson-Roberts Dry-Goods Co., 148 Fed. 598, 17 A. B. R. 511; Cleage v. Laidley, 149 Fed. 346, 17 A. B. R. 598.

72—Merchant's Nat. Bank of Toledo v. Cole, 149 Fed. 708, 18 A. B. R. 44.

73—Bernard v. Lea, 210 Fed. 583, 31 A. B. R. 436.

74—Willis v. Carpenter, 14 N. B. R. 521, Fed. Cas. No. 17770.

intend and revise in matter of law the proceedings of the courts of bankruptcy within their jurisdiction; and by section 25a with jurisdiction of appeals from judgments adjudging or refusing to adjudge the debtor a bankrupt, from judgments granting or denying a discharge, and from judgments allowing or rejecting claims of five hundred dollars or over. A comparison of sections 23, 24 and 25 will show that section 23 clearly indicates a distinction between "controversies arising in bankruptcy proceedings," and "proceedings in bankruptcy;" that section 24a provides for appeals in the former and section 25a in the latter. Section 25a leaves appeals in "controversies arising in bankruptcy proceedings" to be determined by the general provisions of the statutes, under section 24a.<sup>75</sup> The classification of matters in bankruptcy as "controversies arising in bankruptcy proceedings" and "proceedings in bankruptcy," has, in actual application, caused much confusion. There is, however, a clear distinction between the two phrases, the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, and not directly affecting those administrative orders and judgments ordinarily known as "proceedings in bankruptcy," and the latter being confined to those questions between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for an adjudication to the settlement of the estate and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily.<sup>76</sup> This distinction is emphasized by the provisions

75—*Shutts, Tr. v. 1st Nat. Bk.*, 2 N. B. N. R. 320, 323, 98 Fed. 705, 3 A. B. R. 492; *First Nat. Bank of Denver v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 8 A. B. R. 12; compare *Walter Scott & Co. v. Wilson*, 115 Fed. 284, 8 A. B. R. 349; *Holden v. Stratton*, 198 U. S. 202, 48 L. ed. 116, 10 A. B. R. 786.

76—*Barnes v. Pampel*, 192 Fed. 525, 27 A. B. R. 192; *In re Mueller*, 135 Fed. 711, 14 A. B. R. 256; *Liddon & Bro. v. Smith*, 135 Fed. 43, 14 A. B. R. 204;

*Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 56 L. ed. 118, 27 A. B. R. 338; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986, 11 A. B. R. 709; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102, rev'g 125 Fed. 169, 11 A. B. R. 79; *Thompson v. Mauzy*, 174 Fed. 611, 23 A. B. R. 489; *Brady v. Bernard & Kittinger*, 170 Fed. 576, 22 A. B. R. 342; *Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 24 A.

of section 23a, providing limitations of the circuit courts [now district courts] in controversies at law and in equity between trustees in bankruptcy, as such, and adverse claimants concerning the property acquired or claimed by the trustee.<sup>77</sup> The right of appeal under section 24a may therefore be said to be limited to separable controversies in reference to the title, possession or distribution of the estates of bankrupts which may be rendered in the course of the proceedings<sup>78</sup> in the courts of bankruptcy, which here means only the district courts, and not to the rulings or action of either referee or trustee.

In determining the question of the remedy, as between review and appeal, the object and character of the proceeding as determined by the nature of the right involved and the issues raised,<sup>79</sup> and not by the circumstance as to which party is actor and which is defendant,<sup>80</sup> must govern.

### § 1641. — Appealable cases.

The circuit court of appeals has power to review on appeal the action of a circuit or district court granting or refusing an interlocutory injunction in a hearing in equity, but not an order appointing a receiver unless an injunction issues also;<sup>81</sup> and, as a bankruptcy proceeding may be equitable, this would probably apply to an injunction granted in bankruptcy proceedings. The decision of the district court in "controversies" between the trustee and a stranger to the bankruptcy proceedings, at

B. R. 178; *In re Friend*, 134 Fed. 778, 13 A. B. R. 595.

77—See *Holden v. Stratton*, 198 U. S. 202, 48 L. ed. 116, 10 A. B. R. 786; *Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102, rev'g 125 Fed. 169, 11 A. B. R. 79.

78—*Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, 22 A. B. R. 63; *Mound Mines Co. v. Hawthorne*, 173 Fed. 882, 23 A. B. R. 242; *Dodge v. Norlin*, 133 Fed. 363, 13 A. B. R. 176; *In re Adler*, 3 N. B. N. R. 15, 103 Fed. 444, 4 A. B. R. 583.

Section 24a is limited to cases where third persons claim hostile to title of trustee or going to the right of the court to administer the particular estate and not to cases where they claim in and under the administration of the estate. *Snow*

*v. Dalton*, 203 Fed. 843, 29 A. B. R. 240.

79—*In re Farrell*, 176 Fed. 505, 23 A. B. R. 826; *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513; *Loeser v. Savings Deposit Bank & Trust Co.*, 163 Fed. 212, 20 A. B. R. 845.

80—*Loeser v. Savings Deposit Bank & Trust Co.*, 163 Fed. 212, 20 A. B. R. 845; *Mason v. Wolkowich*, 150 Fed. 699, 10 L. R. A. (N. S.) 765, 17 A. B. R. 709; *Thomas v. Woods*, 173 Fed. 585, 26 L. R. A. (N. S.) 1180, 23 A. B. R. 132; *contra*, *In re McMahon*, 147 Fed. 684, 17 A. B. R. 530.

81—*Highland Ave. B. R. v. Equipment Co.*, 168 U. S. 627, 42 L. ed. 605; *In re Tampa R.*, 168 U. S. 583, 42 L. ed. 589.



law or in equity, may be reviewed;<sup>82</sup> as a judgment, in a suit commenced by the trustee in the bankruptcy court to cancel a conveyance, or set aside a sale<sup>83</sup> or in proceedings instituted by the trustee to have adverse claims and liens declared void and for a sale of the property free of same;<sup>84</sup> or in an independent suit in the nature of an equitable replevin;<sup>85</sup> or a decision of a circuit court failing to find on the question of fraud and ruling that the cause of action was merged in the judgment and fraud could not be inquired into;<sup>86</sup> or in a case involving a copyright.<sup>87</sup>

On the same theory, a decision in a plenary suit against the wife of the bankrupt to recover funds alleged to have been given her by the bankrupt,<sup>88</sup> or an order granting the petition of an adverse claimant to have paid over to him the proceeds of accounts receivable alleged to have been assigned to him by the bankrupt<sup>89</sup> or the decision upon a petition praying that the trustee be ordered to surrender property in his hands,<sup>90</sup> or an order directing the distribution of the proceeds of property recovered by the trustee as fraudulently conveyed,<sup>91</sup> is appealable.

An order directing an adverse claimant to deliver property to the trustee,<sup>92</sup> or an order requiring the purchaser of property

82—*Shutts v. Bank*, 2 N. B. N. R. 320, 3 A. B. R. 492, 98 Fed. 705; see *Boonville Nat. Bank v. Blakey*, 107 Fed. 891, 6 A. B. R. 13.

83—*McCarty v. Coffin*, 150 Fed. 307, 18 A. B. R. 148; *In re Jacobs*, 99 Fed. 593, 3 A. B. R. 671. •

• Appeal from decree in suit to set aside preference is proper. *Carey v. Donohue*, 209 Fed. 328, 31 A. B. R. 210.

84—*Thomas v. Woods*, 173 Fed. 585, 26 L. R. A. (N. S.) 1180, 23 A. B. R. 132; but see *In re McMahon*, 147 Fed. 684, 17 A. B. R. 530.

85—*Stelling v. Jones Lumber Co.*, 116 Fed. 261, 8 A. B. R. 521; compare *Walter Scott & Co. v. Wilson*, 115 Fed. 284, 8 A. B. R. 349; and see *Delta Nat. Bank v. Easterbrook*, 133 Fed. 521, 13 A. B. R. 339, holding that a writ of error is the only remedy.

86—*Packer v. Whittier*, 1 N. B. N. 99, 91 Fed. 511, 1 A. B. R. 621.

87—*Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367.

88—*Kirkpatrick v. Harnesberger*, 199 Fed. 886, 29 A. B. R. 439.

89—*Greedy v. Dockendorff*, 231 U. S. 513, 58 L. ed. 339, 31 A. B. R. 407.

90—*Smith v. Evans*, 148 Fed. 89, 17 A. B. R. 433; *Deere Plow Co. v. McDavid*, 137 Fed. 802, 14 A. B. R. 653.

91—*In re Martin*, 198 Fed. 947, 29 A. B. R. 935.

92—*Hinds v. Moore*, 134 Fed. 221, 14 A. B. R. 1, rev'g 129 Fed. 922, 12 A. B. R. 136; compare *First Nat. Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 49 L. ed. 1051, 14 A. B. R. 102, rev'g 125 Fed. 169, 11 A. B. R. 79.

An order directing an attorney to turn over to the trustee a sum of money received from the bankrupt for services to be rendered in the bankruptcy proceedings held appealable. *Haffenberg v. Chicago Title & Trust Co.*, 192 Fed. 874, 27 A. B. R. 708.

from the receiver to carry out his contract<sup>93</sup> is appealable, but a decision of the bankruptcy court making or refusing to make a summary order to turn over alleged assets, has been held not appealable.<sup>94</sup>

Proceeding on intervention to establish a lien upon or title to the property of the bankrupt is a controversy arising in bankruptcy proceedings within the meaning of section 24a<sup>95</sup> and a controversy over a lien, which is independent of the assertion of the debt on which it is claimed to be based is appealable under that section.<sup>96</sup> It is held that an appeal will not lie from an order in a proceeding instituted by the trustee's petition to bring in an adverse claimant to adjudicate his lien or claim against property alleged to belong to the estate.<sup>97</sup> Orders setting aside the allowance of a secured claim and requiring the surrender of a preferential payment,<sup>98</sup> or decisions involving disputes of parties to the bankruptcy proceedings as to their respective rights to participate in the proceeds of admittedly valid security,<sup>99</sup> have been held not to be appealable. An order allowing a claim but disallowing priority has been held appealable under section 24a,<sup>1</sup> but the decisions so holding are clearly erroneous.<sup>2</sup>

93—*In re Jungman, Inc.*, 186 Fed. 302, 26 A. B. R. 401.

94—*Kirsner v. Taliaferro*, 202 Fed. 51, 29 A. B. R. 832; *In re Farrell*, 176 Fed. 505, 23 A. B. R. 826.

95—*In re Standard Tel. & Elec. Co.*, 216 U. S. 545, 54 L. ed. 610, 24 A. B. R. 761, aff'g 162 Fed. 675, 20 A. B. R. 671; *In re First Nat. Bank of Canton*, 135 Fed. 62, 14 A. B. R. 180.

An intervention for the purpose of asserting title or claim to property in the possession of the bankrupt's trustee is an intervention in equity, and a decree is reviewable by appeal to the Circuit Court of Appeals under section 24a. *Houghton v. Burden*, 228 U. S. 161, 57 L. ed. 780, 30 A. B. R. 16.

An issue raised by intervention between creditors of a partnership and creditors of the members thereof held a controversy arising in bankruptcy proceedings. *Burleigh v. Foreman*, 125 Fed. 217, 11 A. B. R. 74.

Intervenor claiming title to property under conditional sale contract may appeal from adverse decision. *Baker Ice Mach. Co. v. Bailey*, 209 Fed. 844, 31 A. B. R. 513.

96—*Century Sav. Bank v. Robert Moody & Son*, 209 Fed. 775, 31 A. B. R. 586.

97—*Odell v. Boyden*, 150 Fed. 731, 17 A. B. R. 751.

98—*In re First Nat. Bank of Louisville*, 155 Fed. 100, 18 A. B. R. 766.

99—*Snow v. Dalton*, 203 Fed. 843, 29 A. B. R. 240.

1—*In re Doran*, 154 Fed. 467, 18 A. B. R. 760, modif'g 148 Fed. 327, 17 A. B. R. 799; *Liddon & Bro. v. Smith*, 135 Fed. 43, 14 A. B. R. 204.

2—The holdings are in direct conflict with *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513. See *In re Loving*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852.

A judgment upon an adverse claim is appealable regardless of whether the trustee instituted the proceedings or whether the claimant<sup>3</sup> intervened, but the denial of a right to intervene in a bankruptcy proceeding, not being a final order or decree, is not appealable.<sup>4</sup>

An order allowing expenses incurred by the trustee for counsel fees in the realization of assets<sup>5</sup> or surcharging the account of the trustee<sup>6</sup> is not appealable. An order or judgment refusing to set aside an adjudication is not appealable under section 24a.<sup>7</sup> The provision in section 25a limiting appeals to decisions on a claim of \$500 or over does not apply to appeals under section 24a.<sup>8</sup>

### § 1642. — Scope of review.

Appeals under section 24a are governed by the provisions of the general judiciary act.<sup>9</sup> The appeal opens up the whole case as in other equity appeals, and both the law and the facts are open for consideration.<sup>10</sup> So, on an appeal from an interlocutory decree granting an injunction, the court may review the whole of the decree, not merely the part granting the injunction, and determine whether there was an insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and if there is it may direct a final decree dismissing the bill.<sup>11</sup>

Where the district court upon retrial of a case has placed a different value on property decreed to be paid to the trustee, than that fixed at the former trial the appellate court will examine the evidence on appeal although the same is conflicting.<sup>12</sup>

3—*Loeser v. Savings Deposit Bank & Trust Co.*, 163 Fed. 212, 20 A. B. R. 845.

4—*In re Columbia Real Estate Co.*, 112 Fed. 643, 7 A. B. R. 441; *In re New York Tunnel Co.*, 166 Fed. 284, 21 A. B. R. 531.

5—*Davidson & Co. v. Friedman*, 140 Fed. 853, 15 A. B. R. 489.

6—*In re Moore*, 166 Fed. 689, 21 A. B. R. 651.

7—*Brady v. Bernard & Kittinger*, 170 Fed. 576, 22 A. B. R. 342.

8—*In re Gold*, 210 Fed. 410, 31 A. B. R. 18.

9—*In re Gold*, 210 Fed. 410, 31 A. B. R. 18.

10—*Houghton v. Burden*, 228 U. S. 161, 57 L. ed. 780, 30 A. B. R. 16.

11—*United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 56 L. ed. 1055, 28 A. B. R. 207.

12—*Mattley v. Giesler*, 202 Fed. 738, 29 A. B. R. 132.

**§ 1643. Writs of error to circuit court of appeals.**

Review of final orders under section 24a may be had upon writ of error or appeal, depending upon whether the proceeding in the lower court was at law or in equity, and with the difference in practice that under writ of error only questions of law can be considered, while on appeal the review may extend to the consideration of questions of fact. In a proceeding partaking of an equitable form as interventions in the bankruptcy court usually do, appeal is a proper remedy, even though the questions at issue are such as can be considered in a court of law. But when review is desired only on one or more legal questions arising under such proceeding in intervention, a writ of error is appropriate for the purpose. When the proceeding is at law, writ of error is proper although the form of proceeding is not one recognized at common law.<sup>13</sup>

If in any "proceeding in bankruptcy" a trial by jury be had under section 19 of the act, a review in the circuit court of appeals cannot be had under section 24b or 25a because those sections confer only jurisdiction in equity and not jurisdiction at law; and a review cannot be had under section 24a because that section relates exclusively to "controversies" as distinguished from "proceedings" in bankruptcy. If a review lies, it must come by writ of error under section 128 of the Judicial Code of 1911.<sup>14</sup> So, in an appeal from a judgment adjudging or refusing to adjudge the defendant a bankrupt in which a jury trial was not had or demanded, but the court of bankruptcy proceeded on its own findings of fact, both the facts and law are re-examinable on appeal, while if the judgment is entered on the verdict of a jury, the issue of facts is concluded and the judgment is reviewable for errors of law only; in the latter case errors in instructions given or refused or in the admission or rejection of evidence must appear by exceptions duly taken and preserved by bill of exceptions.<sup>15</sup> The question whether the petition alleged an act of bankruptcy against the alleged bankrupt does not go to the jurisdiction of the bankruptcy court

13—Rode & Horn v. Phipps, 195 Fed. 414, 27 A. B. R. 827.

14—In re Friend, 134 Fed. 778, 13 A. B. R. 595; In re Neasmith, 147 Fed. 160, 17 A. B. R. 128. But see Lockman v. Lang, 128 Fed. 279, 11 A. B. R. 597.

15—Bower v. Holzworth, 138 Fed. 28, 15 A. B. R. 22; Elliott & Co. v. Toepfner, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50; Insurance Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493; Duncan v. Landis, 106 Fed. 839, 5 A. B. R. 649.

is reviewable upon writ of error.<sup>16</sup> A judgment in a proceeding to punish for contempt for violation of an injunction of the bankruptcy court is reviewable by writ of error.<sup>17</sup> An appeal and a writ of error may be taken to review the same adjudication.<sup>18</sup>

Writs of error must issue in the name of the President of the United States, and be attested by the chief justice of the supreme court and the clerk of the circuit court. Any defect in the writ in this regard, however, is amendable.<sup>19</sup> The citation issued upon a writ of error should contain the names of all persons joining in applying for the writ.<sup>20</sup>

### § 1644. Mandamus.

An order adjudicating a person a bankrupt is not reviewable by mandamus.<sup>21</sup> The propriety of the appointment of a receiver and the effect of the dismissal of the proceedings upon the receivership are judicial questions to be determined primarily by the bankruptcy court and are not reviewable by mandamus.<sup>22</sup> An application for mandamus will be denied where a petition for revision has been filed in the time and no further relief is therefore necessary to preserve the rights of the petitioner.<sup>23</sup>

### § 1645. Time for appeal.

No time is fixed by section 24a for an appeal under its provisions, and an appeal thereunder must be allowed by the judge of the court appealed from or a judge of the court appealed to, within six months, the period of limitation fixed for appeals by the judiciary code.<sup>24</sup> The provisions of section 25a of the bankruptcy act relate only to cases specifically mentioned in the section, and have no application to appeals in independent pro-

16—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825, 24 A. B. R. 216.

17—*Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 24 A. B. R. 178.

18—*Lockman v. Lang*, 132 Fed. 1, 12 A. B. R. 497.

19—*Long v. Farmers' State Bank*, 147 Fed. 360, 9 L. R. A. (N. S.) 585, 17 A. B. R. 103.

20—*Kerch v. United States*, 171 Fed. 366, 22 A. B. R. 544.

21—*In re Riggs*, 214 U. S. 9, 53 L. ed. 887, 22 A. B. R. 720.

22—*Edinburg Coal Co. v. Humphreys*, 134 Fed. 839, 13 A. B. R. 593.

23—*In re Saratoga Gas, Elect. L. & P. Co.*, 21 A. B. R. 592.

24—*In re Mueller*, 135 Fed. 711, 14 A. B. R. 256; *Boonville Nat. Bank v. Blakey*, 107 Fed. 891, 6 A. B. R. 13; *Steele v. Buel*, 104 Fed. 968, 5 A. B. R. 165; 1 Supp. R. S. U. S. 904, § 11.

ceedings instituted for the recovery of assets of the estate or to set aside alleged preferences,<sup>25</sup> or to an appeal from an order or judgment refusing to set aside an adjudication.<sup>26</sup>

The time limit for a review by appeal or writ of error under section 24a begins to run from the time of the entry of the judgment, decree or order.<sup>27</sup>

An appeal from an interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction, or appointing a receiver, must be taken within thirty days from the entry of such order or decree.<sup>28</sup>

An appeal under section 25a must be taken within ten days. Unless so taken and all the statutory requirements complied with, the appellate court will be without jurisdiction;<sup>29</sup> but it has been held that a court may, in its discretion, overlook a breach of its own rules;<sup>30</sup> and, where the failure to appeal in time was due to a mistake of the remedy, the lower court may grant a review of the decision, from which an appeal is desired, so that an appeal may be in time,<sup>31</sup> even though the lower court is satisfied with its original decision on the merits and is unwilling to grant a rehearing in order to give these merits further consideration.<sup>32</sup>

The citation and bond are not jurisdictional prerequisites and an appeal is in time where the petition for appeal is filed within ten days though the citation and bond are not filed until after expiration of ten days.<sup>33</sup> So, when an appeal has been allowed

25—Boonville Nat. Bank v. Blakey, 107 Fed. 891, 6 A. B. R. 13.

26—Brady v. Bernard & Kittinger, 170 Fed. 576, 22 A. B. R. 342.

27—R. S. 1008; section 11 of the Courts of Appeal Act of 1891; In re McCall, 145 Fed. 898, 16 A. B. R. 670, citing Silsby v. Foote, 20 How. 290, 15 L. ed. 410; Board of Com'rs v. Gorman, 19 Wall. 662, 18 L. ed. 226; Polleys v. Black River Imp. Co., 113 U. S. 81, 28 L. ed. 938; Marks v. Northern Pac. R. Co., 76 Fed. 941; Providence Rubber Co. v. Good-year, 6 Wall. 153, 18 L. ed. 762; Credit Co. v. Arkansas Central R. Co., 128 U. S. 258, 32 L. ed. 448.

28—Section 129, Judicial Code of 1911.

29—In re Martin, 198 Fed. 947, 29 A.

B. R. 935; In re Marion Contract & Construction Co., 166 Fed. 618, 22 A. B. R. 81; Benjamin v. Hart, 4 N. B. R. 138, 4 Ben. 454, Fed. Cas. No. 1302; Wood v. Bailey, 12 N. B. R. 132, 21 Wall. 640, 22 L. ed. 689; Sedgwick v. Fridenberg, 11 Blatch. 77, Fed. Cas. No. 12611; In re York, 4 N. B. R. 156, Fed. Cas. No. 18139; Hawkins v. Bank, 1 Dill. 453, Fed. Cas. No. 6245.

30—Barron v. Morris, 14 N. B. R. 371, Fed. Cas. No. 9828.

31—Stickney v. Wilt, 11 N. B. R. 97, 23 Wall. 150, 164, 23 L. ed. 50.

32—In re Wright, 3 A. B. R. 184, 96 Fed. 820.

33—In re Quality Shop, 202 Fed. 196, 29 A. B. R. 854.

by the taking of security within the statutory time, and the transcript of the record has been filed and the case has been docketed at the proper term, the failure to issue a citation within the time prescribed for an appeal is not ground for the dismissal of an appeal.<sup>34</sup> Where, however, appellant, within ten days after the adjudication, prayed an appeal, which was allowed, and filed a bond, but the petition for the appeal, its allowance, and the citation and service thereon were not filed in the district court until after the expiration of the ten days, the appeal was not in time and should be dismissed.<sup>35</sup>

Section 31 of the act, like the similar section in the act of 1867, adopts the general rule followed in computing time. In the event the last day falls on Sunday or a holiday and is succeeded by a holiday or a Sunday, the next day thereafter which is not a legal holiday would be included. In computing the time within which an act must be done, holidays or Sundays occurring within the term are to be counted, unless expressly excluded or the last day falls on Sunday or a holiday.<sup>36</sup>

Whether the time limit begins to run from the date of the decision or from the date of the entry of the judgment is not settled<sup>37</sup> though it is held that a judgment allowing or rejecting a claim is presumptively rendered at the date of its filing with the clerk, and that the ten days would begin to run from that time.<sup>38</sup> Where a motion for a rehearing is filed within the time allowed for an appeal the time limit for an appeal or writ of error does not begin to run until the motion is disposed of.<sup>39</sup> The court cannot, however, extend the time for appeal,<sup>40</sup> and a rehearing should not be granted for the purpose of reviving the right to appeal unless the facts clearly warrant it.<sup>41</sup> Nor can the time be extended indirectly by the entry of an alias

34—*Lockman v. Lang*, 132 Fed. 1, 12 A. B. R. 497.

35—*Norcross v. Mercantile Co.*, 101 Fed. 796, 4 A. B. R. 317.

36—*In re York*, 4 N. B. R. 156, Fed. Cas. No. 18139.

37—See *In re McCall*, 145 Fed. 898, 16 A. B. R. 670.

38—*Peterson v. Nash Bros.*, 112 Fed. 311, 55 L. R. A. 344, 7 A. B. R. 181.

39—*In re McCall*, 145 Fed. 898, 16 A. B. R. 670; *Mills v. Fisher & Co.*, 159

Fed. 897, 16 L. R. A. (N. S.) 656, 20 A. B. R. 237.

40—*Brady v. Bernard & Kittinger*, 170 Fed. 576, 22 A. B. R. 342; *Judson v. Courier Co.*, 25 Fed. 705.

41—*In re Hudson Clothing Co.*, 140 Fed. 49, 15 A. B. R. 254; *Rode & Horn v. Phipps*, 195 Fed. 414, 27 A. B. R. 827; *In re Girard Glazed Kid Co.*, 129 Fed. 841, 12 A. B. R. 295; *Morgan v. Benedum*, 157 Fed. 232, 19 A. B. R. 601.

adjudication<sup>42</sup> or a motion to set aside the order of adjudication made after the expiration of the time allowed for an appeal.<sup>43</sup> While it is an abuse of the court's discretion to set aside an order disallowing a claim for the sole purpose of granting an appeal,<sup>44</sup> yet, an order disallowing a claim is within the discretion of the court, and it may, in the exercise of a sound judicial discretion, set it aside after the expiration of 10 days and thereby revive the right to appeal.<sup>45</sup> When the bankruptcy court in a controversy between the trustee and a creditor has rendered a decision adverse to the trustee and he has lost his right of appeal without culpable neglect, the court may grant a rehearing for the purpose of reviving such right.<sup>46</sup> While it has been held that if a circuit or district court permits the filing of a petition for rehearing during the term at which the order sought to be reviewed was entered,<sup>47</sup> it retains jurisdiction to act on it at the succeeding term, and the time for appeal does not begin to run until action is taken on the petition,<sup>48</sup> such decisions seem to overlook the fact that in the bankruptcy court the term is continuous from the commencing of a proceeding to the closing of an estate.<sup>49</sup>

### § 1646. Procedure in taking appeals.

The appellant must present a petition praying the appeal accompanied by an assignment of errors, without which the judgment will be affirmed,<sup>50</sup> and, if by others than the trustee, an appeal bond, to the judge of the court of bankruptcy or circuit court of appeals. It should be presented to the judge of the court of bankruptcy first, and, in case of his refusal to allow it, to the judge of the circuit court of appeals. This is the usual

42—*In re Berkebile*, 144 Fed. 577, 16 A. B. R. 277.

43—*In re Goldberg*, 167 Fed. 808, 21 A. B. R. 828.

44—*West v. McLaughlin & Co.*, 162 Fed. 124, 20 A. B. R. 654.

45—*In re Keyes*, 160 Fed. 763, 20 A. B. R. 183; *West v. McLaughlin & Co.*, 162 Fed. 124, 20 A. B. R. 654.

46—*In re Wright*, 96 Fed. 820, 3 A. B. R. 184.

47—*In re Anderson*, 23 Fed. 482.

48—*In re Worcester Co.*, 102 Fed. 808,

4 A. B. R. 496; *Andrews v. Thum*, 64 Fed. 149; *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 679, 42 L. ed. 1192.

49—See § 25, *ante*.

50—*Lloyd v. Chapman*, 93 Fed. 599; *In re Dunning*, 94 Fed. 709. But see *Bernard v. Lea*, 210 Fed. 583, 31 A. B. R. 436, holding that the failure of an appellant to file his assignment of errors, as required by rule of court, will not deprive the Circuit Court of jurisdiction.



course and the higher judge, unless there was reason for not having presented it to the lower, would exact this requirement. Upon the allowance of the appeal and the approval of the bond, indorsed on it usually, the papers with the citation, with evidence of service on the adverse party,<sup>51</sup> should be filed in the clerk's office of the court of bankruptcy, which must be done within ten days after the order appealed from or the appeal will be dismissed.<sup>52</sup> Where the record is incomplete, the appellees should suggest to the court the defect complained of and apply for a certiorari to send up the missing matter.<sup>53</sup> If the papers are regular and the judge applied to refuses to allow the appeal, he may be compelled to do so by mandamus.<sup>54</sup> The assignment of errors must ordinarily be filed within the time allowed for an appeal,<sup>55</sup> though where the appeal is allowed upon condition that the petitioner give a bond, the assignment of errors need not be filed until such bond is approved.<sup>56</sup> In proceedings by appeal and by writ of error to review the same rulings the filing of a single assignment of errors is sufficient.<sup>57</sup> While an appeal may be dismissed because of the generality of the assignment of errors, the court may allow an amendment and retain the case when the special circumstances justify it, and the application is promptly made.<sup>58</sup>

A bill of exceptions is unnecessary, for the proceeding in bankruptcy being a proceeding in equity, the appeal makes the entire record available to the appellant, and imposes the duty upon him, and upon the clerk of the lower court, to place the material parts of it in the transcript sent to the appellate court.<sup>59</sup> The practice and requirements upon appeals are substantially the same as in other cases, and the record required to be certified and filed is the record of the case in the bankruptcy court, not

51—Mead v. Platt, 17 Fed. 509; *Ex parte Mead*, 109 U. S. 230, 27 L. ed. 914.

52—G. O. XXXVI (1); *Norcross v. Mercantile Co.*, 101 Fed. 796, 4 A. B. R. 317.

53—Flickinger v. First Nat. Bank of Vandalia, 145 Fed. 162, 16 A. B. R. 678.

54—Ins. Co. v. Comstock, 8 N. B. R. 145, 16 Wall. 258, 21 L. ed. 493. See also *In re McCall*, 145 Fed. 898, 16 A. B. R. 670.

55—Lockman v. Lang, 132 Fed. 1, 12

A. B. R. 497; *Lockman v. Lang*, 128 Fed. 279, 11 A. B. R. 597. But see *Bernard v. Lea*, 210 Fed. 583, 31 A. B. R. 436.

56—Lockman v. Lang, 132 Fed. 1, 12 A. B. R. 497.

57—Lockman v. Lang, 132 Fed. 1, 12 A. B. R. 497.

58—Flickinger v. First Nat. Bank of Vandalia, 145 Fed. 162, 16 A. B. R. 678.

59—Dodge v. Norlin, 133 Fed. 363, 13 A. B. R. 176.

that before the referee.<sup>60</sup> Sections 698 and 750 of the revised statutes providing for sending up proofs, entries and papers on file necessary to a hearing of the appeal, and for the transmission of the whole of the record, in the absence of stipulation, apply to appeals under section 25a.<sup>61</sup> The district court is not authorized to designate what records shall be certified,<sup>62</sup> the clerk of the district court, who is also the clerk of the bankruptcy court, being the only person authorized to certify to the appellate court the proceedings had in the bankruptcy court, either on appeal or on a petition to revise.<sup>63</sup> Where the parties fail to agree on what the record is to contain, the appellant should file a praecipe with the clerk, pointing out specifically what records in his judgment should be certified. If the appellee deems the record insufficient, he can suggest a diminution of the record, and ask for a certiorari.<sup>64</sup> While the record should disclose the question of law suggested in the assignment of errors,<sup>65</sup> the failure to incorporate evidence in the record, when there is nothing to show that any evidence was taken, is no ground for dismissing an appeal.<sup>66</sup> While on notice of an appeal, the citation must be given,<sup>67</sup> the citation and bond are not jurisdictional prerequisites, and a failure to give or a defect therein may be cured after the time limited for an appeal,<sup>68</sup> and an alias citation may be issued to omitted parties where application therefor is made before the expiration of the first term at which the case could have been heard.<sup>69</sup>

An appeal cannot be taken in *forma pauperis*, nor can a receiver be ordered to advance the costs of the transcripts and printing upon an appeal from an order adjudging a debtor a bankrupt because the latter is without means.<sup>70</sup>

60—Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 17 A. B. R. 135.

61—In re Robertshaw Mfg. Co., 135 Fed. 220, 14 A. B. R. 341.

62—In re Robertshaw Mfg. Co., 135 Fed. 220, 14 A. B. R. 341.

63—Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 17 A. B. R. 135.

64—In re Robertshaw Mfg. Co., 135 Fed. 220, 14 A. B. R. 341.

65—Fidelity Trust Co. v. Robinson, 192 Fed. 562, 27 A. B. R. 784.

66—Taft Co. v. Century Sav. Bank, 141 Fed. 369, 15 A. B. R. 594.

67—Wear v. Mayer, 6 Fed. 658.

68—In re Hill Co., 148 Fed. 832, 17 A. B. R. 517; Columbia Iron Works v. Nat. Lead Co., 127 Fed. 99, 11 A. B. R. 340. And see In re Quality Shop, 202 Fed. 196, 29 A. B. R. 854.

69—Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 14 A. B. R. 780.

70—Keck Mfg. Co. v. Lorsch, 179 Fed. 485, 24 A. B. R. 705.

**§ 1647. Appeal bonds.**

A bond running only to the original petitioning creditors has been held sufficient.<sup>71</sup> The trustee as beneficial owner of a bond given upon appeal from the adjudication and made payable to certain creditors of the bankrupt may sue thereon, but <sup>72</sup> the complaint in such suit must allege that the trustee is the beneficial owner, and should show the manner in which he became such.<sup>73</sup>

Section 25c of the act provides that trustees shall not be required to give bond when they take appeals or sue out writs of error. This section applies to supersedeas as well as cost bonds.<sup>74</sup>

**§ 1648. Effect of appeal to circuit court of appeals.**

The taking of an appeal deprives the lower court of jurisdiction to further consider matters involved in the appeal,<sup>75</sup> but without a supersedeas an appeal to the circuit court of appeals does not suspend the execution of an order of the bankruptcy court nor stop its enforcement.<sup>76</sup>

Upon reversal of an order refusing the bankrupt his discharge the court may merely reverse the decree of the lower court leaving the question of a discharge to a new inquiry, or reverse it with instructions to grant the discharge.<sup>77</sup> The lower court cannot in any way limit the effect of a judgment or order of the circuit court of appeals on affirmance of an order of the lower court. It is bound to obey the mandate of the court of appeals and carry it into effect without any limitation whatever.<sup>78</sup>

By the intervention of a term of the appellate court between the allowance of an appeal and the issuance of the citation, if citation is not waived, the appeal becomes inoperative.<sup>79</sup>

71—*Flickinger v. First Nat. Bank of Vandalia*, 145 Fed. 162, 16 A. B. R. 678.

72—*Dreher Co. v. Nat. Surety Co.*, 174 Ala. 490, 27 A. B. R. 486.

73—*Dreher Co. v. Nat. Surety Co.*, 174 Ala. 490, 27 A. B. R. 486.

74—*In re Dresser & Co.*, 14 A. B. R. 41.

75—*Bernard v. Lea*, 210 Fed. 583, 31 A. B. R. 436; *First Nat. Bank of Miles*

*City v. State Nat. Bank of Miles City*, 131 Fed. 430, 12 A. B. R. 440.

76—*In re Brady*, 169 Fed. 152, 21 A. B. R. 364.

77—*Vehon v. Ullman*, 147 Fed. 694, 17 A. B. R. 435.

78—*In re Hudson River Elec. Co.*, 184 Fed. 970, 25 A. B. R. 873.

79—*Nazima Trading Co. v. Martin*, 164 Fed. 838, 21 A. B. R. 159.

### § 1649. Rehearing in circuit court of appeals.

The fact that the circuit court of appeals erroneously exercised jurisdiction under an appeal does not render the judgment void, but merely erroneous. The error may be corrected by a timely application to that court upon a petition to rehear or by resort to some appellate procedure for the correction of the error.<sup>80</sup> A petition to rehear should ordinarily be filed within thirty days after the filing of the opinion but a petition has been allowed after such time where the point upon which the rehearing was asked was a reversal of the authority upon which the opinion was based after the time for a petition to rehear, but before the court had lost jurisdiction by the expiration of the term.<sup>81</sup>

### § 1650. Revision of bankruptcy proceedings.

#### § 1651. — In general.

Section 24b of the bankruptcy act provides that "the several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."<sup>82</sup>

By this provision, the jurisdiction of the circuit courts of appeals is limited to the review in matters of law of some action taken or order made in the course of a bankruptcy proceeding for which an appeal is not provided, and, if an appeal is provided, that is exclusive, but then both law and fact are reviewed.<sup>83</sup> The "proceedings" reviewable are those adminis-

80—*Loeser v. Savings Deposit Bank & Trust Co.*, 163 Fed. 212, 20 A. B. R. 845.

81—*Unitype Co. v. Long*, 149 Fed. 196, 17 A. B. R. 627.

82—Analogous provision of Act of 1867. "Sec. 2. . . . That the several circuit courts . . . shall have a general superintendence and jurisdiction of all cases and questions . . . and, except when special provision is otherwise made, may . . . hear and determine the case."

It has been held that the circuit court of appeals of the Eighth Circuit has no

revising jurisdiction over courts of bankruptcy in the Indian Territory, but the court of appeals of that territory alone has appellate jurisdiction (*In re Blair*, 106 Fed. 662, 5 A. B. R. 793); and that this subdivision has no application to territorial courts (*In re Stumpff*, 9 Okla. 639, 4 A. B. R. 267).

83—*Elliott & Co. v. Toeppner*, 187 U. S. 327, 47 L. ed. 200, 9 A. B. R. 50, § 25a, Act of 1898; *In re Jacobs*, 99 Fed. 539, 3 A. B. R. 671; *In re Good*, 99 Fed. 389, 3 A. B. R. 605; *In re Richards*, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 Fed. 935; *In re Rusch*, 8 A. B. R. 518, 116 Fed.

trative orders and decrees in the ordinary course of a bankruptcy proceeding between the filing of the petition and the final settlement of the estate, which are not made specially appealable under sections 24a or 25b, the provision not being intended as a substitute for the right of appeal upon controverted questions of fact under sections 24a and 25a.<sup>84</sup> It is held, however, that the circuit court of appeals will not on its own motion decline jurisdiction, of a controversy brought up by petition to revise which should properly have come up on appeal;<sup>85</sup> and conversely an order appealed from has been treated as before the court of appeals by petition for revision where no objection was made and no questions of fact were involved,<sup>86</sup> though the true rule, in view of the recent decision of the supreme court,<sup>87</sup> that the provisions for an appeal under section 25a and those for review under section 24b are mutually exclusive, would seem to be that where an appeal has been erroneously taken it cannot be treated as a petition for review.<sup>88</sup>

An order is subject to review though made in chambers.<sup>89</sup>

To have a referee's decision reviewed, it should be certified to a judge of the district court, and his decision first taken.

## § 1652. — What may be reviewed.

This provision is limited to proceedings already had and contemplates a summary review of the orders of the bankruptcy

270; *Mueller v. Nugent*, 184 U. S. 1, 9, 46 L. ed. 405, 7 A. B. R. 224.

A similar view prevailed under the former act. *Bank v. Slagle*, 106 U. S. (16 Otto) 558, 22 L. ed. 273; *Bank v. Cooper*, 20 Wall. 171, 22 L. ed. 273; *Sandusky v. Bank*, 23 Wall. 289, 23 L. ed. 155; *Leggett v. Allen*, 110 U. S. 741, 28 L. ed. 313.

In the case of *Meyers* (105 Fed. 353, 5 A. B. R. 4) it was held that there is nothing in the law which requires the court of bankruptcy to make findings of fact for the purposes of an appeal from its decision.

84—In *re Loving*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852; *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513; In *re Mueller*, 135 Fed. 711, 14 A. B. R. 256.

85—In *re Stroum*, 192 Fed. 762, 27 A. B. R. 721; *Martin v. Globe Bank & Trust Co.*, 193 Fed. 841, 27 A. B. R. 545.

86—In *re Williams' Estate*, 156 Fed. 934, 19 A. B. R. 389; In *re Blanchard Shingle Co.*, 164 Fed. 311, 21 A. B. R. 142; In *re Rose Shoe Mfg. Co.*, 168 Fed. 39, 21 A. B. R. 725.

87—In *re Loving*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852.

88—*Brady v. Bernard & Kittinger*, 170 Fed. 576, 22 A. B. R. 342; *Davidson & Co. v. Friedman*, 140 Fed. 853, 15 A. B. R. 489; *Dickas v. Barnes*, 140 Fed. 849, 5 L. R. A. (N. S.) 654, 15 A. B. R. 566.

89—*Hall v. Allen*, 9 N. B. R. 6, 12 Wall. 452, 20 L. ed. 458; *Morgan v. Thornhill*, 5 N. B. R. 1, 11 Wall. 65, 20 L. ed. 60.

courts in matters of law, whether the proceedings be at law or in equity, but does not contemplate any review of the facts, or of decisions which require the consideration of conflicting evidence, or evidence from which different deductions or conclusions may reasonably be drawn.<sup>90</sup> The legal questions which can be examined are only those which arise out of the facts found by the court or admitted by the parties.<sup>91</sup>

An order based upon an agreed statement of facts, presents a question of law reviewable by petition.<sup>92</sup> The failure of the defendant to deny or otherwise controvert the facts alleged will be deemed an admission that they are true. A mere motion to dismiss the petition upon the ground that the order is not reviewable upon a petition to revise is not a denial of the facts alleged.<sup>93</sup>

An order vacating or refusing to vacate an adjudication,<sup>94</sup> or denying a petition for the reinstatement of proceedings, where

90—In re Witherbee, 202 Fed. 893, 30 A. B. R. 314; In re Zinner, 202 Fed. 197, 29 A. B. R. 860; In re Blum, 202 Fed. 883, 29 A. B. R. 332; In re Smith, 203 Fed. 369, 29 A. B. R. 628; Stuart v. Reynolds, 204 Fed. 709, 29 A. B. R. 412; Kirsner v. Taliaferro, 202 Fed. 51, 29 A. B. R. 832; In re Frank, 182 Fed. 794, 25 A. B. R. 486; Ruddick v. Billings, 3 N. B. R. 14, Woolw. 330, Fed. Cas. No. 12110; In re Irwin, 174 Fed. 642, 23 A. B. R. 487; In re Leech, 171 Fed. 622, 22 A. B. R. 599; In re Knosher & Co., 197 Fed. 136, 28 A. B. R. 747; Barnes v. Pampel, 192 Fed. 525, 27 A. B. R. 192; In re Grassler & Reichwald, 154 Fed. 478, 18 A. B. R. 694; Samel v. Dodd, 142 Fed. 68, 16 A. B. R. 163; In re O'Connell, 137 Fed. 838, 14 A. B. R. 237; Kenova Loan & Trust Co. v. Graham, 135 Fed. 717, 14 A. B. R. 313; Ellis v. Krulewitch, 141 Fed. 954, 15 A. B. R. 615; In re Gill, 195 Fed. 643, 28 A. B. R. 333; Lennox v. Allen Lane Co., 167 Fed. 114, 21 A. B. R. 648; Ryan v. Hendricks, 166 Fed. 94, 21 A. B. R. 570; Lesaius v. Goodman, 165 Fed. 889, 21 A. B. R. 446, rev'g 163 Fed. 614, 21 A. B. R. 23; In re Blanchard Shingle Co., 164 Fed. 311, 21 A. B. R. 142; Chestertown Bank of Maryland v. Walker, 163 Fed. 510, 20 A. B. R. 840; Mulford v. Fourth St. Nat. Bank, 157

Fed. 897, 19 A. B. R. 742; In re Letson, 157 Fed. 78, 19 A. B. R. 506; In re Lee, 182 Fed. 579, 25 A. B. R. 436; In re Hays, 179 Fed. 222, 24 A. B. R. 691; In re Loving, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852.

91—In re Haring, 29 A. B. R. 387, aff'g 193 Fed. 168, 27 A. B. R. 285; In re Moore, 166 Fed. 689, 21 A. B. R. 651; In re Throckmorton, 149 Fed. 145, 17 A. B. R. 856.

92—In re Judkins, 205 Fed. 892, 30 A. B. R. 529.

93—In re Frank, 182 Fed. 794, 25 A. B. R. 486.

94—B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co., 206 Fed. 885, 30 A. B. R. 424; In re Worsham, 142 Fed. 121, 15 A. B. R. 672; Brady v. Bernard & Kittinger, 170 Fed. 576, 22 A. B. R. 342; contra, In re Goldberg, 167 Fed. 808, 21 A. B. R. 828.

An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is reviewable. In re Ives, 113 Fed. 911, 7 A. B. R. 692.

Order dismissing the petition after adjudication because corporation is not such as can be adjudicated under the act is reviewable. In re New England Breeders' Club, 169 Fed. 586, 22 A. B. R. 124, rev'g 165 Fed. 517, 21 A. B. R. 349.

the adjudication has been refused and the petition dismissed,<sup>95</sup> may be reviewed.

The court of appeals of the eighth circuit has held that an order dismissing a petition for failure to allege facts sufficient to constitute an act of bankruptcy is reviewable under section 24b as well as appealable under section 25a,<sup>96</sup> but its holding is contrary to the decision of the supreme court, which holds the two sections mutually exclusive and not cumulative.<sup>97</sup>

A finding that an alleged creditor has a provable claim entitling him to be a petitioning creditor is reviewable,<sup>98</sup> as is a decision as to the priority of a claim not amounting to \$500, the validity not being disputed;<sup>99</sup> setting off a usury judgment against claims;<sup>1</sup> or setting aside the allowance of a secured claim and requiring the surrender of a preferential payment;<sup>2</sup> or denying partnership creditors the right to participate in the individual assets of a bankrupt partner until the individual partners have been paid.<sup>3</sup>

The circuit court of appeals has jurisdiction to review the decision of the district court, exercising ancillary jurisdiction in bankruptcy proceedings, that it has no jurisdiction to determine adverse claims.<sup>4</sup> It is only when the jurisdiction of the lower court as a federal court is in issue that the supreme court has exclusive jurisdiction to entertain a writ of error or an appeal.<sup>5</sup>

A summary order to turn over assets is held reviewable under section 24b,<sup>6</sup> as is an order requiring partners to turn over prop-

95—*In re Jamison Mercantile Co.*, 112 Fed. 966, 7 A. B. R. 558.

96—*Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 17 A. B. R. 609.

97—*In re Loving*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852.

98—*In re Ellis*, 143 Fed. 103, 16 A. B. R. 221.

99—*In re Rouse, Hazard & Co.*, 1 N. B. N. 75, 1 A. B. R. 234, 91 Fed. 96; *In re Worcester County*, 102 Fed. 808, 4 A. B. R. 496. See *In re Mueller*, 153 Fed. 711, 14 A. B. R. 256. And see *In re Flatland*, 196 Fed. 310, 28 A. B. R. 476, which

makes no reference to the amount involved.

1—*Wilson v. Bank*, 3 Fed. 91.

2—*In re First Nat. Bank of Louisville*, 155 Fed. 100, 18 A. B. R. 766.

3—*Euclid Nat. Bank v. Union Trust & Deposit Co.*, 149 Fed. 975, 17 A. B. R. 834, aff'g 142 Fed. 588, 16 A. B. R. 91.

4—*Fidelity Trust Co. v. Gaskell*, 195 Fed. 865, 28 A. B. R. 4.

5—*Fidelity Trust Co. v. Gaskell*, 195 Fed. 865, 28 A. B. R. 4.

6—*Kirsner v. Taliaferro*, 202 Fed. 51, 29 A. B. R. 832; *First Nat. Bank of Chi-*

erty to the partnership trustee<sup>7</sup> or an order enjoining replevin by a third person against a trustee claiming property in such trustee's possession;<sup>8</sup> or enjoining an assignee under a voluntary general assignment avoided by the bankruptcy and directing the marshal to take the assigned property.<sup>9</sup> So, an order directing a trustee to take possession of property held by a sheriff under attachment at the time of adjudication;<sup>10</sup> or enjoining a sheriff from paying over money to an execution creditor and directing him to pay it to a trustee;<sup>11</sup> or directing the payment to a claimant of funds in the hands of a bankrupt's trustee, where the facts are undisputed,<sup>12</sup> or the refusal of an order directing a receiver to turn over assets to the trustee;<sup>13</sup> or a decision as to the validity of a trust deed executed by the bankrupt within four months of the filing of the petition in bankruptcy<sup>14</sup> may be reviewed by petition, as may the action of the district court in erroneously retaining jurisdiction of summary proceedings against an adverse claimant,<sup>15</sup> or decisions involving disputes of parties to the bankruptcy proceedings as to their respective rights to participate in the proceeds of admittedly valid security.<sup>16</sup>

The right of revision extends to an order denying the bankrupt the right to amend his schedules<sup>17</sup> or imprisoning bankrupt for contempt in failing to obey an order requiring him to pay

cago v. Chicago Title & Trust Co., 198 U. S. 280, 49 L. ed. 1051, rev'g 125 Fed. 169, 11 A. B. R. 79; *In re Farrell*, 176 Fed. 505, 23 A. B. R. 826.

But see *In re Richards*, 183 Fed. 501, 25 A. B. R. 176; *In re Cole*, 144 Fed. 392, 16 A. B. R. 302, holding that unless the affirmance of an order directing the bankrupt to turn over assets to the trustees is so unwholly unjustified on the proofs as would require the court on a writ of error to set aside a verdict for want of evidence to sustain it, the determination of the court below is not reviewable on petition to revise.

7—*Dickas v. Barnes*, 140 Fed. 849, 5 L. R. A. (N. S.) 654, 15 A. B. R. 566.

8—*In re Russell*, 101 Fed. 248, 3 A. B. R. 658.

9—*Davis v. Bohle*, 1 N. B. N. 216, 1 A. B. R. 421, 92 Fed. 325.

10—*In re Francis-Valentine Co.*, 1 N. B. N. 529, 2 A. B. R. 522, 94 Fed. 793.

11—*In re Kenney*, 2 N. B. N. R. 140, 3 A. B. R. 353, 97 Fed. 554.

12—*In re Hutchinson*, 113 Fed. 202, 8 A. B. R. 20.

13—*In re Hecox*, 164 Fed. 823, 21 A. B. R. 314.

14—*Morgan v. First Nat. Bank of Mannington*, 145 Fed. 466, 16 A. B. R. 639.

15—*Shea v. Lewis*, 206 Fed. 877, 30 A. B. R. 436.

16—*Snow v. Dalton*, 203 Fed. 843, 29 A. B. R. 240.

17—*In re Goodman*, 174 Fed. 644, 23 A. B. R. 504.



over money to a trustee;<sup>18</sup> or to produce books;<sup>19</sup> or requiring a bankrupt to indorse a liquor license for sale.<sup>20</sup>

An order for the sale of property by a trustee on exception to the report;<sup>21</sup> or refusing to set aside a sale<sup>22</sup> or allowing an exemption<sup>23</sup> or directing a sale of property claimed as exempt,<sup>24</sup> or a decision involving a widow's right to dower in the estate of the bankrupt,<sup>25</sup> may be review by petition.

Orders confirming or refusing to confirm, or setting aside a composition;<sup>26</sup> or revoking a discharge;<sup>27</sup> or denying a motion to dismiss an application for a discharge,<sup>28</sup> or denying a creditor the right to amend his specifications in opposition to a discharge;<sup>29</sup> have been held reviewable by petition but this seems doubtful.<sup>30</sup>

An order removing or refusing to remove a trustee;<sup>31</sup> or allowing expenses incurred by the trustee for counsel fees in the realization of assets<sup>32</sup> is reviewable by petition.

Whether an order directing a re-reference is reviewable under 24b has not been decided.<sup>33</sup>

### § 1653. — What may not be reviewed.

On a petition to the circuit court of appeals under section 24b, an objection of the petitioner that the evidence in the case did not warrant the order complained of will not be considered;<sup>34</sup>

18—*In re Purvine*, 2 A. B. R. 787, 1 N. B. N. 326, 96 Fed. 192.

19—*In re Horgan*, 98 Fed. 414, 2 N. B. N. 233, 3 A. B. R. 253, *aff'd* 97 Fed. 319, 2 N. B. N. 53.

20—*In re Fisher*, 103 Fed. 860, 4 A. B. R. 646.

21—*Bank v. Slagle*, 106 U. S. (16 Otto) 558, 27 L. ed. 204; *Nimick v. Coleman*, 95 U. S. (5 Otto) 266, 24 L. ed. 447.

22—*In re Knosher & Co.*, 197 Fed. 136, 28 A. B. R. 747.

23—*Holden v. Stratton*, 198 U. S. 202, 48 L. ed. 116, 10 A. B. R. 786.

24—*Ingram v. Wilson*, 125 Fed. 913, 11 A. B. R. 192.

25—*In re McKenzie*, 142 Fed. 383, 15 A. B. R. 679, *aff'd* 132 Fed. 986, 13 A. B. R. 227.

26—*In re Adler*, 3 N. B. N. R. 15, 103 Fed. 444, 4 A. B. R. 583; *In re Joseph*, 24 Fed. 137.

27—See *Thompson v. Mauzy*, 174 Fed. 611, 23 A. B. R. 489.

28—*Lindeke v. Converse*, 198 Fed. 618, 28 A. B. R. 596.

29—*In re Carley*, 117 Fed. 130, 8 A. B. R. 720.

30—See cases cited in succeeding section.

31—*Hutchins v. Briggs*, 61 Fed. 498; *In re Prouty*, 24 Fed. 554.

32—*Davidson & Co. v. Friedman*, 140 Fed. 853, 15 A. B. R. 489.

33—See *In re Judkins*, 205 Fed. 892, 30 A. B. R. 529.

34—*In re Rosser*, 101 Fed. 562, 4 A. B. R. 153; *Babbett v. Burgess*, 7 N. B. R. 561, 2 Dill. 169, Fed. Cas. No. 693.

or a finding that a creditor did not have reasonable cause to believe his debtor insolvent when he obtained security for his debt;<sup>35</sup> or an error in entertaining a bill in equity by the trustee against a stranger, a citizen of the same state, to set aside a fraudulent conveyance;<sup>36</sup> or mere irregularities.<sup>37</sup> Matters committed to the discretion of the lower court cannot be revised unless there was a manifest abuse of such discretion,<sup>38</sup> as an order transferring the case to another district,<sup>39</sup> or an order to produce bonds and papers and regarding examination of witnesses;<sup>40</sup> or an order relating to attorney's fees,<sup>41</sup> or an order removing a referee from office<sup>42</sup> or an order staying creditors' proceedings in a state court.<sup>43</sup> The proceedings before the referee are not before the court<sup>44</sup> nor are the master's findings of fact approved by the district judge brought up for review.<sup>45</sup> Questions that do not appear on the record,<sup>46</sup> or that were not raised and considered by the court below,<sup>47</sup> will not be considered.

The illegality of the adjudication cannot be considered upon petition to revise.<sup>48</sup> An order directing the payment of the proceeds of a receiver's sale to the trustee, is not reviewable though

Petition to revise not proper where the order complained of, involving the validity of a mortgage, resulted from a consideration of disputed facts and depended upon the findings made thereon. *Wells & Co. v. Sharp*, 208 Fed. 399, 31 A. B. R. 348.

35—*In re Eggert*, 102 Fed. 735, 4 A. B. R. 449.

36—*In re Jacobs*, 99 Fed. 539, 3 A. B. R. 671; *In re Abraham*, 1 N. B. N. 281, 2 A. B. R. 266, 93 Fed. 767; *Stickney v. Wilt*, 23 Wall. 150, 23 L. ed. 50; *Milner v. Meek*, 95 U. S. (5 Otto) 252, 24 L. ed. 444.

37—*Huntington v. Saunders*, 64 Fed. 476, 72 Fed. 10.

38—*In re Guanacevi Tunnel Co.*, 201 Fed. 316, 29 A. B. R. 229; *Mulford v. Fourth St. Nat. Bank*, 157 Fed. 897, 19 A. B. R. 742; *In re Lesser*, 99 Fed. 913, 3 A. B. R. 758; *In re Marsh*, Fed. Cas. No. 9108; *In re Adler*, 2 Woods 511, Fed. Cas. No. 82; *In re Perkins*, 8 N. B. R. 56, 5 Biss. 254, Fed. Cas. No. 10982; *Morgan*

*v. Thornhill*, 5 N. B. R. 1, 11 Wall. 65, 20 L. ed. 60; *Woods v. Buckewell*, 7 N. B. R. 405, 2 Dill. 38, Fed. Cas. No. 17991.

39—*Kyle Lumber Co. v. Bush*, 133 Fed. 688, 13 A. B. R. 535.

40—*In re Horgan*, 98 Fed. 414, 3 A. B. R. 253.

41—*In re Irwin*, 174 Fed. 642, 23 A. B. R. 487.

42—*Birch v. Steele*, 165 Fed. 577, 21 A. B. R. 539.

43—*In re Guanacevi Tunnel Co.*, 201 Fed. 316, 29 A. B. R. 229.

44—*In re Pettingil & Co.*, 137 Fed. 840, 14 A. B. R. 757.

45—*In re Caponigri*, 183 Fed. 307, 25 A. B. R. 509.

46—*Stuart v. Reynolds*, 204 Fed. 709, 29 A. B. R. 412; *In re Baum*, 169 Fed. 410, 22 A. B. R. 295; *Serra e Hijo v. Hoffman*, 17 N. B. R. 124.

47—*In re Jaycox*, 13 N. B. R. 122, Fed. Cas. No. 7244.

48—*Cook Inlet Coal Fields Co. v. Caldwell*, 147 Fed. 475, 17 A. B. R. 135.

made upon petition of the trustee<sup>49</sup> nor can a decree setting aside or sustaining a conveyance made by the bankrupt,<sup>50</sup> or an interlocutory decree in a plenary suit brought in the bankruptcy court by the trustee under section 67e,<sup>51</sup> or a proceeding to punish for contempt one who has violated an injunction of the bankruptcy court in a collateral matter<sup>52</sup> be reviewed upon petition. The propriety of an order directing the bankrupt to turn over property to the trustee cannot be questioned upon a petition to review an order adjudging the bankrupt guilty of contempt.<sup>53</sup>

A specific provision<sup>54</sup> having been made for appeal from a judgment adjudging or refusing to adjudge a bankrupt, granting or denying a discharge or allowing or rejecting a debt or claim of \$500 or over, the courts are not at liberty to disregard the distinction and only non-appealable orders can be reviewed under this provision;<sup>55</sup> which was also the view under the former act;<sup>56</sup> but the present act is mandatory as to the revision while the former was permissive.<sup>57</sup> Accordingly a review of an order allowing or rejecting a claim exceeding \$500<sup>58</sup> cannot be had under section 24b though the trustee admits the validity of the claim and contests only its validity as a lien upon the bankrupt's property<sup>59</sup> since the proper procedure is by appeal.

49—*Mason v. Wolkowich*, 150 Fed. 699, 10 L. R. A. (N. S.) 765, 17 A. B. R. 709.

50—*Barnes v. Pampel*, 192 Fed. 525, 27 A. B. R. 192.

Judgment of district court in plenary suit under section 60b not revisable. In re *Hamilton Automobile Co.*, 198 Fed. 856, 29 A. B. R. 163.

Appeal under section 24a not petition under section 24b proper to review plenary suit against wife of bankrupt to recover funds alleged to have been given her by bankrupt. *Kirkpatrick v. Harnesberger*, 199 Fed. 886, 29 A. B. R. 439.

51—*Doroshov v. Ott*, 134 Fed. 740, 14 A. B. R. 34.

52—*Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 24 A. B. R. 178.

53—In re *Lans*, 158 Fed. 610, 19 A. B. R. 458.

54—Section 25a, Act of 1898.

55—In re *Loving*, 224 U. S. 183, 56

L. ed. 725, 27 A. B. R. 852; In re *Worcester County*, 102 Fed. 808, 4 A. B. R. 496; In re *Good*, 99 Fed. 389, 3 A. B. R. 605.

56—*Smith v. Mason*, 6 N. B. R. 1, 14 Wall. 419, 20 L. ed. 748; In re *Alexander*, 3 N. B. R. 6, Chase 295, Fed. Cas. No. 160.

57—*Bank v. Cooper*, 20 Wall. 171, 22 L. ed. 273.

58—*Union Nat. Bank of Kansas City v. Neill*, 149 Fed. 720, 17 A. B. R. 853; In re *Dickson*, 111 Fed. 726, 55 L. R. A. 349, 7 A. B. R. 186.

59—In re *Streator Metal Stamping Co.*, 205 Fed. 280, 30 A. B. R. 55; In re *Loving*, 224 U. S. 183, 56 L. ed. 725, 27 A. B. R. 852. See also In re *Doran*, 154 Fed. 467, 18 A. B. R. 760, modf'g 148 Fed. 327, 17 A. B. R. 799.

As holding to a contrary effect, see *Rode & Horn v. Phipps*, 195 Fed. 414, 27 A. B. R. 827; *Barnes v. Pampel*, 192 Fed. 525, 27 A. B. R. 192; In re *Lee*, 182 Fed.

An order denying to a partnership creditor the right to prove his claim against the partnership estate is not reviewable since it is in effect an order disallowing a claim.<sup>60</sup> If the claim is less than \$500 it is not within the provision as to appeals and an order allowing or rejecting it is final on the facts but may be reviewed under this provision as to any question of law.

An order dismissing an application for discharge<sup>61</sup> or granting a discharge or confirming a composition<sup>62</sup> is not reviewable.

### § 1654. — Time for presenting petition.

While neither the statute nor the rules limit the time within which a petition for review should be filed,<sup>63</sup> it should be within a reasonable time depending upon the circumstances of each case.<sup>64</sup> The better practice is to fix it at six months, by analogy to the time allowed by the statute for taking appeals to the circuit court of appeals in other cases.<sup>65</sup> A petition to revise an order setting aside a sale of the bankrupt's property and ordering a resale need not be presented until after the resale has been made and confirmed.<sup>66</sup>

Rule 38 of the second circuit limits the time to ten days, unless an order of the bankruptcy court enlarging the time is granted within the ten days,<sup>67</sup> but an order extending the time for the filing of the petition to revise is improper if made *nunc pro tunc* after the expiration of the time allowed by the rules for the

579, 25 A. B. R. 436; *Ritchie County Bank v. McFarland*, 183 Fed. 715, 24 A. B. R. 893, *aff'g* 174 Fed. 859, 23 A. B. R. 530; *In re Holmes*, 142 Fed. 391, 15 A. B. R. 689; *Courier Journal Co. v. Schaefer Co.*, 101 Fed. 699, 4 A. B. R. 183.

60—*In re Mueller*, 135 Fed. 711, 14 A. B. R. 256.

61—*In re Kuffler*, 127 Fed. 125, 11 A. B. R. 469.

62—*In re Friend*, 134 Fed. 778, 13 A. B. R. 595.

63—*In re New York Economical Printing Co.*, 106 Fed. 839, 5 A. B. R. 697.

64—*Blanchard v. Ammons*, 183 Fed. 556, 25 A. B. R. 590.

Delay of one month not unreasonable. *In re Rome*, 162 Fed. 971, 19 A. B. R. 820.

Delay of three months not unreasonable. *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396, 14 A. B. R. 477.

65—*Blanchard v. Ammons*, 183 Fed. 556, 25 A. B. R. 590; *In re Groetzinger & Sons*, 127 Fed. 124, 11 A. B. R. 467; *In re Tomlinson Co.*, 154 Fed. 834, 18 A. B. R. 691; *In re Holmes*, 142 Fed. 391, 15 A. B. R. 689; *In re Youngstrom*, 153 Fed. 98, 18 A. B. R. 572; *In re Worcester County*, 102 Fed. 808, 4 A. B. R. 496; *First Nat. Bk. v. Cooper*, 20 Wall. 171, 22 L. ed. 273; *In re Casey*, 8 N. B. R. 71, 10 Blatch. 376, Fed. Cas. No. 2495; compare *In re Good*, 99 Fed. 389, 3 A. B. R. 605.

66—*Sturgis v. Corbin*, 141 Fed. 1, 15 A. B. R. 543.

67—*In re Brown*, 174 Fed. 339, 23 A. B. R. 93.

filing of such petition.<sup>68</sup> A stipulation that two petitions to revise be printed in one appeal book is not a waiver of the failure to file within the ten days allowed.<sup>69</sup>

### § 1655. — Practice.

It is expressly provided that the power of revision shall be exercised "on due notice and petition by the party aggrieved."<sup>70</sup> The circuit court of appeals cannot revise the proceedings of the district court in bankruptcy without an issue made and presented by parties who have a substantial interest in the controversy, and who can suitably represent it, or at least without a proper opportunity being given therefor, and where the creditor against whom the petition for review was filed has been paid, and has therefore no longer any interest in the controversy, the court will not proceed further until other creditors, having an interest, are brought in or given an opportunity to come in by notice properly served.<sup>71</sup> Reasonable notice should be given to the adverse party; but where the record contains everything that was done it may contain more than is necessary, but is certainly sufficient, and notice given in open court in the presence of all the parties and their attorneys at the very instant the judgment sought to be revised was announced is due notice.<sup>72</sup> A petition for revision should not be dismissed for lack of proper parties, where the parties referred to were not parties to the proceedings below.<sup>73</sup>

While it has been held that the petition may be presented and allowed by a judge of a court of bankruptcy,<sup>74</sup> or any one of the judges of the circuit courts of appeals, the better practice is to present it to the latter.<sup>75</sup>

The petition should state specifically the question of law which was involved and was ruled upon by the court below, and

68—In re Brown, 174 Fed. 339, 23 A. B. R. 93.

69—In re Strobel, 160 Fed. 916, 20 A. B. R. 22.

70—Section 24b, Act of 1898; Clark v. Pidecock, 129 Fed. 745, 12 A. B. R. 309.

71—In re Baker, 3 N. B. N. R. 104, 104 Fed. 287, 4 A. B. R. 778.

72—In re Abraham, 1 N. B. N. 281, 93 Fed. 767, 2 A. B. R. 266.

73—In re Utt, 105 Fed. 754, 5 A. B. R. 383.

74—In re Abraham, 1 N. B. N. 28, 93 Fed. 767, 2 A. B. R. 266.

75—In re Williams, 105 Fed. 906, 5 A. B. R. 198. But see Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 14 A. B. R. 477, in which the court refused to dismiss the petition though it was not allowed by any judge of the lower or appellate court.

should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination,<sup>76</sup> and the question of law so presented is the only question which will be decided.<sup>77</sup> An informal memorandum filed by the judge in connection with an order made by him forms no part of the record,<sup>78</sup> and a mere opinion of the district court not specially made a part of the record does not take the place of a finding of facts, although it may be referred to to ascertain what propositions of law governed the court in making its decision, or to determine whether the case went off on facts or law.<sup>79</sup>

The clerk of the district court, who is also the clerk of the bankruptcy court, is the only person authorized to certify to the appellate court the proceedings had in the bankruptcy court, either on appeal or on a petition to revise.<sup>80</sup> The appellee, in support of the decision of the lower court, may rely upon any ground disclosed by the record even though it may not have been the ground upon which the decision was based.<sup>81</sup>

76—*In re Taft*, 133 Fed. 511, 13 A. B. R. 417; *Ross v. Stroh*, 165 Fed. 628, 21 A. B. R. 644; *Steiner v. Marshall*, 140 Fed. 710, 15 A. B. R. 486; *Hegner v. American Trust & Savings Bank*, 187 Fed. 599, 26 A. B. R. 571; *In re Pettin-gill & Co.*, 137 Fed. 840, 14 A. B. R. 757; *In re Throckmorton*, 196 Fed. 656, 28 A. B. R. 487; *In re O'Connell*, 137 Fed. 838, 14 A. B. R. 237; *In re Boston Dry Goods Co.*, 125 Fed. 226, 11 A. B. R. 97; *In re Baker*, 3 N. B. N. R. 104, 104 Fed. 287; *In re Richards*, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 Fed. 935; *In re Abra-ham*, 2 A. B. R. 266, 1 N. B. N. 28, 93 Fed. 767; *Courier Journal Co. v. Schaefer Br'g Co.*, 101 Fed. 699; see also *In re Casey*, 8 N. B. R. 71, 10 Blatch. 376, Fed. Cas. No. 2495; *A. & C. R. R. Co. v. Jones*, 5 N. B. R. 97, Fed. Cas. No. 126. But see *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396, 14 A. B. R. 477.

The petition to revise should allege that the error complained of was "in matter

of law" and should specifically assign the alleged errors of law. *In re Wither-bee*, 202 Fed. 896, 30 A. B. R. 314.

In absence of special findings or suffi-cient transcript, question will not be re-viewed under section 24b. *In re Smith*, 203 Fed. 369, 29 A. B. R. 628.

Petition denied where transcript con-tained neither an agreed statement of facts, a finding of facts by the judge, nor a summary of the evidence. *Landry v. San Antonio Brewing Ass'n*, 159 Fed. 700, 20 A. B. R. 226.

77—*In re Roadarmour*, 177 Fed. 379, 24 A. B. R. 49.

78—*In re Alden*, 205 Fed. 145, 30 A. B. R. 48.

79—*In re Pettin-gill & Co.*, 137 Fed. 840, 14 A. B. R. 757.

80—*Cook Inlet Coal Fields Co. v. Cald-well*, 147 Fed. 475, 17 A. B. R. 135.

81—*Davis v. Crompton*, 158 Fed. 735, 20 A. B. R. 53.

### § 1656. — Dismissal, affirmance or reversal.

A petition to revise will be dismissed where the parties elect to stand upon an appeal.<sup>82</sup> Where the record upon motion to dismiss a petition to revise, covers substantially the entire case the court may not only deny the motion to dismiss, but may deny the petition.<sup>83</sup> On the other hand, the appellate court may render a decision on the merits though the petitioner has filed his consent that the petition to revise be dismissed.<sup>84</sup>

A revisory petition may be dismissed without prejudice to such further proceedings in the district court as that court may consider proper.<sup>85</sup> Ordinarily a case erroneously brought up should be dismissed unless such action would leave a decree entered in a case over which the court had no jurisdiction, when it may be remanded with directions to dismiss.<sup>86</sup> The petition will be dismissed where it presents merely a moot question, as where the property to which the appellant asserts the right to a lien has been sold by the receiver in bankruptcy since the entry of the order of the lower court denying the petition asserting the lien.<sup>87</sup>

Where an order of the district court is reversed and the case remanded, the district court cannot amend its original order to conform with the opinion of the circuit court of appeals since the same is annulled by the reversal.<sup>88</sup>

It should be borne in mind that the power to review does not confer original jurisdiction over bankruptcy proceedings as such and the decree, if affirmed, remains the decree of the lower court, to be carried out by it.<sup>89</sup> Upon a petition to revise the circuit court of appeals has no power to make any orders requiring certain acts of the trustee<sup>90</sup> though it has been held that the circuit court of appeals sits as a court of bankruptcy on a peti-

82—*Salsburg v. Blackford*, 204 Fed. 438, 29 A. B. R. 320.

83—*In re Judkins*, 205 Fed. 892, 30 A. B. R. 529.

84—*In re Witherbee*, 202 Fed. 896, 30 A. B. R. 314.

85—*Lennox v. Allen Lane Co.*, 167 Fed. 114, 21 A. B. R. 648.

86—*Stickney v. Wilt*, 11 N. B. R. 97, 23 Wall. 150, 23 L. ed. 50.

87—*In re Altieri*, 19 A. B. R. 459.

88—*In re Lesaius*, 181 Fed. 690, 25 A. B. R. 102.

89—*Clark v. Bininger*, 3 N. B. R. 489, 7 Blatch. 165, Fed. Cas. No. 2815.

90—*In re Witherbee*, 202 Fed. 896, 30 A. B. R. 314.

tion for review, and, so far as is necessary to give effect to its decision, has all the powers of the district court.<sup>91</sup>

### § 1657. The Supreme Court of the United States.

#### § 1658. — Statutory provisions as to appeals generally.<sup>92</sup>

The judicial code of 1911,<sup>93</sup> re-enacting in part the act of March 3, 1891,<sup>94</sup> establishing the circuit courts of appeals, except as amended,<sup>94a</sup> fixes the appellate jurisdiction of the United States courts. Appeals or writs of error may be taken from the district courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, in which case only the question of jurisdiction shall be certified;<sup>95</sup> in any case that involves the construction or application of the constitution of the United States;<sup>96</sup> or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; or in which the constitution or a law of a state is claimed to be in contravention

91—In re Tucker, 153 Fed. 91, 18 A. B. R. 378.

92—The following statutory provisions have particular reference to the jurisdiction of the supreme court:

U. S. Rev. Stat., §§ 687-710, 5261.

The Act of April 7, 1874, c. 80 (1 Supp. R. S. 7), which provides that the appellate jurisdiction of the supreme court over judgments and decrees of territorial courts, in cases of trial by jury, shall be by writ of error, and in other cases by appeal, etc.

The Act of Feb. 16, 1875, c. 77, § 1 (1 Supp. R. S. 62, 63), limits the review of the supreme court of decrees of circuit courts in admiralty cases to questions of law arising on findings of fact to be made in such cases by circuit courts.

The Act of March 3, 1885, c. 353 (1 Supp. R. S. 485), provides for an appeal to the supreme court in cases of habeas corpus.

The Act of March 3, 1885, c. 353 (1 Supp. R. S. 485), regulates appeals from the Supreme Court of the District of Columbia and the territories.

The Act of Aug. 13, 1888, c. 866, §§ 1, 6 (1 Supp. R. S. 613, 614), takes away

the right of review by the supreme court of orders of circuit courts remanding causes to state courts.

The Act of Feb. 25, 1889, c. 266 (1 Supp. R. S. 650), provides for writs of error or appeals to the supreme court in cases involving the question of the jurisdiction of circuit courts.

The Act of March 3, 1891 (1 Supp. R. S. 901), creating the circuit courts of appeals.

The Act of March 3, 1911 (36 Stat. at Large 1087), § 239, re-enacting in part the Act of March 3, 1891.

93—The Act of March 3, 1911 (36 Stat. at Large 1087), § 239.

94—1 Supp. R. S. 901, 26 U. S. Stat. 826; commonly called the Evarts Act.

94a—Act Jan. 28, 1915, c. 22, § 4, as amended, Act Sept. 6, 1916, c. 448, § 3.

95—Bldg. & Loan Ass'n v. Price, 169 U. S. 45, 42 L. ed. 655; First Nat. Bank of Denver v. Klug, 186 U. S. 202, 46 L. ed. 1127, 8 A. B. R. 12; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 12 A. B. R. 673.

96—Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341.



of the constitution of the United States,<sup>97</sup> in which three latter cases the supreme court passes on the whole case,<sup>98</sup> and under any of which a controversy in bankruptcy proceedings may arise.

Where the jurisdiction of the district court is in issue, an appeal may be taken to the supreme court on the question of jurisdiction or to the circuit court of appeals on the merits, but appellant will be bound by his election,<sup>99</sup> but after an appeal to the circuit court of appeals in a case involving the construction of the constitution of the United States, the case may be taken to the supreme court.<sup>1</sup>

The supreme court is also expressly vested with appellate jurisdiction "of controversies arising in bankruptcy proceedings, from the court of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from the courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia."<sup>2</sup>

Prior to the amendment of January 28, 1915, an appeal could be taken to the supreme court "from any final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as were prescribed by the supreme court, in the following cases and no other: First. Where the amount in controversy exceeded the sum of two thousand dollars, and the question involved was one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or Second. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim was essential to a uniform construction of the laws relating to bankruptcy throughout the United States."<sup>3</sup>

Under the amendment of January 28, 1915, the judgments and decrees of the circuit court of appeals in all proceedings or causes arising under the bankruptcy act, and in all contro-

97—Penn. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626.

98—Carey v. Houston & T. Ry., 150 U. S. 170, 37 L. ed. 1041.

99—Benjamin v. New Orleans, 169 U. S. 161, 42 L. ed. 700.

1—Pullman Car Co. v. Central Trans-

portation Co., 171 U. S. 138, 43 L. ed. 108.

2—Act of 1898, § 24a.

3—Bankruptcy Act of 1898, § 25b. Judicial Code of 1911, § 252 (36 Stat. L. 1159).

versies arising in such proceedings, are made final, and they can only be reviewed by certiorari.<sup>4</sup>

**§ 1659. — What constitutes matter or amount in controversy.**

Under the law as it existed prior to the amendment of January 28, 1915, the amount in controversy was a material question. As to what constitutes "matter in controversy" or "matter in dispute," the supreme court has long since definitely stated the law. Chief Justice Taney, in *Barry v. Mercein*,<sup>5</sup> states that matter in controversy, under section 22 of the judiciary act of 1891, must be "money or some right, the value of which, in money, can be calculated and ascertained. . . . The words of the act of congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of business transactions. . . . It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the circuit court." Chief Justice Marshall, in passing upon this same question in *Gordon v. Ogden*,<sup>6</sup> said: "The jurisdiction of the court has been supposed to depend on the sum or the value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties." The same view is laid down in *Kanouse v. Martin*,<sup>7</sup> wherein it is held that: "The settled rule is, that until some further judicial proceedings have taken place, showing upon the record that the sum demanded in the declaration is not the matter in dispute, that sum is the matter in dispute."

4—Act Jan. 28, 1915, as amended Sept. 6, 1916, c. 448, § 3 (U. S. Comp. St. § 1120a).

5—5 How. 103, 12 L. ed. 70.

6—3 Pet. 33, 7 L. ed. 592.

7—15 How. 198, 14 L. ed. 660.

**§ 1660. — Appeals from the highest court of a state.**

As the trustee is authorized to sue in the state courts and must do so in many cases, the provisions as to the review of such cases by the Supreme Court of the United States<sup>8</sup> are important. The Supreme Court may re-examine on writ of error the final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity. A ruling of the state court involving a construction of the bankruptcy act is reviewable by the supreme court where the construction contended for but not adopted would have defeated the jurisdiction of the state court.<sup>9</sup> Only questions of law can be examined;<sup>10</sup> and the amount involved is immaterial, but there must have been a final judgment or decree in the lower court;<sup>11</sup> that is, there must not be any judicial question undetermined.<sup>12</sup>

If either party claims a right, title, privilege or immunity under the United States or the constitution, laws or treaties thereof, he must plead it;<sup>13</sup> and the attention of the state court must have been directed to it in time for consideration before deciding the case.<sup>14</sup> It is not sufficient to raise such question

8—Section 237, Judicial Code of 1911; § 709, 36 Stat. L. 1156, as amended Act Dec. 23, 1914, c. 2, and Act Sept. 16, 1916, c. 448, § 2 (U. S. Comp. St. § 1214).

9—*Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262.

10—*Kaufman v. Tredway*, 195 U. S. 271, 49 L. ed. 190, 12 A. B. R. 682; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680.

The direction of a verdict by the state court in an action by the trustees in bankruptcy to recover alleged assets of the bankrupt estate raises a question of law as to whether the evidence was sufficient to require a submission of the case to the jury. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 A. B. R. 336.

Findings of fact will not be reviewed in supreme court. *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 596, 17 A. B. R. 675.

11—See also *Grant Shoe Co. v. Laird Co.*, 212 U. S. 445, 53 L. ed. 591, 21 A. B. R. 484; *Clark v. Kansas City*, 172 U. S. 334, 43 L. ed. 467.

12—*California Bank v. Stateler*, 171 U. S. 447, 43 L. ed. 233.

13—*Chicago & N. W. R. v. Chicago*, 164 U. S. 454, 41 L. ed. 511; *Pittsburgh, etc., Ry. v. L. & T. Co.*, 172 U. S. 493, 43 L. ed. 528.

14—*Bellingham Bay v. New Whatcom*, 172 U. S. 314, 43 L. ed. 460; *Capital Bank v. Cadiz Bank*, 172 U. S. 425, 43 L. ed. 502.

first on a motion for a new trial or petition for rehearing,<sup>15</sup> except in a statutory proceeding requiring no answer and where the defense could not be made earlier,<sup>16</sup> but the points may be made on trial.<sup>17</sup>

The decision of the state court will not be reviewed if it can be supported on some other ground, though a federal question was passed upon;<sup>18</sup> nor unless there was an adverse decision on the federal question;<sup>19</sup> or the federal question was directly involved.<sup>20</sup> If there are several federal questions and the state court considered only one, the supreme court will not consider the others,<sup>21</sup> but will affirm the judgment unless the question was decided erroneously.<sup>22</sup>

The fact that in determining the right to exemptions, a state court accepts the judgment of the bankruptcy court in the matter does not make the decision of the former court appealable to the supreme court.<sup>23</sup>

An action brought by the trustee in bankruptcy to recover what is alleged to be an asset of the estate presents a federal question, and a judgment rendered therein is appealable,<sup>24</sup> and, a judgment of a state supreme court in an action by the trustee to recover a preference deciding the right to avoid a preference under the state law has been held appealable.<sup>25</sup>

15—*Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714; *Louisville & N. R. R. v. Louisville*, 166 U. S. 709, 41 L. ed. 1173; comp. *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374; in which, however, the state court may have decided on a non-federal question, see dissenting opinion.

16—*Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226, 41 L. ed. 979.

17—*Backus v. Fort Street Co.*, 169 U. S. 557, 42 L. ed. 853.

18—*McQuade v. Trenton*, 172 U. S. 636, 43 L. ed. 581; *Bausman v. Dixon*, 173 U. S. 113, 43 L. ed. 633.

19—*Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622.

20—*Leyson v. Davis*, 170 U. S. 36, 42 L. ed. 939; *Briggs v. Walker*, 171 U. S. 466, 43 L. ed. 243.

No federal question involved where in an action based upon the purchase of property from the trustee, the state court did not pass upon the nature and char-

acter of the title acquired from the trustee, but its decision was based upon the fact of a prior adjudication of the issues between the parties. *Corbett v. Craven*, 215 U. S. 125, 54 L. ed. 122, 23 A. B. R. 516.

21—*Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665.

22—*Laclede Gas Co. v. Murphy*, 170 U. S. 78, 42 L. ed. 955.

23—*Smalley v. Laugenour*, 196 U. S. 93, 49 L. ed. 400, 13 A. B. R. 692.

24—*Rector v. City Deposit National Bank*, 200 U. S. 405, 50 L. ed. 527, 15 A. B. R. 336; *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467.

A decision of the supreme court of a state interpreting the bankruptcy act and holding that a preference was given held to present a federal question. *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 596, 17 A. B. R. 675.

25—*Miller v. New Orleans Acid & Fer-*

Where the defendant in a suit in a state court set up the issuance of an injunction against the prosecution of the suit by the bankruptcy court, he thereby sets up a right claimed under a judgment of a court of the United States, the denial of which lays the foundation for a review by the supreme court. This right to review cannot, in such case, be defeated by a finding of the state court that the bankruptcy court has exceeded or ended its jurisdiction.<sup>26</sup>

### § 1661. — Appeals in bankruptcy proceedings proper.

Section 25b of the bankruptcy act, which is practically identical with section 252 of the judicial code of 1911, provides that "From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy<sup>27</sup> exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal<sup>28</sup> or writ of error from the highest court of a state to the Supreme Court of the United States; or

2. Where some justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."<sup>29</sup>

This section of the statute has been superseded by a recent

tilizer Co., 211 U. S. 496, 53 L. ed. 300, 21 A. B. R. 416, aff'g 117 La. 821.

26—*Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 56 L. ed. 208, 27 A. B. R. 262.

27—Note the different phraseology here: "exceeds the sum of two thousand dollars." The amount in controversy would not, under this provision, suffice if just \$2,000.

28—The use of the word "appeal" in reference to the removal of cases from the highest court of a state to the supreme court was probably a slip, as such cases are taken to the supreme court by writ of error only (U. S. Rev. Stat.,

§ 109; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680); and only when there is an adverse decision on a federal question on which the decision rests.

29—It will be observed that if the case comes under this subdivision, there is no specified amount required.

Analogous provision of Act of 1867. "Sec. 9. . . . That in cases arising under this act no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars."

amendment by which all judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under the bankruptcy act are made final and subject to review by certiorari only.<sup>29a</sup> It may, however, be of value to note the decisions prior to the change in the law.

An appeal under section 25b was allowed only in cases coming under clause 3 of section 25a, and then only from the final decision, i. e., one that could not be further affected by action in the circuit court of appeals.<sup>30</sup>

A ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether the petitioning creditors held "provable" claims is not a judgment allowing or rejecting a debt within the meaning of section 25a, and a decision by the circuit court of appeals upon such a ruling is not a final decision allowing or rejecting a claim within the meaning of section 25b.<sup>31</sup>

The judgment of the circuit court of appeals as to the validity of a lien asserted by a creditor was appealable under the latter section where the parties insisted upon different constructions of the act one of which would defeat the lien and the other of which would render it valid.<sup>32</sup> A certificate of a justice of the supreme court under section 25b (2) did not give the right of appeal from a decision of the circuit court of appeals allowing or rejecting a claim of less than \$500. In regard to such claims the decision of the circuit court of appeals was final.<sup>33</sup>

Even before the act of 1915, no appeal lay from the decision of a circuit court of appeals, in the exercise of its supervisory jurisdiction over proceedings in bankruptcy.<sup>34</sup> A judgment that

29a—Act Jan. 28, 1915, c. 22, § 4, as amended Sept. 6, 1916, c. 448 § 3 (U. S. Comp. St., § 1120a).

30—See *Duff v. Carrier*, 55 Fed. 433, aff'g 51 Fed. 906; *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 18 A. B. R. 844; *Blake v. Openhym & Sons*, 216 U. S. 322, 54 L. ed. 498, 23 A. B. R. 616; *Hall v. Allen*, 9 N. B. R. 6, 12 Wall. 452, 20 L. ed. 458; *Wiswall v. Campbell*, 15 N. B. R. 421; *Bank v. Cooper*, 9 N. B. R. 529, 20 Wall. 171, 22 L. ed. 273.

31—*Calnan Co. v. Doherty*, 224 U. S. 145, 56 L. ed. 702, 27 A. B. R. 880.

32—*Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, aff'g 152 Fed. 943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513.

33—*Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 54 L. ed. 1047, 25 A. B. R. 66.

34—Act Jan. 28, 1915, c. 22, § 4, as amended Sept. 6, 1916, c. 448, § 3 (U. S. Comp. St. 1120a); *Wynkoop, etc., Co. v. Gaines*, 227 U. S. 4, 57 L. ed. 391, 29 A. B. R. 369; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986, 11 A. B. R. 709; *Holden v. Stratton*, 193

a person was or was not a bankrupt, entered by the court of bankruptcy on a verdict by a jury, demanded as of right, was reviewable only by writ of error.<sup>35</sup> No appeal lay from orders denying a petition for rehearing.<sup>36</sup>

An erroneous decision against an asserted right to an exemption does not create a question of jurisdiction proper to be passed upon by the supreme court by a direct appeal;<sup>37</sup> nor does an appeal lie from a decision of the circuit court of appeals under section 24b allowing or rejecting a claim for an exemption, the remedy being by certiorari.<sup>38</sup> An order granting or refusing a discharge is not appealable to the supreme court.<sup>39</sup>

### § 1662. — Controversies arising in bankruptcy proceedings.

By the judicial code of 1911, the supreme court was expressly vested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases.<sup>40</sup> Where the jurisdiction of the federal court rendering the judgment or decree appealed from rested alone upon the diversity of citizenship, the decision of the circuit court of appeals was final and no appeal lay to the supreme court.<sup>41</sup> Whether the jurisdiction depended upon diverse citizenship alone was determined from the complaint or bill, regardless of questions which may have been brought into the suit by the answer or in the course of the subsequent proceedings.<sup>42</sup> It was not sufficient that grounds of jurisdiction other than diverse citizenship might be inferred argumentatively from the statements in the complaint or bill.<sup>43</sup> A suit could not be said to arise under the laws of the United States, simply because the trustee was a party.<sup>44</sup>

So, under the judicial code of 1911, an appeal might be had to the supreme court from a decision of the court of appeals

U. S. 202, 48 L. ed. 116, 10 A. B. R. 786;  
Duryea Power Co. v. Sternbergh, 218 U.  
S. 299, 54 L. ed. 1047, 25 A. B. R. 66.

35—Grant Shoe Co. v. Laird Co., 203  
U. S. 502, 51 L. ed. 292, 17 A. B. R. 1.

36—Conboy v. First Nat. Bank of New  
Jersey, 203 U. S. 141, 51 L. ed. 128, 16  
A. B. R. 773.

37—Lucius v. Cawthon-Coleman Co.,  
196 U. S. 149, 49 L. ed. 425, 13 A. B. R.  
696.

38—Holden v. Stratton, 198 U. S. 202,  
48 L. ed. 116, 10 A. B. R. 786.

39—James v. Stone & Co., 227 U. S.  
411, 57 L. ed. 573, 29 A. B. R. 476.

40—Judicial Code 1911, § 252 (36  
Stat. L. 1159); Bankruptcy Act of 1898,  
§ 24a.

41-42-43-44—Lovell v. Newman &  
Sons, 227 U. S. 412, 57 L. ed. 577, 29 A.  
B. R. 482.

upon an appeal to it under section 24a of the act, where the amount in controversy exceeded \$1,000 besides costs.<sup>45</sup> The circuit court of appeals could allow an appeal to the supreme court from its decision in a case involving a controversy existing independent of the bankruptcy proceedings which involved the requisite amount and did not depend upon the citizenship of the parties.<sup>46</sup> A decree of the circuit court of appeals on appeal from an interlocutory decree granting an injunction, directing a decree dismissing the suit was held a final decree and appealable, the requisite amount being involved <sup>47</sup> as was a decree dismissing the petition of a trustee to prevent the enforcement of a lien in a state court.<sup>48</sup>

The act of January 28, 1915,<sup>48a</sup> is sweeping in its provisions and makes all judgments and decrees of the circuit court of appeals in all proceedings and causes arising under the bankruptcy act, as well as in all controversies arising under such proceedings and causes, final, and reviewable only by certiorari, regardless of the amount in controversy. The purpose of congress was to render the decisions of the circuit court of appeals final not only in bankruptcy proceedings proper, but in all collateral controversies arising in the course of the proceedings as well, and the distinction between "proceedings in bankruptcy" and "controversies arising in bankruptcy proceedings" is now immaterial, so far as the right to appeal to the supreme court is concerned.

Section 238 of the judicial code of 1911 allowing appeals from

45—*Hewitt v. Berlin Machine Works*, 194 U. S. 296, 48 L. ed. 986, 11 A. B. R. 709.

46—*Hobbs v. Head & Dowst Co.*, 191 Fed. 811, 27 A. B. R. 484, aff'd 231 U. S. 692, 58 L. ed. 440, 31 A. B. R. 656.

47—*United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 56 L. ed. 1055, 28 A. B. R. 207.

48—*Hobbs v. Head & Dowst Co.*, 231 U. S. 692, 58 L. ed. 440, 31 A. B. R. 636, aff'g 184 Fed. 409, 26 A. B. R. 63.

48a—Act Jan. 28, 1915, c. 22, § 4, as amended Act. Sept. 6, 1916, c. 448, § 3 (U. S. Comp. St., § 1120a). "Judgments or decrees of the circuit court of appeals in all proceedings arising under 'An act to establish a uniform system

of bankruptcy throughout the United States,' approved July 1st, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; . . .; and, also in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may be hereafter enacted, shall be final, save only that it shall be competent for the supreme court to require by certiorari, upon petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error."



the district court direct to the supreme court only includes cases where the question is as to the jurisdiction of the United States court as such and does not include a case where the district court determines that it has jurisdiction to require an alleged adverse claimant to turn over property to the trustee.<sup>49</sup>

**§ 1663. — Appeals from courts not in organized circuits.**

The concluding clause of section 24a does not confer jurisdiction upon the supreme court to review decisions of the courts of bankruptcy not within any organized circuit of the United States, deciding questions arising in the bankruptcy proceedings proper, but jurisdiction in such case is limited as in appeals from the decisions of the other courts to controversies which are not inherently steps in the bankruptcy court, though they may arise in the course of the proceedings. Accordingly, the decision of the district court of Porto Rico allowing or disallowing a claim, has been held not appealable to the supreme court.<sup>50</sup> Nor does the supreme court have jurisdiction under section 24b to review an order of the district court of Porto Rico declaring a person to be a general partner of the bankrupt partnership and as such individually liable for firm debts.<sup>51</sup>

**§ 1664. — Appeals from District of Columbia.**

Under section 24a of the act appeals from the Supreme Court of the District of Columbia are taken immediately to the Supreme Court of the United States instead of through the court of appeals of the district.\*

**§ 1665. — Certification of cases and certiorari.**

The circuit court of appeals may at any time within its discretion certify to the Supreme Court of the United States any questions or proposition of law whether its decision would be final or not, concerning which it desires the instruction of that court for its proper decision. The supreme court may either give its opinion which shall bind the circuit court of appeals or require the whole record and then decide it as if on appeal or

49—Schweer v. Brown, 195 U. S. 171,

49 L. ed. 144, 12 A. B. R. 673.

50—Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118, 27 A. B. R.

338.

51—Munsuri v. Fricker, 222 U. S. 121,

56 L. ed. 121, 27 A. B. R. 344.

writ of error.<sup>52</sup> While the certification is made by the circuit court of appeals of its own motion, the advisability therefor may be suggested by counsel though not by formal motion. The certification should be restricted to questions of law and not seek a decision of the whole case,<sup>53</sup> nor comprehend mixed questions of law and fact.<sup>54</sup>

By the act of March 3, 1891,<sup>55</sup> re-enacted in the act of March 3, 1911,<sup>56</sup> it is provided that the supreme court may require by certiorari, or otherwise, certain cases made final in the circuit courts of appeals to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court. Apart from section 25 of the law, the circuit courts of appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts may be reviewed in the supreme court on certiorari or in certain cases by appeal.<sup>57</sup> The writ of certiorari may also be allowed by the supreme court in aid of the writ of habeas corpus and for the purpose of enlarging the scope of that writ.<sup>58</sup> Application for the issuance of this writ should be addressed to the supreme court and will not be granted except in its discretion and then only in matters of gravity and general importance.<sup>59</sup> Only final orders of the district court can be reviewed by certiorari,<sup>60</sup> and after affirmance of an order by the circuit court of appeals, the lower court cannot insert in its order entered on the mandate of the court of appeals a provision that it should not be prejudicial to the right to apply to the supreme court for a writ of certiorari.<sup>61</sup>

52—Section 239, Judicial Code of 1911; Act of March 3, 1891, par. 6, 1 Supp. R. S. 901, 26 Stat. L. 826; section 25d, Bankruptcy Act of 1898.

53—*Warner v. New Orleans*, 167 U. S. 467, 42 L. ed. 239.

54—*McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614.

55—1 Supp. R. S. 903, § 6.

56—Section 240.

57—*First Nat. Bank of Denver v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 8

A. B. R. 12; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 7 A. B. R. 224.

58—*Ex parte Lange*, 18 Wall, 163, 21 L. ed. 872; *In re Chetwood*, 165 U. S. 443, 41 L. ed. 782; R. S. U. S., § 716.

59—*In re Woods*, 143 U. S. 202, 36 L. ed. 125; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095.

60—*In re Hudson Elec. Co.*, 184 Fed. 970, 25 A. B. R. 873.

61—*In re Hudson River Elec. Co.*, 184 Fed. 970, 25 A. B. R. 873.

By a recent act of congress,<sup>61a</sup> the decisions of the circuit courts of appeals in all proceedings and causes arising under the bankruptcy act, and in all controversies arising under such proceedings and causes, are made final, save only that it shall be competent for the supreme court to require by certiorari, upon petition of any party thereto, that the proceeding, case or controversy be certified to it for review and determination, with the same power and with like effect as if taken to that court by appeal or writ of error.

No certiorari for diminution of the record will be awarded by the supreme court in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court accounting satisfactorily for the delay.<sup>62</sup> The application must be made by petition, in which the title is A. B., petitioner, vs. C. D., respondent, and which must be filed in the office of the clerk of the supreme court together with a certified copy of the entire record, including the proceedings in the circuit court of appeals, an entry of appearance for the petitioner, signed by a member of the bar of the supreme court, a deposit of twenty-five dollars on account of costs, and between fifteen and twenty printed copies of such certified copy of the record. It is well to have printed fifty copies for use on the final hearing, in case the application, which must be presented in open court, is granted.

#### § 1666. — Practice in taking appeals.

The supreme court provides in its general orders that the lower court, when rendering judgment or decree, must make and file a finding of the facts and its conclusions of law thereon, stated separately, and the record to be transmitted to the supreme court is to contain only the pleadings, the judgment or decree, the finding of facts and the conclusions of law.<sup>63</sup> A party contemplating an appeal to the supreme court, if the conclusion of

61a—Act Jan. 28, 1915, c. 22, § 4, as amended Act Sept. 6, 1916, c. 448, § 3 (U. S. Comp. St., § 1120a).

62—Sup. Ct. Rule 14. But see post § 1667.

63—G. O. XXVI; *Calnan Co. v. Doherty*, 224 U. S. 145, 56 L. ed. 702, 27 A. B. R. 880.

the lower court is against him, should at the hearing and before the entry of the decree, request the making of findings of facts and conclusions.<sup>64</sup> General Order 36 does not require such findings to be made without request, but is intended to give the party a right thereto, if he demands it.<sup>65</sup>

It is the practice of the circuit court of appeals not to anticipate a further appeal but to await requests for findings and conclusions under General Order 36 and if the decree has been entered prior to a request for findings and conclusions, to vacate the decree.<sup>66</sup>

The transcript must show affirmatively the ground upon which the action complained of was taken<sup>67</sup> and the omission of findings of fact and conclusions of law cannot be supplied by a reference to the opinion below.<sup>68</sup> The findings of fact and conclusions of law may be filed *nunc pro tunc* as of the date the judgment was entered.<sup>69</sup>

The rule requiring the filing of specific findings of fact and conclusions of law does not apply to an appeal in a case involving a controversy existing independent of the bankruptcy proceedings, and appealable under section 24a of the act, and the appeal brings up the whole case.<sup>70</sup>

The record on appeal from a state supreme court includes the pleadings and judgment in an action at law and the bill of exceptions; or the pleadings, evidence and decree in equity; and if the local practice makes it part of the record, the opinion of the

64—*Lumpkin v. Foley*, 204 Fed. 372, 29 A. B. R. 673.

65—*Knapp v. Milwaukee Trust Co.*, 162 Fed. 675, 20 A. B. R. 671; *Crucible Steel Co. v. Holt*, 174 Fed. 127, 23 A. B. R. 302; *Washington v. Tearney*, 197 Fed. 307, 28 A. B. R. 633.

66—*Century Sav. Bank v. Robert Moody & Son*, 209 Fed. 775, 31 A. B. R. 586.

67—*Buckingham v. Estes*, 128 Fed. 584, 12 A. B. R. 182.

68—*Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 18 A. B. R. 844.

69—*Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 22 A. B. R. 1, *aff'g* 152 Fed.

943, 15 L. R. A. (N. S.) 372, 18 A. B. R. 513.

70—*Baker Ice Mach. Co. v. Bailey*, 209 Fed. 844, 31 A. B. R. 513; *Houghton v. Burden*, 228 U. S. 161, 57 L. ed. 780, 30 A. B. R. 16; *In re Martin*, 201 Fed. 31, 29 A. B. R. 935; *Hobbs v. Head & Dowst Co.*, 191 Fed. 811, 27 A. B. R. 484.

No special finding of facts held necessary where appellant was an intervenor in the bankruptcy proceeding seeking to establish a lien on property of the bankrupt. *In re Standard Tel. & Elec. Co.*, 216 U. S. 545, 54 L. ed. 610, 24 A. B. R. 761, *aff'g* 162 Fed. 675, 20 A. B. R. 671.

court may be considered.<sup>71</sup> The record must show on its face that the federal question was presented to the state court.<sup>72</sup>

A motion made in the circuit court of appeals to vacate a prior decree of reversal entered by it and to enter a final decree consistent with a subsequent holding of the court will be granted where its purpose is simply to avoid the necessity of having the case remanded, only to return to the circuit court of appeals and proceed thence to the supreme court.<sup>73</sup>

### § 1667. — Time of appeal.

Under a recent act of congress, "no writ of error, appeal or writ of certiorari intended to bring up any cause for review by the supreme court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."<sup>74</sup>

This statute supersedes General Order 36, under which a party was given thirty days within which to appeal. Even before the act of congress above referred to, it was held that the general order was not applicable to writs of error, the time within which the latter might be brought having been fixed by the Revised Statutes;<sup>75</sup> nor was the general order applicable to a case involving a controversy existing independent of the bankruptcy proceedings.<sup>76</sup>

The limitation begins to run from the date of the judgment, not from the date of an order denying a rehearing.<sup>77</sup>

### § 1668. — Effect of appeal.

Under the act of 1867, where a party appealed from the circuit court to the supreme court, it was held that the allowance of the appeal related back to the time when the original application was made for appeal to the circuit court and entitled the party to a stay of proceedings, which would be true of an appeal under the present act.<sup>78</sup> The pendency of an appeal operates as

71—Thompson v. Maxwell Land Co., 168 U. S. 451, 42 L. ed. 539.

72—Columbia Water Power Co. v. Railway Co., 172 U. S. 475, 43 L. ed. 521.

73—In re Martin, 198 Fed. 947, 29 A. B. R. 935.

74—Act Sept. 6, 1916, c. 448, § 6 (U. S. Comp. St., § 1228a).

75—Section 1008; Grant Shoe Co. v.

W. M. Laird Co., 212 U. S. 445, 53 L. ed. 591, 21 A. B. R. 484.

76—Hobbs v. Head & Dowst Co., 191 Fed. 811, 27 A. B. R. 484.

77—Conboy v. First Nat. Bank of New Jersey, 203 U. S. 141, 51 L. ed. 128, 16 A. B. R. 773.

78—Thornhill v. Bank, 5 N. B. R. 377, Fed. Cas. No. 13991.

a stay not only of the decree or order appealed from, but of all proceedings in aid of the execution of the same.<sup>79</sup>

A decision of the supreme court reversing a decree of the circuit court of appeals and directing that court to dismiss an appeal to it and to remand the case to the district court for further proceedings, in conformity with the decision, though addressed to the circuit court of appeals alone, does not authorize that court to grant a peremptory writ of mandamus to enforce obedience to the mandate by the district court. The decision is to be regarded as giving directions which the circuit court of appeals is simply to communicate to the district court, and which the latter is to follow on the authority of the supreme court, not of the circuit court of appeals.<sup>80</sup>

79—*In re Dresser & Co.*, 14 A. B. R. 41.

R. 542, rev'g 146 Fed. 742, 16 A. B. R.

80—*Ex parte First Nat. Bank of Chicago*, 207 U. S. 61, 52 L. ed. 103, 19 A. B.

848.

## FORMS IN BANKRUPTCY

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The forms given herewith, consisting of the sixty-three official forms promulgated by the Supreme Court of the United States, and 125 forms collected and compiled by the author, are intended merely as a working foundation for use by members of the bar and officers of the bankruptcy court, and are not offered as a complete set of forms to meet every imaginable situation which might arise in bankruptcy practice.

Care has been taken to avoid unnecessary repetition and duplication. Orders and notices of motion must necessarily follow to a great extent the wording of the particular motion or petition for relief, and, for that reason, preference has been given to forms of petitions, rather than to forms of orders or notices based thereon.

Many of the forms represented are verbatim copies of or adopted from forms actually used before the courts. These forms have as a rule been adopted from important cases carried to the Supreme Court by counsel of the highest standing in the bankruptcy practice. No form is represented, however, which does not meet the requirements of the Bankruptcy Act, and the decisions of the courts.

The forms have been indexed in the general index and, to further facilitate their use, they have been arranged, as nearly as practicable, in the order in which the matters to which they pertain, are treated in the text.

Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.

### § 1669. Form No. 1. [Official Form No. 1.]

#### DEBTOR'S PETITION.

To the Honorable ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ———, of ———, in the County of ——— and District and State of ———, ——— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or has resided, or has*

had his domicil] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

WHEREFORE your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

—————, *Attorney.*

UNITED STATES OF AMERICA, District of ———, ss:

I, ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

—————, *Petitioner.*

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

—————,  
—————,

[*Official character.*]



§ 1670. Form No. 2.

OFFICIAL SCHEDULE A.—STATEMENT OF ALL DEBTS OF  
BANKRUPT.

SCHEDULE A. (1)

STATEMENT OF ALL CREDITORS WHO ARE TO BE PAID IN FULL, OR TO  
WHOM PRIORITY IS SECURED BY LAW.

CLAIMS WHICH HAVE PRI- ORITY.	Reference to ledger or voucher.	Names of creditors.	Residence (if un- known, that fact must be stated).	Where and when contracted.	Nature and consid- eration of the debt, and whether contracted as part- ner or joint con- tractor; and if so, with whom.	Amount.	
						\$	c.
(1) Taxes and debts due and owing to the United States .....							
(2) Taxes due and owing to the State of _____, or to any county, district or mu- nicipality thereof.....							
(3) Wages due workmen, clerks, or servants, to an amount not exceeding \$300 each, earned within three months before filing the petition .....							
(4) Other debts having priority by law.....							
Total .....							

\_\_\_\_\_, *Petitioner.*

## § 1671. Form No. 3.

## OFFICIAL SCHEDULE A. (2)

## CREDITORS HOLDING SECURITIES.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.	Amount of debts.
					\$	c.
				Total...		

\_\_\_\_\_, *Petitioner.*

## § 1672. Form No. 4.

## OFFICIAL SCHEDULE A. (3)

## CREDITORS WHOSE CLAIMS ARE UNSECURED.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.	
					\$	c.
				Total.....		

\_\_\_\_\_, *Petitioner.*

**OFFICIAL SCHEDULE A. (4)**

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

\_\_\_\_\_, *Petitioner.*

**OFFICIAL SCHEDULE A. (5)**

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

\_\_\_\_\_, *Petitioner.*

## OATH TO SCHEDULE A.

UNITED STATES OF AMERICA, District of ———, ss:

On this ——— day of ———, A. D. 19—, before me personally came ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

\_\_\_\_\_,  
[Official character.]

## § 1675. Form No. 7.

**OFFICIAL SCHEDULE B.—STATEMENT OF ALL PROPERTY OF  
BANKRUPT.**

**SCHEDULE B. (1)**

**REAL ESTATE.**

LOCATION AND DESCRIPTION OF ALL REAL ESTATE OWNED BY DEBTOR OR HELD BY HIM.	Incumbrances there- on, if any, and dates thereof.	Statement of par- ticulars relating thereto.	Estimated value.	
			\$	¢.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	Total .....	.....	.....

\_\_\_\_\_, *Petitioner*

## § 1676. Form No. 8.

## OFFICIAL SCHEDULE B. (2)

## PERSONAL PROPERTY.

		\$	c.
a. Cash on hand.....	.....	.....	.....
b. Bills of exchange, promissory notes, or securities of any description (each to be set out separately)...	.....	.....	.....
c. Stock in trade, in — business of — — —, at — — —, of the value of — — —.....	.....	.....	.....
d. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz. ....	.....	.....	.....
e. Books, prints, and pictures, viz. ....	.....	.....	.....
f. Horses, cows, sheep, and other animals (with number of each), viz. ....	.....	.....	.....
g. Carriages and other vehicles, viz. ....	.....	.....	.....
h. Farming stock and implements of husbandry, viz. ....	.....	.....	.....
i. Shipping, and shares in vessels, viz. ....	.....	.....	.....
k. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz. ....	.....	.....	.....
l. Patents, copyrights, and trade-marks, viz. ....	.....	.....	.....
m. Goods or personal property of any other description, with the place where each is situated, viz. ....	.....	.....	.....
Total .....	.....	.....	.....

\_\_\_\_\_, *Petitioner.*

## § 1677. Form No. 9.

## OFFICIAL SCHEDULE B. (3)

## CHUSES IN ACTION.

		Dollars.	Cents.
a. Debts due petitioner on open account.....	.....	.....	.....
b. Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds. ....	.....	.....	.....
c. Policies of insurance.....	.....	.....	.....
d. Unliquidated claims of every nature, with their estimated value .....	.....	.....	.....
e. Deposits of money in banking institutions and elsewhere .....	.....	.....	.....
Total .....	.....	.....	.....

\_\_\_\_\_, *Petitioner.*

## § 1678. Form No. 10.

## OFFICIAL SCHEDULE B. (4)

PROPERTY IN REVERSION, REMAINDER, OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

GENERAL INTEREST.	Particular description.	Supposed value of my interest.	
		\$	c.
Interest in land.....			
Personal property.....			
Property in money, stock, shares, bonds, annuities, etc. ....			
Rights and powers, legacies and bequests.....			
	Total .....		
Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
		\$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.....			
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.....			
	Total .....		

\_\_\_\_\_, Petitioner.

## § 1679. Form No. 11.

## OFFICIAL SCHEDULE B. (5)

A PARTICULAR STATEMENT OF THE PROPERTY CLAIMED AS EXEMPTED FROM THE OPERATION OF THE ACTS OF CONGRESS RELATING TO BANKRUPTCY, GIVING EACH ITEM OF PROPERTY AND ITS VALUATION; AND, IF ANY PORTION OF IT IS REAL ESTATE, ITS LOCATION, DESCRIPTION, AND PRESENT USE.

		Valuation.	
		\$	c.
Military uniform, arms, and equipments.....			
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.....			
	Total .....		

\_\_\_\_\_, Petitioner.

§ 1680. Form No. 12.

OFFICIAL SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books .....	
Deeds .....	
Papers .....	

\_\_\_\_\_, *Petitioner.*

OATH TO SCHEDULE B.

UNITED STATES OF AMERICA, District of \_\_\_\_\_, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, before me personally came \_\_\_\_\_, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

\_\_\_\_\_  
[Official character.]

## § 1681. Form No. 13.

**SUMMARY OF DEBTS AND ASSETS.**

[From the statements of the bankrupt in Schedules A and B.]

Schedule A	1	(1) Taxes and debts due United States.....			
"	1	(2) Taxes due States, counties, districts, and municipalities .....			
"	1	(3) Wages .....			
"	1	(4) Other debts preferred by law .....			
Schedule A	2	Secured claims .....			
Schedule A	3	Unsecured claims .....			
Schedule A	4	Notes and bills which ought to be paid by other parties thereto .....			
Schedule A	5	Accommodation paper .....			
		Schedule A, total .....			
Schedule B	1	Real estate .....			
Schedule B	2-a	Cash on hand .....			
"	2-b	Bills, promissory notes, and securities....			
"	2-c	Stock in trade .....			
"	2-d	Household goods, &c. ....			
"	2-e	Books, prints, and pictures .....			
"	2-f	Horses, cows, and other animals .....			
"	2-g	Carriages and other vehicles .....			
"	2-h	Farming stock and implements .....			
"	2-i	Shipping and shares in vessels .....			
"	2-k	Machinery, tools, &c. ....			
"	2-l	Patents, copyrights, and trade-marks. ...			
"	2-m	Other personal property .....			
Schedule B	3-a	Debts due on open accounts .....			
"	3-b	Stocks, negotiable bonds, &c. ....			
"	3-c	Policies of insurance .....			
"	3-d	Unliquidated claims .....			
"	3-e	Deposits of money in banks and elsewhere .....			
Schedule B	4	Property in reversion, remainder, trust, &c. ....			
Schedule B	5	Property claimed to be excepted .....			
Schedule B	6	Books, deeds, and papers .....			
		Schedule B, total .....			

## § 1682. Form No. 14. [Official Form No. 2.]

**PARTNERSHIP PETITION.**

To the Honorable ———, Judge of the District Court of the United States for the ——— District of ———:

The petition of ——— respectfully represents:

That your petitioners and ——— have been partners under the firm name of ———, having their principal place of business at ———, in the County of ———, and District and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by oath, contains a full and true statement of all the debts of said partners, and,



as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by ——— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

WHEREFORE your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,

\_\_\_\_\_, *Attorney.*

*Petitioners.*

\_\_\_\_\_, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,

*Petitioners.*

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
\_\_\_\_\_,

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form Nos. 2 to 13, *ante*.]

**§ 1683. Form No. 15. [Official Form No. 3.]**

**CREDITORS' PETITION.**

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That \_\_\_\_\_, of \_\_\_\_\_, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or resided, or had his domicile*] at \_\_\_\_\_, in the County of \_\_\_\_\_ and State and District aforesaid, and owes debts to the amount of \$1,000.

That your petitioners are creditors of said \_\_\_\_\_, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows: \_\_\_\_\_

And your petitioners further represent that said \_\_\_\_\_ is insolvent, and that within four months next preceding the date of this petition the said \_\_\_\_\_ committed an act of bankruptcy, in that he did heretofore, to-wit, on the \_\_\_\_\_ day of \_\_\_\_\_

WHEREFORE your petitioners pray that service of this petition, with a subpoena, may be made upon \_\_\_\_\_, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_

*Petitioners.*

\_\_\_\_\_, *Attorney.*

UNITED STATES OF AMERICA, District of \_\_\_\_\_, ss:

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,  
[Official character.]

[Schedules to be annexed corresponding with schedules under Forms 2 to 13, *ante*.]

### § 1684. Form No. 16.

1. Form of alleging acts of bankruptcy. See *post*, § 1684. Form No. 16.

#### INVOLUNTARY PETITION—LESS THAN TWELVE CREDITORS.

To the Honorable Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

Respectfully submitting to the Honorable Court, your petitioners allege:

First. That the said K. P. Co. (a corporation) for the greater portion of six months preceding the date of the filing of this petition has been principally engaged in business as manufacturer of pianos and had its principal place of business at No. \_\_\_\_\_ Street in the City of \_\_\_\_\_, and that the said K. P. Co. (a corporation) is not a wage-earner or person engaged chiefly in farming or tilling of soil and is not a municipal, railroad, insurance or banking corporation, and owes debts to the amount of \$1,000 or over.

Second. That your petitioners are creditors of the said alleged bankrupt, having provable claims amounting in the aggregate in excess of securities held by them to the sum of \$500.

Third. The nature and amount of your petitioners' claim are as follows:

(a) The claim of your petitioner W. C. S. is as follows:

Money loaned and advanced by G. C. to the alleged bankrupt above named on or about and between the first day of January, 1907, and the first day of January, 1908, both days inclusive, amounting to the sum of \$800.00, and thereafter and for value said claim was assigned by G. C. to petitioner, who is now the owner and holder thereof.

[(b) The claim of your petitioner A. B. is as follows: (Here allege nature of other claims).]

Fourth. Your petitioners further show that the said alleged bankrupt is insolvent, and within four months next preceding the date of this petition, and while insolvent, committed acts of bankruptcy as follows:

I. Your petitioners are informed and believe that said alleged bankrupt paid certain claims, demands, accounts and indebtedness to several persons, firms and corporations, creditors of said alleged bankrupt, upon antecedent indebtedness, with the intent and for the purpose of preferring such creditors of said alleged bankrupt and for the purpose of allowing said creditors to obtain a greater percentage of their respective debts than any other of such creditors of the same class, which payments amounted in the aggregate to the sum of about \$2,500.00.

II. Your petitioners are informed and believe that the said alleged bankrupt, with intent to hinder, delay and defraud its creditors, and with intent and for the purpose of giving a preference contrary to the provisions of the Bankruptcy Law, and upon pretended and alleged antecedent indebtedness claim and alleged to be due from said alleged bankrupt to divers persons, firms and corporations, assigned, transferred and set over unto said divers persons, firms and corporations large and valuable property, consisting of merchandise, accounts and dues receivable, of the value of about \$2,500.00, applicable to the payment of the debts of said alleged bankrupt.

Fifth. Your petitioners further represent that the said alleged bankrupt has creditors other than your petitioners, and that the said creditors were and are less than twelve in number.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, may be made upon K. P. Co. (a corporation), as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged by the Court to be bankrupt within the purview of said acts.

Dated ———, 19—.

M. & G.,

*Attorneys for Petitioning Creditor.*

[Verification.]

[Schedules to be annexed corresponding with schedules under Forms 2 to 13, *ante*.]

W. C. S., *Petitioner.*

## § 1685. Form No. 17.

**AMENDED VERIFICATION OF PETITION BY ATTORNEY  
FOR CREDITOR.**

H. F. H., being duly sworn upon his oath, says that he is a member of the firm of D. & H., a society of attorneys practicing in the city of San Juan, Porto Rico, composed of the said H. F. H. and F. H. D., and that the said D. & H. are members of the bar of the United States District Court for Porto Rico, regularly practicing therein; that the said firm D. & H., and each of the partners thereof, were duly and fully authorized by S. P. & Co. and by S. R. & Co. to sign the petition in bankruptcy herein filed by the said S. P. & Co. and S. R. & Co., and the A. T. Co. against the S. de J. H., on the 8th day of June, 1903; that the said S. P. & Co. and S. R. & Co. are mercantile associations and firms engaged in business in the city of New York, neither of whom have any representatives in Porto Rico, nor did they have at the time of filing the petition in bankruptcy as aforesaid; that neither the said S. P. & Co. nor the said S. R. & Co. nor the partners thereof in the said city of New York were aware of the acts of bankruptcy alleged in the said petition to have been committed by the said S. de J. H. at the time of the filing of the said petition, but that your affiant had knowledge thereof, having acquired such knowledge within a few days previous to the filing of said petition in bankruptcy, and the affiant alleges that he acquired knowledge of the said acts of bankruptcy by reading a certified copy of the transfer set forth in the said petition in bankruptcy, dated March 7, 1903, and that the reason why he signed and verified the said petition in bankruptcy in behalf and for the said S. P. & Co. and S. R. & Co. is and was because he was familiar with the facts as aforesaid and it would greatly delay the filing of the petition in bankruptcy if time had been taken to send the petition in bankruptcy to New York for the signature of a member of the firm of the said S. P. & Co. and the said S. R. & Co., or to have awaited the arrival in Porto Rico of a duly authorized person to sign such petition.

Affiant states that all the matters and facts set forth in said petition in bankruptcy filed as aforesaid are true. And affiant further says that at the time of the filing of said petition in bankruptcy D. J. A. was the regular and general agent in Porto Rico of the A. T. Co. of New York, and such company had no other agent in Porto Rico at the time; that the said D. J. A. was duly and fully authorized by the said A. T. Co. to sign the said petition in bankruptcy and that he signed the same for the reason that the facts relating to the act in bankruptcy as set forth in said petition were not known to said A. T. Co., but were known to the said J. A., who acquired the knowledge thereof from the reading of the document or transfer set forth in said petition in bank-

ruptcy; and that he, the said J. A., signed and verified the said petition in bankruptcy for the reason that it would have delayed the proceedings herein, to the great prejudice of his client, the said A. T. Co., if he had waited until the petition of bankruptcy should be sent to New York for signature or if he should wait until an officer of the said company should come to Porto Rico.

[Sgd.]

H. F. H.

[Verification.]

NOTE.—From Record in *Munsuri v. Fricke*, 222 U. S. 121.

### § 1686. Form No. 18.

#### PETITION FOR LEAVE TO FILE AMENDED PETITION.

[Caption.]

To the District Court of the United States, for the ——— District of ———:

Your petitioners respectfully represent and show to the court:

1. That they are the petitioning creditors in the above entitled proceeding, which was duly commenced on the ——— day of ———, 19—, by the filing of an involuntary petition in bankruptcy against the above named ———.

2. That it becomes necessary for your petitioners to amend the petition originally filed by them as aforesaid in the following respects: (*or*, by the insertion of the following clause in place of — paragraph thereof; *or* otherwise indicate the nature of the proposed amendment).

3. That a copy of the proposed amendment is attached hereto and made a part hereof.

4. That the cause of the error (*or* omission) in the petition originally filed by the petitioners is as follows:

5. That no previous application for leave to amend said petition has been made.

WHEREFORE, your petitioners pray that they be granted leave to file the amended petition attached hereto in lieu of the petition originally filed by them.

[Verification.]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## § 1687. Form No. 19.

**ADMISSION OF WILLINGNESS TO BE ADJUDICATED.**(BY AN INDIVIDUAL.)<sup>1</sup>

I, \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_, hereby admit my inability to pay my debts and consent to being adjudged bankrupt on that ground.

[Acknowledgment.]

<sup>1</sup> This form can also be used by a partnership.

## § 1688. Form No. 20.

**ADMISSION OF WILLINGNESS TO BE ADJUDICATED.**(BY CORPORATE DIRECTORS.)<sup>1</sup>

We, the undersigned, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, being \_\_\_\_\_ of the directors of the \_\_\_\_\_, a corporation duly organized and existing under the laws of the State of \_\_\_\_\_, with its principal place of business at \_\_\_\_\_, \_\_\_\_\_, for and in behalf of said corporation, hereby admit its inability to pay its debts and consent to its being adjudged a bankrupt on that ground.

[Acknowledgment.]

<sup>1</sup> Authority of directors, see *ante*, § 53.

## § 1689. Form No. 21.

**ADMISSION OF WILLINGNESS TO BE ADJUDICATED.**(BY STOCKHOLDERS.)<sup>1</sup>

At a special meeting of the stockholders of the \_\_\_\_\_, a corporation organized and existing under the laws of the State of \_\_\_\_\_, which meeting was duly called and held pursuant to law and to the articles and by-laws of said corporation, the following resolution was duly adopted by the affirmative vote of \_\_\_\_\_ shares of the capital stock outstanding.

RESOLVED, That the \_\_\_\_\_, a corporation organized and existing under the laws of the State of \_\_\_\_\_, the principal place of business of which is at \_\_\_\_\_, in the State of \_\_\_\_\_, do and the same hereby

does admit its inability to pay its debts and consents to being adjudged a bankrupt on that ground.

STATE OF \_\_\_\_\_ }  
COUNTY OF \_\_\_\_\_ } ss.

We, the undersigned, \_\_\_\_\_, president, and \_\_\_\_\_, secretary, of the \_\_\_\_\_, do hereby certify that the foregoing resolution admitting the inability of said corporation to pay its debts and its willingness to be adjudged a bankrupt on that ground was duly adopted at a special meeting of the stockholders of said corporation, duly called and held pursuant to law and to its articles and by-laws, which meeting was held at the principal office of said corporation at \_\_\_\_\_, \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—.

And we do further certify that the whole number of shares of stock of said corporation issued and outstanding at the time of the holding of such meeting was \_\_\_\_\_; that \_\_\_\_\_ shares voted in favor of said resolution and \_\_\_\_\_ shares against it.

That the foregoing copy of said resolution is a full, true and correct copy of the original resolution so adopted, and of the whole thereof.

IN WITNESS WHEREOF, We, the president and secretary of the \_\_\_\_\_, have hereunto officially subscribed our names and have caused the corporate seal of said corporation to be hereto affixed this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

\_\_\_\_\_, *President.*  
\_\_\_\_\_, *Secretary.*

[Corporate Seal.]

<sup>1</sup> In some states the power to make the above admission resides in the stockholders and not the directors. See *ante*, § 53.

#### § 1690. Form No. 22. [Official Form No. 4.]

#### ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

In the District Court of the United States for the \_\_\_\_\_ District  
of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
In Bankruptcy.

Upon consideration of the petition of \_\_\_\_\_ that \_\_\_\_\_ be declared a bankrupt, it is ordered that the said \_\_\_\_\_ do appear at this court, as a court of bankruptcy, to be holden at \_\_\_\_\_, in the district aforesaid, on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena, be served on said \_\_\_\_\_, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.



Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1—.

[Seal of the Court.]

\_\_\_\_\_, Clerk.

**§ 1691. Form No. 23. [Official Form No. 5.]**

**SUBPOENA TO ALLEGED BANKRUPT.**

UNITED STATES OF AMERICA, \_\_\_\_\_ District of \_\_\_\_\_.

To \_\_\_\_\_, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the \_\_\_\_\_ district of \_\_\_\_\_, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, \_\_\_\_\_ to answer to a petition filed by \_\_\_\_\_ in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in his behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.]

\_\_\_\_\_, Clerk.

**§ 1692. Form No. 24.**

**AFFIDAVIT FOR SERVICE BY PUBLICATION UPON NON-RESIDENT BANKRUPT.**

[Caption.]

STATE OF \_\_\_\_\_ }  
COUNTY OF \_\_\_\_\_ } ss.

\_\_\_\_\_, being first duly sworn, says:

That he is one of the attorneys for the petitioning creditors in the above entitled proceeding.

That the above named \_\_\_\_\_, against whom a petition in involuntary bankruptcy was filed in this court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, by \_\_\_\_\_, and other creditors of said \_\_\_\_\_, is not a resident of the \_\_\_\_\_ district of \_\_\_\_\_ and cannot be found therein.

That the above named \_\_\_\_\_ has not voluntarily appeared in this proceeding.

[Jurat.]

\_\_\_\_\_

## § 1693. Form No. 25.

**ORDER FOR SERVICE BY PUBLICATION UPON NON-RESIDENT  
BANKRUPT.**

[Caption.]

On reading and filing the affidavit of \_\_\_\_\_ and on the files and proceedings herein, it appearing to the satisfaction of the court that \_\_\_\_\_, against whom a petition in involuntary bankruptcy was filed in this court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, by \_\_\_\_\_ and other creditors of said \_\_\_\_\_, is not a resident of this district and cannot be found therein and that personal service of subpoena cannot be made upon him,

Now, on motion of \_\_\_\_\_, attorney for the petitioning creditors herein,

IT IS ORDERED, That said alleged bankrupt, \_\_\_\_\_, appear and plead to the aforesaid petition in involuntary bankruptcy on or before the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, and that in default thereof this court will proceed to a hearing on said petition and an adjudication thereon.

Let a copy of this order be published in \_\_\_\_\_, a newspaper published at \_\_\_\_\_, in said district, once a week for two consecutive weeks.

Dated \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
U. S. District Judge.

## § 1694. Form No. 26.

**PRINTER'S AFFIDAVIT OF PUBLICATION.**

STATE OF \_\_\_\_\_ }  
COUNTY OF \_\_\_\_\_ } ss.

\_\_\_\_\_, of said county, being duly sworn, says that he is the printer and publisher (or, the principal clerk of the publisher) of the \_\_\_\_\_, a daily (or, weekly) newspaper printed and published in the city of \_\_\_\_\_, in the county and state aforesaid, and duly designated by the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_, for the publication of notices in bankruptcy, in the county and state aforesaid.

[Here annex Printed  
Copy of Notice.]

That the notice of which the annexed is a printed copy taken from the paper in which it was published, was published in said newspaper, \_\_\_\_\_, on the following date or dates, to-wit: \_\_\_\_\_.

[Verification.]

**§ 1695. Form No. 27. [Official Form No. 6.]**

**DENIAL OF BANKRUPTCY.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ } In Bankruptcy.

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

And now the said \_\_\_\_\_ appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[Official character.]

NOTE.—The respondent is not limited to this form. See *ante*, § 181, *post*, § 1695.

**§ 1696. Form No. 28.**

**ANSWER OF CREDITOR OR BANKRUPT.**

[Caption.]

Now comes, \_\_\_\_\_, and in answer to the petition in involuntary bankruptcy filed herein, by \_\_\_\_\_, and others, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, respectfully shows to the Court:

[That he is a creditor of the above named alleged bankrupt, \_\_\_\_\_, and has a provable claim against said \_\_\_\_\_, amounting in the aggregate in excess of securities held by him to the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), the value of which is as follows:]

That neither the petitioners in the aforesaid petition nor the form

of the petition are within the requirements of the acts of Congress relating to bankruptcy.

That the alleged bankrupt is (principally engaged in farming and tilling of the soil) (a banking corporation) and is not amenable to the acts of Congress relating to bankruptcy and not subject to the jurisdiction of this court.

[Verification.] \_\_\_\_\_.

**§ 1697. Form No. 29.**

**WITHDRAWAL OF ANSWER.**

[Caption.]

IT IS HEREBY STIPULATED AND AGREED that the answer heretofore filed by me for and in behalf of \_\_\_\_\_, is hereby withdrawn with prejudice, and the same may be stricken from the records herein, and an order adjudicating the above-named \_\_\_\_\_ bankrupt entered by the court without notice.

Dated \_\_\_\_\_, 19—.

**§ 1698. Form No. 30.**

**PETITION OF INTERVENTION.**

[Caption.]

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

Respectfully represents, \_\_\_\_\_, that he is a creditor of the above-named bankrupt and has a claim against said bankrupt amounting in the aggregate, in excess of securities held by him, to the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

That the nature of your petitioner's claim is as follows:

That a petition in bankruptcy has been filed in this court against \_\_\_\_\_ by \_\_\_\_\_, Case No. \_\_\_\_\_, in bankruptcy, praying that said \_\_\_\_\_ may be adjudged a bankrupt, and your petitioner hereby intervenes, and prays that the said \_\_\_\_\_ be adjudged a bankrupt.

[Verification.] \_\_\_\_\_,

\_\_\_\_\_, *Petitioner.*

NOTE.—Order is unnecessary. See *ante*, § 137.

## § 1699. Form No. 31.

**MOTION TO DISMISS INVOLUNTARY PETITION.**

[Caption.]

Now come the said alleged bankrupts, S. de J. H., J. M. y H., and J. T. y M., by their attorneys, N. B. K. P., appearing specially for this purpose and no other, and move the Court to vacate and set aside the service of process in said cause upon the said respondents and to dismiss the said petition filed against them, for the following reasons, to-wit:

First, because said writ was issued on the 10th day of June, 1903, and made returnable on the 12th day of June, 1903, which failed to give such reasonable notice as is required to constitute due process of law.

Second, because, although said writ was issued and attested on the 10th day of June, 1903, it was not served upon respondents until late in the afternoon of the 11th day of June, 1903, by reason of which these respondents were given less than twenty-four hours' notice to appear in this court in defense of said petition, which is not such reasonable notice as constitutes due process of law.

Third, because the petition in this case fails to allege that these respondents are included within the classes of persons against whom involuntary petitions in bankruptcy can be filed under the law, by reason whereof this Court is without jurisdiction to proceed against these respondents.

Fourth, because the said petition is not legally or sufficiently verified, in that it is sworn to by one claiming to be an attorney in fact of certain corporation petitioners without power of attorney under which he claims to act being set forth or attached to the said petition so as to enable the Court to judge of the sufficiency of the same.

Fifth, because the said petition is not legally or sufficiently verified, in that the party verifying the same as an attorney in fact does not set forth in said affidavit to said petition that he has had any opportunity to ascertain the accuracy of the allegations made in the said petition, or has in fact any knowledge thereof, whereby he is enabled to verify the same.

Sixth, because of others matters apparent on the face of said petition.  
Filed June 15, 1903.      N. B. K. P., *Attorney for Respondents.*

NOTE.—From record in *Munsuri v. Fricker*, 222 U. S. 121.

## § 1700. Form No. 32. [Official Form No. 7.]

**ORDER FOR JURY TRIAL.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—.

Upon the demand in writing filed by \_\_\_\_\_, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

[Seal of the Court.] \_\_\_\_\_, Clerk.

## § 1701. Form No. 33. [Official Form No. 8.]

**SPECIAL WARRANT TO MARSHAL.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, filed against \_\_\_\_\_, of the County of \_\_\_\_\_ and State of \_\_\_\_\_, in said district, and said petition is still pending; and whereas it satisfactorily appears that said \_\_\_\_\_ has committed an act of bankruptcy [*or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value*], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said \_\_\_\_\_, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.] \_\_\_\_\_, Clerk.

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ———, and of all his deeds, books of account, and papers which have come to my knowledge.

\_\_\_\_\_,  
*Marshal [or Deputy Marshal].*

FEEES AND EXPENSES.

1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mlie each way.....		
3. Actual expenses in custody of property and other services as follows. [Here state the particulars.]		

\_\_\_\_\_,  
*Marshal [or Deputy Marshal].*

District of ———, A. D. 19—.

Personally appeared before me the said ———, and made oath, that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

§ 1702. Form No. 34.

PETITION FOR RECEIVER.

[Caption.]

To the Honorable Judges of the District Court of the United States for the ——— District of ———:

The petition of W. C. S. respectfully shows to this Honorable Court and alleges:

First. That he is a creditor of the bankrupt above named, and that a petition praying for the involuntary adjudication of said alleged bankrupt was filed in the office of the clerk of this court on the ——— day of ———, 19—, and thereafter on said day a subpoena was issued on the said involuntary petition.

Second. That the alleged bankrupt above named has its place of business at No. ——— Street, ———, ———, and is a corporation incorporated under the laws of the State of ——— and has liabilities of ——— dollars, and assets which consist of outstanding accounts and merchandise of about ——— dollars.

Third. That the alleged bankrupt is a manufacturer of pianos. That none of the creditors have an inventory of the bankrupt's property and that ——— its officers or other employers desire to abstract,

purloin or remove any parts of the piano or merchandise used in the construction thereof, if it can be done without knowledge of the creditors, for the reasons aforesaid, that the creditors have no inventory.

Fourth. Petitioner's attorneys, Messrs. M. & G., were informed by the bankrupt's attorneys that the said alleged bankrupt has less than twelve creditors, and further that it is insolvent and cannot pay its just debts in full. Information was also obtained that the rent of the premises of the bankrupt has not been paid for the past month and there is fear that dispossession proceedings will be brought, and, if permitted, grave and serious injury will result. That if the bankrupt's property is dispossessed, the wood used in the construction of said pianos,— which is of delicate hue—as well as the veneer which is attached to the various wood—and is also delicate—will become scratched, and if they become scratched, they become worthless.

Fifth. Petitioner further says that he has been informed that the bankrupt has outstanding accounts, having sold some pianos on the installment plan, which demand immediate attention by a custodian to be appointed by this court. That if the debtors become advised of the bankruptcy herein, they will delay making payments on the installment accounts through various pretexts and excuses, and some will move and the accounts become lost and the property of the bankrupt to which the estate is entitled will also be lost.

Sixth. Therefore, petitioner submits that a custodian be appointed at once to take charge of these outstanding accounts and vigorously prosecute them, to the end that collection of the same may be successfully had.

Seventh. Petitioner further shows that the bankrupt has refused to permit an examination of its books and that the major portion of its debts are now past due and no inspection can be obtained of the bankrupt's premises in relation to the payment of past due accounts.

Eighth. Your petitioner further shows that the outstanding and quick assets of the bankrupt might be disposed of in some way so that the same will be lost to the estate.

WHEREFORE, your petitioner prays for an order of this court appointing a receiver of the K. P. Co., with the usual powers, and that the usual injunction order issue, and for such other and further relief in the premises as to the Court may seem just and proper.

And your petitioner will ever pray, etc.

Dated ———, 19—.

[Verification.]

W. C. S., *Petitioner.*

NOTE.—From record in *Cameron v. United States*, 231 U. S. 710.



## § 1703. Form No. 35.

**NOTICE OF APPLICATION FOR RECEIVER.**

[Caption.]

Upon consideration of the petition of \_\_\_\_\_ that a temporary receiver be appointed to take charge of the estate of \_\_\_\_\_, prior to the adjudication and until a trustee can be elected herein, and on motion of \_\_\_\_\_, of \_\_\_\_\_, attorney for the creditors petitioning for said receivership,

IT IS ORDERED that the said \_\_\_\_\_ do appear at this court (continuing as in Form No. 22).

NOTE.—Notice should be given to the alleged bankrupt and to any person in possession of the property sought to be seized. See *ante*, § 203.

## § 1704. Form No. 36.

**ORDER APPOINTING RECEIVER.**

[Caption.]

On reading and consideration of the petition of \_\_\_\_\_ for the appointment of a receiver herein, the Court finds that it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of and conserve the property of said estate, and it is therefore

Ordered, that \_\_\_\_\_ be and hereby is appointed receiver of the property and estate of said bankrupt, upon filing a bond herein in the penal sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), conditioned for the faithful performance of its duties as such receiver.

Dated \_\_\_\_\_, 19—. \_\_\_\_\_, Judge.

## § 1705. Form No. 37.

**BOND OF RECEIVER.**

[Caption.]

Know all men by these presents: That we, \_\_\_\_\_, of \_\_\_\_\_, as principal, and \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, as sureties, are held and firmly bound unto the United States of America in the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) in lawful money of the United States, to be paid to the said United States, for which payment well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

The conditions of this obligation are such, that whereas the above-named \_\_\_\_\_, was, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, appointed receiver to take charge of the above-named \_\_\_\_\_ until the petition herein to have the said \_\_\_\_\_ declared a bankrupt is dis-

missed or a trustee qualifies herein, and he, the said ———, has accepted said trust with all the duties and obligations pertaining thereto:

Now, therefore, if the said ———, receiver in bankruptcy as aforesaid, shall obey all such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said ———, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said receiver, that this obligation be void; otherwise, to remain in full force and virtue.

Signed and sealed in the presence of \_\_\_\_\_ [SEAL.]  
 \_\_\_\_\_ [SEAL.]  
 \_\_\_\_\_ [SEAL.]

[Acknowledgment.]

[Justification of Sureties.]

### § 1706. Form No. 38. [Official Form No. 9.]

#### BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, ———, as principal, and ———, as sureties, are held and firmly bound unto ———, in the full and just sum of ——— dollars, to be paid to the said ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ——— A. D. 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the ——— District of ——— against the said ———, and the said ——— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ———, subject to the further orders of said District Court.

Now, therefore, if such warrant shall issue for the seizure of said property, and if the said ——— shall indemnify the said ——— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of \_\_\_\_\_ [SEAL.]  
 \_\_\_\_\_ [SEAL.]  
 \_\_\_\_\_ [SEAL.]

[Acknowledgment.]

[Justification of Sureties.]

Approved this ——— day of ———, A. D. 19—.

\_\_\_\_\_, District Judge.

NOTE.—See *ante*, § 204.

## § 1707. Form No. 39. [Official Form No. 10.]

**BOND TO MARSHAL.**

Know all men by these presents: That we, ———, as principal, and ———, as sureties, are held and firmly bound unto ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ——— A. D. 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ———, and the said ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of \_\_\_\_\_ [SEAL.]  
 \_\_\_\_\_ [SEAL.]  
 \_\_\_\_\_ [SEAL.]

[Acknowledgment.]

[Justification of Sureties.]

Approved this ——— day of ———, A. D. 19—.

\_\_\_\_\_, *District Judge.*

## § 1708. Form No. 40. [Official Form No. 11.]

**ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.**

In the District Court of the United States for the ———  
 District of ———.

In the matter of }  
 \_\_\_\_\_ } In Bankruptcy.

At ———, in said district, on ——— day of ———, A. D. 19—, before the Honorable ———, judge of the ——— district of ———.

This cause came on to be heard at ———, in said court, upon the petition of ——— that ——— be adjudged a bankrupt

within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said \_\_\_\_\_ was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.]

\_\_\_\_\_, Clerk.

### § 1709. Form No. 41. [Official Form No. 12.]

#### ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.  
Bankrupt. }

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, before the Honorable \_\_\_\_\_, judge of said court in bankruptcy, the petition of \_\_\_\_\_ that \_\_\_\_\_ be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said \_\_\_\_\_ is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.]

\_\_\_\_\_, Clerk.

### § 1710. Form No. 42.

#### PETITION TO VACATE ADJUDICATION.

[Caption.]

To the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

Now comes \_\_\_\_\_, appearing specially under protest to the jurisdiction of the court and for the sole purpose of moving to set aside the adjudication in bankruptcy herein, and respectfully shows to the court:

1. That he is the alleged bankrupt above named (*or*, a creditor of the alleged bankrupt, and has not proved his claim in these proceedings).

2. That the order of the court herein adjudging the above named \_\_\_\_\_ a bankrupt is void and should be set aside for the following reasons, to-wit: (here allege fully the facts relied upon, as defects in the petition or process, want of residence in the district, or any of the grounds mentioned in § 300, *ante*).

3. That no previous application to have said order vacated and set aside has been made.

WHEREFORE, Your petitioner prays that the order herein adjudging the above named \_\_\_\_\_ a bankrupt be vacated and set aside and that the petition for adjudication herein be dismissed and all the proceedings had thereon vacated, and for such other and further relief as may be just, with costs.

\_\_\_\_\_  
*Petitioner.*

[Verification.]

NOTE.—The usual notice of motion should be given parties interested.

### § 1711. Form No. 43. [Official Form No. 13.]

#### APPOINTMENT, OATH, AND REPORT OF APPRAISERS.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

It is ordered that \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_  
*Referee in Bankruptcy.*

\_\_\_\_\_ District of \_\_\_\_\_, ss:

Personally appeared the within named \_\_\_\_\_ and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[Official character.]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.
_____	_____	_____
.....	.....	.....
.....	.....	.....

In witness whereof we hereunto set our hands, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

§ 1712. Form No. 44. [Official Form No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
Bankrupt. } In Bankruptcy.

Whereas \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and district aforesaid, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, was duly adjudged a bankrupt upon a petition filed in this court by [or, against] him on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, according to the provisions of the acts of Congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to \_\_\_\_\_, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said \_\_\_\_\_ shall attend before said referee on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, and thenceforth shall submit to such orders as may

be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 19—.

[Seal of the Court.]

—————, *Clerk.*

**§ 1713. Form No. 45. [Official Form No. 15.]**

**ORDER OF REFERENCE IN JUDGE'S ABSENCE.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.

Whereas on the ——— day of ———, A. D. 19—, a petition was filed to have ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors*], it is thereupon ordered that the said matter be referred to ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ——— shall attend before said referee on the ——— day of ——— A. D. 19—, at ———.

Witness my hand and the seal of the said court, at ———, in said district, on the ——— day of ———, A. D. 19—.

[Seal of the Court.]

—————, *Clerk.*

**§ 1714. Form No. 46. [Official Form No. 16.]**

**REFeree'S OATH OF OFFICE.**

I, ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

—————,  
*District Judge.*

## § 1715. Form No. 47. [Official Form No. 17.]

**BOND OF REFEREE.**

Know all men by these presents: That we, \_\_\_\_\_ of \_\_\_\_\_, as principal, and \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, as sureties, are held and firmly bound to the United States of America in the sum of \_\_\_\_\_ dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

The condition of this obligation is such that whereas the said \_\_\_\_\_ has been on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, appointed by the Honorable \_\_\_\_\_, judge of the district court of the United States for the \_\_\_\_\_ district of \_\_\_\_\_, a referee in bankruptcy, in and for the County of \_\_\_\_\_, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said \_\_\_\_\_ shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]

[Acknowledgment.]

[Justification of Sureties.]

Approved this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_, *District Judge.*

## § 1716. Form No. 48.

**PETITION FOR TRANSFER OF CASE FROM ONE REFEREE TO ANOTHER.**

[Caption.]

To the Honorable \_\_\_\_\_, Judge of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_ respectfully shows to the court:

That your petitioner is a creditor of the above named \_\_\_\_\_, having a provable claim amounting, in excess of securities held by him, to the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), the nature of which is as follows: (or otherwise show the interest of the petitioner).

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the above named \_\_\_\_\_



\_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and district aforesaid, was duly adjudicated a bankrupt upon a petition filed by (*or, against*) him on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, according to the provisions of the acts of Congress relating to bankruptcy.

That thereafter and on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by order of this court, the said matter was referred to \_\_\_\_\_, one of the referees in bankruptcy of this court.

That your petitioner verily believes that the interest and convenience of all parties concerned would be better served if the proceedings herein be referred to \_\_\_\_\_, Esq., one of the referees in bankruptcy of this court, having his office in the city of \_\_\_\_\_, in the county of \_\_\_\_\_, and district aforesaid, for the following reasons:

*(If the removal is sought for cause allege:)*

That the referee appointed as aforesaid has conducted himself in a manner unbecoming a judicial officer, and is not a proper person to act as referee herein, for the following reasons:

That no previous application has been made for the order asked for herein.

WHEREFORE, your petitioner prays for an order of this court directing that the proceedings herein be transferred from the said \_\_\_\_\_, to the said \_\_\_\_\_, to take such further proceedings herein as required by law.

\_\_\_\_\_,  
*Petitioner.*

[Verification.]

NOTE.—See *ante*, § 323.

### § 1717. Form No. 49.

#### REPORT OF REFEREE.

[Caption.]

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

The undersigned referee of your court in compliance with your annexed order would respectfully report herewith the evidence taken upon the claim of \_\_\_\_\_ against said estate with findings of fact established by same. In addition to the evidence hereto attached and taken herein, the evidence taken upon the claim of \_\_\_\_\_ against said estate is to be considered herein as far as applicable, which said evidence has been returned and is on file herein.

All of which is respectfully submitted.

Dated \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_,  
*Referee.*

NOTE.—From record in *Coder v. Arts*, 213 U. S. 223.

## § 1718. Form No. 50.

**PETITION FOR REVIEW OF REFEREE'S ORDER.**

[Caption.]

Comes W. T. N., by counsel, and files herewith his petition for review of the order of the referee entered herein on Oct. 16th, 1900, and says that said referee erred in ordering and adjudging as insufficient his response to the rule filed herein on Oct. 13th, 1900, that said referee erred in adjudging that there came to the hands of said W. T. N. as agent of the bankrupt on Feb. 9th, 1900, the sum of \$4,133.45, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the city of Louisville; that said referee erred in adjudging that there came to the hands of said W. T. N., as the agent of the bankrupt on Feb. 19th, 1900, the further sum of \$10,100.00, being the net proceeds from the sale of merchandise sold to H. S.; that said referee erred in adjudging that the said sums are the property of the bankrupt, E. B. N., and belong to A. E. M., trustee in bankruptcy herein of said estate; that the said referee erred in ordering that the said rule be made absolute to the amount of said two sums aggregating the sum of \$14,233.45; that the said referee erred in ordering and requiring said W. T. N. to pay to A. E. M., trustee in bankruptcy in this cause on or before 9:30 o'clock on Oct. 17th, 1900, the said sum of \$14,233.45, and said referee erred in entering said order on Oct. 16th, 1900, a copy of which is filed herewith, that said order is erroneous and void, and said referee had no jurisdiction to enter same.

WHEREFORE, said W. T. N. prays that said order entered hereon by the referee on Oct. 16th, 1900, be reviewed by the honorable judge of the District Court of the United States for the District of Kentucky, and that said order be adjudged erroneous and void.

W. M. S.,  
Z. P.,  
F. F., Jr.,  
*Att'ys for W. T. N.*

NOTE.—From the record in *Mueller v. Nugent*, 184 U. S. 1.  
See, also, *ante*, § 356.

**§ 1719. Form No. 51. [Official Form No. 56.]****CERTIFICATE BY REFEREE TO JUDGE.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_  
Bankrupt. } In Bankruptcy.

I, \_\_\_\_\_, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
Referee in Bankruptcy.

**§ 1720. Form No. 52.****APPLICATION FOR PROTECTION FROM ARREST.**

[Caption.]

To \_\_\_\_\_, Esq., Referee in Bankruptcy:

The petition of \_\_\_\_\_ respectfully shows:

1. That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, a petition was duly filed in the above entitled court praying that your petitioner be adjudged a— (in)voluntary bankrupt; that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, your petitioner was duly adjudged a bankrupt on said petition; <sup>1</sup> that the above entitled proceeding is still pending and your petitioner has not received (*or* applied for) his discharge therein.

2. That your petitioner is informed and verily believes civil process is about to be issued (*or*, has been issued) by the \_\_\_\_\_ Court of the County of \_\_\_\_\_, State of \_\_\_\_\_, for the arrest of your petitioner in a civil action commenced \_\_\_\_\_ (*or* about to be commenced) by \_\_\_\_\_ against your petitioner upon a debt or claim from which your petitioner's discharge in bankruptcy would be a release; that your petitioner is liable to arrest thereon.

3. That the facts upon which said claim is based are as follows:

4. That your petitioner has not previously applied for the order hereinafter prayed for.

<sup>1</sup> WHEREFORE, Petitioner prays for an order exempting him from arrest upon civil process in all actions now pending or hereafter begun in any

state court, upon any debt or claim from which his discharge in bankruptcy would be a release, to continue until the final adjudication on petitioner's application for a discharge in bankruptcy.

\_\_\_\_\_,  
Petitioner.

[Verification.]

<sup>1</sup> Exemption begins with filing of petition and the allegation as to adjudication is unnecessary. See *ante*, § 425.

•  
§ 1721. Form No. 53.

**ORDER PROTECTING BANKRUPT FROM ARREST.**

[Caption.]

The petition of \_\_\_\_\_ praying for an order exempting him from arrest in certain actions in the state courts having been filed from which it satisfactorily appears that sufficient grounds exist for the issuance of the order prayed for, now on motion of \_\_\_\_\_, attorney for the said \_\_\_\_\_.

IT IS ORDERED that said petition be and the same is hereby granted, and that all persons and officers be and they are hereby prohibited from arresting said \_\_\_\_\_ upon civil process in any action now pending or hereafter begun in any state court, upon any debt or claim from which his discharge in bankruptcy would be a release, until the final adjudication on his application for a discharge in bankruptcy, or until further order of this Court.

\_\_\_\_\_,  
Referee.

Dated \_\_\_\_\_ 19—.

§ 1722. Form No. 54.

**PETITION FOR WRIT OF HABEAS CORPUS.**

[Caption.]

To the Honorable \_\_\_\_\_, Judge of the District Court for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_ of \_\_\_\_\_ of the County of \_\_\_\_\_, State of \_\_\_\_\_, respectfully shows to the Court:

That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, a petition in bankruptcy was filed against (by) him in the above named court; (that thereafter and on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, he was duly adjudicated a bankrupt thereon).

That he is now imprisoned and restrained of his liberty by \_\_\_\_\_ at \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_; that he is not committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree; that the cause or pretense of such confinement or restraint, according to the knowledge and belief of the petitioner, is a claim constituting a debt provable and dischargeable in bankruptcy, (*or*, that your petitioner is utterly ignorant of the cause or pretense of such confinement or restraint and is unable to ascertain the same).

YOUR PETITIONER THEREFORE PRAYS, That a writ of habeas corpus may issue directed to the said \_\_\_\_\_ commanding him that he have the body of the said \_\_\_\_\_ by him imprisoned and detained, together with the time and cause of such imprisonment and detention, before the said court to do and receive what shall then and there be considered concerning the said \_\_\_\_\_ in pursuance of the statute in such case provided.

\_\_\_\_\_,  
*Petitioner.*

Dated \_\_\_\_\_, A. D. 19—.  
[Verification.]

**§ 1723. Form No. 55. [Official Form No. 18.]**

**NOTICE OF FIRST MEETING OF CREDITORS.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_. In Bankruptcy.

In the matter of \_\_\_\_\_ }  
*Bankrupt.* } In Bankruptcy.

To the creditors of \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and district aforesaid, a bankrupt:

Notice is hereby given that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, the said \_\_\_\_\_ was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at \_\_\_\_\_ in \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_-noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

\_\_\_\_\_, 19—.

## § 1724. Form No. 56. [Official Form No. 19.]

## LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
Bankrupt. } In Bankruptcy.

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, before \_\_\_\_\_, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

\_\_\_\_\_,  
Referee in Bankruptcy.

## § 1725. Form No. 57. [Official Form No. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN  
CREDITOR IS NOT REPRESENTED BY  
ATTORNEY AT LAW.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
Bankrupt. } In Bankruptcy.

To \_\_\_\_\_:

I, \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden; on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding

such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_. [L. S.]

Signed, sealed, and delivered in presence of —

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[Official character.]

§ 1726. Form No. 58. [Official Form No. 21.]

**SPECIAL LETTER OF ATTORNEY IN FACT.**

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.  
Bankrupt. }  
To \_\_\_\_\_,  
\_\_\_\_\_.

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, before \_\_\_\_\_, or any adjournment thereof, and then and there \_\_\_\_\_ for \_\_\_\_\_ and in \_\_\_\_\_ name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

\_\_\_\_\_. [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

Signed, sealed, and delivered in presence of—

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_, [Official character.]

§ 1727. Form No. 59. [Official Form No. 22.]

**APPOINTMENT OF TRUSTEE BY CREDITORS.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.* }

At ———, in said district, on the ——— day of ———, A. D. 19—, before ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ———, of ———, in the County of ——— and State of ———, to be the trustee of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.
.....	.....	.....	.....
.....	.....	.....	.....

Ordered that the above appointment of trustee be, and the same is hereby, approved.

—————,  
*Referee in Bankruptcy.*

§ 1728. Form No. 60. [Official Form No. 23.]

**APPOINTMENT OF TRUSTEE BY REFEREE.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.* }

At ———, in said district, on the ——— day of ———, A. D. 19—, before ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bank-



ruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, as trustee of the same.

\_\_\_\_\_  
*Referee in Bankruptcy.*

§ 1729. Form No. 61. [Official Form No. 24.]

**NOTICE TO TRUSTEE OF HIS APPOINTMENT.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_  
*Bankrupt.* } In Bankruptcy.

To \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or one of the trustees*] of the estate of the above-named bankrupt at the first meeting of the creditors, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at \_\_\_\_\_ dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_  
*Referee in Bankruptcy.*

§ 1730. Form No. 62.

**TRUSTEE'S ACCEPTANCE OR REJECTION OF APPOINTMENT.**

[Caption.]

To \_\_\_\_\_, Referee, in the above entitled proceeding:

I hereby signify my acceptance [*rejection*] of my appointment as trustee in bankruptcy of the estate of \_\_\_\_\_, bankrupt, above named.

Dated \_\_\_\_\_, 19—.

NOTE.—See *ante*, § 684.

## § 1731. Form No. 63.

**BOND OF TRUSTEE.**

Know all men by these presents: That we, \_\_\_\_\_, of \_\_\_\_\_, as principal, and \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, as sureties, are held and firmly bound unto the United States of America in the sum of \_\_\_\_\_ dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

The condition of this obligation is such, that whereas the above named \_\_\_\_\_ was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, appointed trustee in the case pending in bankruptcy in said court, wherein \_\_\_\_\_ is the bankrupt, and he, the said \_\_\_\_\_, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said \_\_\_\_\_, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in presence of \_\_\_\_\_, [SEAL.]  
 \_\_\_\_\_, [SEAL.]  
 \_\_\_\_\_, [SEAL.]

[Acknowledgment.]

[Justification of Sureties.]

## § 1732. Form No. 64. [Official Form No. 26.]

**ORDER APPROVING TRUSTEE'S BOND.**

At a court of bankruptcy, held in and for the \_\_\_\_\_ District of \_\_\_\_\_, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

Before \_\_\_\_\_, referee in bankruptcy, in the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
   *Bankrupt.* } In Bankruptcy.

It appearing to the Court that \_\_\_\_\_, of \_\_\_\_\_, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful perform-

ance of his official duties, in the amount fixed by the creditors [*or by order of the court*], to-wit, in the sum of \_\_\_\_\_ dollars, it is ordered that the said bond be, and the same is hereby, approved.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

§ 1733. Form No. 65. [Official Form No. 27.]

**ORDER THAT NO TRUSTEE BE APPOINTED.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_  
*Bankrupt.* } In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

\_\_\_\_\_,  
*Referee in Bankruptcy.*



## § 1735. Form No. 67. [Official Form No. 50.]

## OATH TO FINAL ACCOUNT OF TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, before me comes \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, and makes oath, and says that he was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, appointed trustee of the estate and the effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing \_\_\_\_\_ sheets of paper, the first sheet whereof is marked with the letter \_\_\_\_\_ [reference may here also be made to any prior account filed by said trustee] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

\_\_\_\_\_, Trustee.

Subscribed and sworn to before me at \_\_\_\_\_, in said \_\_\_\_\_ District of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[Official character.]

## § 1736. Form No. 68.

## NOTICE OF FINAL ACCOUNT AND MEETING.

[Caption.]

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

To the creditors of \_\_\_\_\_, Bankrupt:

Notice is hereby given that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, \_\_\_\_\_, trustee of the estate of the above-named bankrupt, filed his final account in the above entitled matter, containing a detailed statement of the administration of said estate; that the final meeting of the creditors of said bankrupt will be held at \_\_\_\_\_, in \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, at which time the creditors of said bankrupt may attend, examine the final account of said trustee filed as aforesaid, object to the confirmation thereof and

transact such other business as may properly come before the meeting; and that at said time and place the Court will make allowances to the officers of the court for their fees and expenses, and to the attorneys for the bankrupt and the trustee for their services, and will declare final dividends due to the creditors of said estate.

\_\_\_\_\_,  
Referee in Bankruptcy.

NOTE.—See *ante*, §§ 445, 721, 1344, 1425.

§ 1737. Form No. 69. [Official Form No. 51.]

**ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.*

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

\_\_\_\_\_,  
Referee in Bankruptcy.

§ 1738. Form No. 70. [Official Form No. 52.]

**PETITION FOR REMOVAL OF TRUSTEE.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.*

To the Honorable \_\_\_\_\_, Judge of the District Court for the  
\_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that \_\_\_\_\_, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to-wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

WHEREFORE \_\_\_\_\_ prays that notice may be served upon said \_\_\_\_\_, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

## § 1739. Form No. 71. [Official Form No. 53.]

**NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

To \_\_\_\_\_,

Trustee of the estate of \_\_\_\_\_, bankrupt:

You are hereby notified to appear before this court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, at \_\_\_\_\_ o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of \_\_\_\_\_, one of the creditors of said bankrupt, filed in this court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, in which it is alleged [*here insert the allegation of the petition*].

\_\_\_\_\_, Clerk.

## § 1740. Form No. 72. [Official Form No. 54.]

**ORDER FOR REMOVAL OF TRUSTEE.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

Whereas \_\_\_\_\_, of \_\_\_\_\_, did, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, present his petition to this court, praying that for the reasons therein set forth, \_\_\_\_\_, the trustee of the estate of said \_\_\_\_\_, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said \_\_\_\_\_ and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said \_\_\_\_\_ be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said \_\_\_\_\_, trustee [*or, out of the estate of the said \_\_\_\_\_, subject to prior charges*].

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.]

\_\_\_\_\_, Clerk.

**§ 1741. Form No. 73. [Official Form No. 55.]**  
**ORDER FOR CHOICE OF NEW TRUSTEE.**

In the District Court of the United States for the ———  
 District of ———.

In the matter of }  
 ————— } In Bankruptcy.  
*Bankrupt.* }

At ———, on the ——— day of ———, A. D. 19—.

Whereas by reason of the removal [*or the death or resignation*] of  
 ———, heretofore appointed trustee of the estate of said bank-  
 rupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held  
 at ———, in ———, in said district, on the ——— day of ———, A. D.  
 19—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the  
 time, place, and purpose of said meeting, by letter to each, to be deposited  
 in the mail at least ten days before that day.

—————,  
*Referee in Bankruptcy.*

**§ 1742. Form No. 74. [Official Form No. 40.]**  
**LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY**  
**REFEREE AND BY HIM DELIVERED TO TRUSTEE.**

In the District Court of the United States for the ———  
 District of ———.

In the matter of }  
 ————— } In Bankruptcy.  
*Bankrupt.* }

At ———, in said district, on the ——— day of ———, A. D. 19—.

A LIST OF DEBTS PROVED AND CLAIMED UNDER THE BANKRUPTCY OF  
 ———, WITH ——— DIVIDEND AT THE RATE OF ——— PER  
 CENT THIS DAY DECLARED THEREON BY ———, A REFEREE IN  
 BANKRUPTCY.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

—————,  
*Referee in Bankruptcy.*



## § 1743. Form No. 75.

**ORDER DECLARING DIVIDENDS.**

[Caption.]

And now to-wit, \_\_\_\_\_, 19—, a meeting of the creditors having been this day held, after due notice, to consider and pass upon the account of the trustee, and to declare and fix the time of payment of a dividend, now upon due consideration it is ordered, adjudged and decreed as follows, to-wit:

First. That the account of the trustee, no exceptions being filed thereto, is hereby confirmed.

Second. The claims for wages set forth in the Schedule of Distribution hereto attached are allowed in the amounts set forth in said schedule as entitled to priority under the provisions of the Bankruptcy Law.

Third. The following rent claims are allowed in the following amounts as entitled to priority under the provisions of the Bankruptcy Law, to-wit: \_\_\_\_\_, \$—; \_\_\_\_\_, \$—.

The total amount of debts duly proven and allowed and entitled to participate in dividends is the sum of \$—, and the dividend rate is hereby declared to be \_\_\_\_\_ per cent upon the claims duly proven and allowed, as aforesaid, and the trustee is ordered to pay out of the funds in \_\_\_\_\_ hands in accordance with the Schedule of Distribution hereto attached, and filed herewith, and that vouchers for said claims, respectively, be prepared for delivery by the trustee to said claimants, respectively, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
Referee in Bankruptcy.

NOTE.—From record in *Guarantee T. & T. Co. v. Title G. & T. Co.*, 224 U. S. 152.

## § 1744. Form No. 76. [Official Form No. 41.]

**NOTICE OF DIVIDEND.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
Bankrupt.

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

To \_\_\_\_\_,  
Creditor of \_\_\_\_\_, bankrupt:

I hereby inform you that you may, on application at my office, \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, or on any day thereafter, between the hours of \_\_\_\_\_, receive a warrant for the \_\_\_\_\_ dividend due to you

out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter. \_\_\_\_\_, *Trustee*.

## CREDITOR'S LETTER TO TRUSTEE.

To \_\_\_\_\_,

Trustee in bankruptcy of the estate of \_\_\_\_\_, bankrupt:

Please deliver to \_\_\_\_\_ the warrant for dividend payable out of the said estate to me. \_\_\_\_\_, *Creditor*.

## § 1745. Form No. 77.

## BOND OF DEPOSITORY.

[Caption.]

Know all men by these presents: That we, the \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_, as principal, and \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, as sureties are held and firmly bound unto the United States of America in the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_), in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

The condition of this obligation is such, that whereas the above bounden \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_, was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, by order of said court designated as a depository for the money of the bankrupt estate of the above named \_\_\_\_\_, bankrupt, and it, the said \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_, has accepted said trust with all the duties and obligations pertaining thereunto.

Now, therefore, if the said \_\_\_\_\_ Bank of \_\_\_\_\_, depositors, as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the money, assets and effects of the estate of said bankrupt which shall come into its hands and possession, and shall in all respects faithfully perform all its official duties as such depository, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed and sealed in presence of:

\_\_\_\_\_[SEAL.]

By \_\_\_\_\_

\_\_\_\_\_[SEAL.]

\_\_\_\_\_[SEAL.]

[Acknowledgment.]

[Justification of Sureties.]

NOTE.—See *ante*, § 728.

## § 1746. Form No. 78.

**ORDER DESIGNATING REFEREE TO COUNTERSIGN  
WARRANTS.**

[Caption.]

An order having been heretofore made in this proceeding appointing \_\_\_\_\_ trustee (or, receiver) herein, and the \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_, having thereafter been designated by an order of this court, as a depository for the money of the bankrupt estate herein, and said \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_, having accepted said trust and duly qualified as such depository,

It is ordered that \_\_\_\_\_, referee in bankruptcy, be and he hereby is, authorized to countersign all checks and warrants drawn by the trustee or clerk herein upon said depository, and that said depository be, and is hereby, directed not to pay out or disburse any funds in its possession as such depository except upon proper check or warrant signed by the trustee or clerk herein and countersigned by the judge of this court, or the referee above named.

Let a copy of this order be served upon the trustee herein and upon the above-named depository forthwith.

Dated \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_, Judge.

NOTE.—See *ante*, § 728.

## § 1747. Form No. 79.

**PETITION FOR EXAMINATION UNDER SECTION 21A.**

[Caption.]

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of J. W. respectfully shows to this Honorable Court:

First. That the petition praying for the involuntary adjudication of the alleged bankrupt above named was duly filed in the office of the clerk of this court on the 2d day of August, 1909, and thereafter and on said day, your petitioner was duly appointed receiver of the property, assets and effects of the alleged bankrupt, above named, and duly qualified in the manner and form prescribed by law.

Second. That after your petitioner's qualification, he entered upon the discharge of his duties as such receiver, and took possession of all the assets of the alleged bankrupt discoverable.

Third. That the petitioner found that the bankrupt was a dealer in and manufacturer of pianos, and that the bankrupt had certain out-

standing accounts with which your petitioner is unacquainted at this time.

Fourth. Petitioner has been informed that the bankrupt made a statement in which he said that he had assets much larger than those taken possession of by him, and petitioner desires an examination and investigation into the facts concerning the disappearance of the assets, as he believes from such examination, facts may be elicited which may bring said assets into the estate.

Fifth. Your petitioner therefore deems it necessary and essential for the best interests of the creditors herein that the alleged bankrupt above named, its officers and directors and J. J. (the name "J. J." being fictitious, real name being unknown, but more particularly identified as the bookkeeper of the alleged bankrupt), be examined under the provisions of Section 21-A of the Bankruptcy Act, so that your petitioner may obtain information which will aid him in bringing assets into the estate herein.

WHEREFORE, your petitioner prays an order of this court directing the alleged bankrupt above named, its officers and directors and J. J. (the name "J. J." being fictitious, real name being unknown, but more particularly identified as the bookkeeper of the alleged bankrupt), to appear for examination before a special examiner to be appointed for the purpose, and that they produce for exhibit and examination all books, vouchers, papers, writings, etc., relating to their business, and that they be examined concerning their acts, conduct and property, and for such other and further order and relief in the premises as the Court may deem just and proper.

And your petitioner will ever pray, etc.

Dated New York, August 3, 1909.

[Verification.]

J. W., *Petitioner.*

NOTE.—From record in *Cameron v. United States*, 231 U. S. 710.

### § 1748. Form No. 80. [Official Form No. 28.]

#### ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

Upon the application of \_\_\_\_\_, trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before \_\_\_\_\_, one of the referees in bankruptcy of this court, at \_\_\_\_\_.

on the —— day of ——, at —— o'clock in the ——noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

———, *Referee in Bankruptcy.*

**§ 1749. Form No. 81. [Official Form No. 29.]**

**EXAMINATION OF BANKRUPT OR WITNESS.**

In the District Court of the United States for the ——  
District of ——.

In the matter of }  
——— } In Bankruptcy.  
*Bankrupt.*

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, one of the referees in bankruptcy of said court. ——, of ——, in the County of ——, and State of ——, being duly sworn and examined at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

———,  
*Referee in Bankruptcy.*

**§ 1750. Form No. 82. [Official Form No. 30.]**

**SUMMONS TO WITNESS.**

In the District Court of the United States for the ——  
District of ——.

In the matter of }  
——— } In Bankruptcy.  
*Bankrupt.*

To ——:

Whereas ——, of ——, in the County of ——, and State of ——, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the —— District of ——,

These are to require you, to whom this summons is directed, personally to be and appear before ——, one of the referees in bankruptcy of the said court, at ——, on the —— day of ——, at —— o'clock in the ——noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ——, judge of said court, and the seal thereof, at ——, this —— day of ——, A. D. 19—.

———, *Clerk.*

## RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.* }

On this ——— day of ———, A. D. 19—, before me came ———  
———, of ———, in the County of ——— and State of ———, and  
makes oath, and says that he did, on ———, the ——— day of ———,  
A. D. 19—, personally serve ——— ———, of ———, in the County  
of ——— and State of ———, with a true copy of the summons hereto  
annexed, by delivering the same to him; and he further makes oath, and  
says that he is not interested in the proceeding in bankruptcy named in  
said summons. ———.

Subscribed and sworn to before me this ——— day of ———,  
A. D. 19—.

## § 1751. Form No. 83. [Official Form No. 31.]

## PROOF OF UNSECURED DEBT.

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.* }

At ———, in said District of ———, on the ——— day of ———,  
A. D. 19—, came ——— ———, of ———, in the County of ———,  
in said District of ———, and made oath, and says that ——— ———,  
the person by [*or against*] whom a petition for adjudication of bank-  
ruptcy has been filed, was, at and before the filing of said petition, and  
still is, justly and truly indebted to said deponent in the sum of ———  
dollars; that the consideration of said debt is as follows: ———; that  
no part of said debt has been paid [*except* ———]; that there are no  
set-offs or counter-claims to the same [*except* ———]; and that deponent  
has not, nor has any person by his order, or to his knowledge or belief,  
for his use, had or received any manner of security for said debt whatever.

—————,  
*Creditor.*

Subscribed and sworn to before me this ——— day of ———, 19—.

—————,  
[*Official character.*]

## § 1752. Form No. 84. [Official Form No. 32.]

**PROOF OF SECURED DEBT.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said District of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, came \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, in said District of \_\_\_\_\_, and made oath, and says that \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows \_\_\_\_\_; that no part of said debt has been paid [except \_\_\_\_\_]; that there are no set-offs or counter-claims to the same [except \_\_\_\_\_]; and that the only securities held by this deponent for said debt are the following: \_\_\_\_\_

\_\_\_\_\_,  
*Creditor.*

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_.

\_\_\_\_\_,  
[Official character.]

## § 1753. Form No. 85. [Official Form No. 33.]

**PROOF OF DEBT DUE CORPORATION.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said District of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, came \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, and made oath, and says that he is \_\_\_\_\_, of the \_\_\_\_\_, a corporation incorporated by and under the laws of the State of \_\_\_\_\_, and carrying on business at \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, and that he is duly authorized to make this proof, and says that the said \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and

truly indebted to said corporation in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_; that no part of said debt has been paid [except \_\_\_\_\_]; that there are no set-offs or counter-claims to the same [except \_\_\_\_\_]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

\_\_\_\_\_,  
\_\_\_\_\_ of said Corporation.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
A. D. 19—.

\_\_\_\_\_,  
[Official character.]

### §1754. Form No. 86. [Official Form No. 34.]

#### PROOF OF DEBT BY PARTNERSHIP.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said District of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, came \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, in said District of \_\_\_\_\_, and made oath, and says that he is one of the firm of \_\_\_\_\_, consisting of himself and \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_; that the said \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_; that no part of said debt has been paid [except \_\_\_\_\_]; that there are no set-offs or counter-claims to the same [except \_\_\_\_\_]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

\_\_\_\_\_,  
*Creditor.*

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
A. D. 19—.

\_\_\_\_\_,  
[Official character.]



## § 1755. Form No. 87. [Official Form No. 35.]

**PROOF OF DEBT BY AGENT OR ATTORNEY.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said District of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, came \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, attorney [*or* authorized agent] of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, and made oath, and says that \_\_\_\_\_, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said \_\_\_\_\_, in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_; that no part of said debt has been paid [*except* \_\_\_\_\_]; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use, had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because \_\_\_\_\_; and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[*Official character.*]

## § 1756. Form No. 88. [Official Form No. 36.]

**PROOF OF SECURED DEBT BY AGENT.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said District of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, came \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, attorney [*or* authorized agent] of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, and made oath, and says that

\_\_\_\_\_, the person by [*or against*] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said \_\_\_\_\_ in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_; that no part of said debt has been paid [except \_\_\_\_\_]; that there are no set-offs or counter-claims to the same [except \_\_\_\_\_]; and that the only securities held by said \_\_\_\_\_ for said debt are the following: \_\_\_\_\_; and this deponent further says that this deposition can not be made by the claimant in person because \_\_\_\_\_, and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[*Official character.*]

### § 1757. Form No. 89. [Official Form No. 37.]

#### AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.*

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, at \_\_\_\_\_, came \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, and makes oath and says that the bill of exchange [*or note*], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, \_\_\_\_\_ and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said \_\_\_\_\_, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or note*], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

*Bill or note above referred to.*

Date.	Drawer or maker.	Acceptor.	Sum.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
[Official character.]

**§ 1758. Form No. 90.**  
**OBJECTIONS TO CLAIM.**

[Caption.]

In re Claim of \_\_\_\_\_.

Now comes \_\_\_\_\_, the trustee of the estate of [*or*, a creditor of] the above named \_\_\_\_\_, bankrupt, and objects to the proof of claim filed by \_\_\_\_\_ of \_\_\_\_\_, \_\_\_\_\_, and prays that the same may not be allowed on the following grounds:

1. That said claim is not due and owing to said \_\_\_\_\_ by the bankrupt herein.

2. That said claim is not a provable claim in bankruptcy; that the amount claimed to be due in said proof of claim was not due and owing at the date of the filing of the petition herein or at the date of the adjudication herein; that said claim was not a fixed liability absolutely owing at the time of the filing of the petition herein.

\_\_\_\_\_,  
Attorneys for \_\_\_\_\_.

**§ 1759. Form No. 91.**  
**SPECIAL REFERENCE.**

[Caption.]

The referee, \_\_\_\_\_, Esq., will take the evidence and make findings to facts as to the claim of \_\_\_\_\_, and report said evidence and said findings of fact to the Court with all reasonable speed, but will make or adopt no conclusions of law.

\_\_\_\_\_,  
Judge.

Dated \_\_\_\_\_, A. D. 19—.

NOTE.—From record in *Coder v. Arts*, 213 U. S. 223.

## § 1760. Form No. 92. [Official Form No. 38.]

**ORDER REDUCING CLAIM.**

In the District Court of the United States for the \_\_\_\_\_  
 District of \_\_\_\_\_.

In the matter of }  
 \_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

Upon the evidence submitted to this court upon the claim of \_\_\_\_\_  
 \_\_\_\_\_ against said estate [and, *if the fact be so*, upon hearing counsel  
 thereon], it is ordered, that the amount of said claim be reduced from  
 the sum of \_\_\_\_\_, as set forth in the affidavit in proof of claim filed by  
 said creditor in said case, to the sum of \_\_\_\_\_, and that the latter-  
 named sum be entered upon the books of the trustee as the true sum upon  
 which a dividend shall be computed [*if with interest*, with interest  
 thereon from the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—].

\_\_\_\_\_,  
*Referee in Bankruptcy.*

## § 1761. Form No. 93. [Official Form No. 39.]

**ORDER EXPUNGING CLAIM.**

In the District Court of the United States for the \_\_\_\_\_  
 District of \_\_\_\_\_.

In the matter of }  
 \_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

Upon the evidence submitted to the court upon the claim of \_\_\_\_\_  
 \_\_\_\_\_ against said estate [and *if the fact be so*, upon hearing counsel  
 thereon], it is ordered, that said claim be disallowed and expunged from  
 the list of claims upon the trustee's record in said case.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

## § 1762. Form No. 94.

**PETITION FOR RE-EXAMINATION OF CLAIM PRAYING FOR  
SURRENDER OF PREFERENCE.**

[Caption.]

To R. S. H., Esquire, Referee in Bankruptcy:

The petition of The P. L. & T. Co., of Philadelphia, trustee of the estate of G. W. and I. W., individually and trading as G. W. & Co., bankrupts, respectfully represents:

1. That a petition praying that G. W. and I. W., individually and trading as G. W. & Co., be adjudged voluntary bankrupts, was filed in the said District Court of the United States, for the Eastern District of Pennsylvania, on the thirty-first day of December, 1901, and in pursuance thereof, they were so adjudged on the same day.

2. That your petitioner is the trustee of the estate of G. W. and I. W., individually and trading as G. W. & Co., bankrupts, and has duly qualified as such.

3. That J. W. & Co. have filed a proof of claim against the estate of the said bankrupts on the present proceedings in the sum of \$2,565.92, and that the said claim is based upon the sale and delivery of merchandise on an open account, as shown by the statement annexed to the proof of claim, between July 19 and October 8, 1901.

4. That G. W. and I. W., individually and trading as G. W. & Co., were on or before October 9, 1901, insolvent, and continued so up to the date of bankruptcy, and your petitioner is informed, believes, and expects to be able to prove, and therefore avers that the said G. W. and I. W., individually and trading as G. W. & Co., did pay or cause to be paid to J. W. & Co., on October 9, 1901, the sum of \$634.78; that said sum of money was then and immediately prior thereto, the property and assets of said G. W. and I. W., individually and trading as G. W. & Co., and that said payment did not wholly extinguish the indebtedness at the date of payment due claimants by said G. W. & I. W., individually and trading as G. W. & Co., but was only in liquidation pro tanto of said indebtedness then existing.

5. That the said payment by said G. W. and I. W., individually and trading as G. W. & Co., to the said J. W. & Co., claimants, constitutes a preference within the meaning and intent of the Bankruptcy Act, being a transfer of property, the result of which will be to enable the said claimants to obtain a greater percentage of their debt than any other of said creditors of the same class.

6. That said preference should be surrendered before the said claim is allowed.

Your petitioner therefore objects to the allowance of said claim and

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prays that if allowed, it be re-examined and that no dividend be paid thereon unless and until the said preference be surrendered.

The P. L. & T. Co.,  
Trustee for the Estate of G. W. and I. W., Individually and Trading as  
G. W. & Co., Bankrupts.

[Sd.] By J. R. F., Trust Officer.

NOTE.—From record in *Wild & Co. v. Prov. L. & T. Co.*, 214 U. S. 292.

### § 1763. Form No. 95.

#### ORDER FOR RE-EXAMINATION OF CLAIM.

[Caption.]

And now, to-wit: this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, on motion of \_\_\_\_\_, esquire, pro petitioner, and upon consideration of the foregoing petition, it is ordered that the claim of \_\_\_\_\_, in the said petition mentioned, be re-examined before me on \_\_\_\_\_, 19—, at \_\_\_\_\_ o'clock, \_\_\_\_\_ m., at \_\_\_\_\_, and that ten days' notice of this order be given to the said claimants or their attorney by mail.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

### § 1764. Form No. 96. [Official Form No. 48.]

#### TRUSTEE'S RETURN OF NO ASSETS.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

On the day aforesaid, before me comes \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, and makes oath, and says that he, as trustee of the estate and effects of the above named bankrupt—, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

## § 1765. Form No. 97.

**PETITION FOR LEAVE TO ABANDON PROPERTY.**

[Caption.]

The petition of \_\_\_\_\_ respectfully shows:

That petitioner is the duly qualified and acting trustee of the estate of the above-named bankrupt.

That among the assets listed by the said bankrupt in his schedules on files herein and coming into the possession of your petitioner as trustee herein is the following described personal property, to-wit:

That your petitioner is informed that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, more than four months prior to the filing of the petition in bankruptcy herein, said bankrupt made and delivered to one \_\_\_\_\_, hereinafter called the mortgagee, his promissory note dated on that day, whereby for value he promised to pay to the order of said \_\_\_\_\_, the sum of \_\_\_\_\_ Dollars, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 19—, at the \_\_\_\_\_ Bank of \_\_\_\_\_, \_\_\_\_\_, with interest thereon at the rate of \_\_\_\_\_ per cent per annum.

That your petitioner is informed that to secure the payment of said note according to its terms, the bankrupt herein made and delivered to said \_\_\_\_\_, a chattel mortgage of and upon the above described personal property, and that said mortgage was filed and recorded in the office of the Register of Deeds in and for the County of \_\_\_\_\_, State of \_\_\_\_\_, as required by law, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the county in which the bankrupt resided at last mentioned date, as petitioner is informed.

That the value of the above described property does not exceed the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), which is less than the amount of the aforesaid mortgage thereon; that the value of said property is not sufficient to justify an attempt on the part of petitioner to redeem it or to administer it in these proceedings, unless the said note and mortgage are invalid as against the trustee herein and the creditors of the said bankrupt other than the aforesaid mortgagee.

That your petitioner has not sufficient information to form a belief that the aforesaid note and mortgage are valid as against him and the creditors of the bankrupt other than the aforesaid mortgagee, but believes that it would be unprofitable at this time for him to retain possession of the said property for the following reasons:

WHEREFORE, your petitioner prays for an order permitting and authorizing him to deliver the said property to the aforesaid mortgagee, without prejudice, however, to the right of the petitioner to contest the validity of the mortgage and retake possession of said property if said

mortgage be declared invalid by a court of competent jurisdiction, and for such other and further relief as to the court may seem just.

\_\_\_\_\_,  
*Petitioner.*

[Verification.]

NOTE.—See *ante*, § 760.

§ 1766. Form No. 98. [Official Form No. 47.]

**TRUSTEE'S REPORT OF EXEMPTED PROPERTY.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.,*

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy:

GENERAL HEAD.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments .....			
Property exempted by State laws .....			

\_\_\_\_\_,  
*Trustee.*

§ 1767. Form No. 99.

**EXCEPTIONS TO TRUSTEE'S REPORT OF EXEMPTED PROPERTY.**

[Caption.]

Now comes \_\_\_\_\_ and respectfully shows to the Court:

That he is a creditor of the above named bankrupt and has filed his claim herein.

That he excepts to the report of the trustee herein as to the articles set off by him to the bankrupt as exempt in the following particulars:

\_\_\_\_\_ for the following reasons, to-wit: \_\_\_\_\_  
[here set up that the property is not exempt under the laws of the state



of bankrupt's domicile, or facts showing a waiver of bankrupt's right to exemptions].

WHEREFORE, Your petitioner prays that the Court fix a time and place for the hearing of his objections to said report, and the argument thereof, as provided by law

Dated \_\_\_\_\_, 19—.

NOTE.—See *ante*, § 994.

§ 1768. Form No. 100.

**ORDER DECLARING INSURANCE POLICIES EXEMPT.**

[Caption.]

This cause coming on this 15th day of July, 1901, to be heard on the report of the referee, filed herein on the 17th day of June, 1901, and the exceptions of said bankrupts to said report in denying to said bankrupts their claim of exemptions to the following life insurance policies numbered 206,383 and 303,921, issued on the 15th day of June, 1894, by the N. L. I. Co., of Milwaukee, Wisconsin; and the Court, after hearing arguments of counsel for and against said report, being fully satisfied in the premises, allows the exemption of said policies claimed by said bankrupts.

WHEREFORE, It is ordered and adjudged that the report of the referee be, and the same is hereby, vacated and set aside, and that the bankrupts, D. N. H. and L. H. be, and they are hereby, allowed their said claim of exemptions as to the said life insurance policies; and it is further ordered and adjudged that the said life insurance policies be, and they are hereby, exempt from all debts and liabilities of said bankrupts, and from all claims of every kind and character made in these proceedings by the creditors of said bankrupts, and that said life insurance policies be returned to said bankrupts.

Done in open court this 16th day of July, 1901.

C. H. H.,  
Judge.

NOTE.—From record in *Holden v. Stratton*, 198 U. S. 202.

§ 1769. Form No. 101.

**PETITION TO RESTRAIN NON-ASSENTING PARTNER.**

And now comes W. H. H., attorney for various creditors herein, and shows unto the Court that evidence having been taken in the above mentioned cause, whereby it is contended that J. M. is a general partner

in the firm of S. de J. H. and therefore liable for the debts of the firm to the full extent of his property, and that the said J. M. is the owner of and through his agents possessor of, houses No. ——— Street, No. ——— Street, and No. ——— Street, San Juan, and certain other country properties in the interior of the island, including those of Utuado, and that he is, through his agents, receiving the rents and profits from said properties, and that the said J. M. is absent in Spain where he has been for some time, and that the said rents and profits are being sent to him monthly, now therefore, the said W. H. H. as attorney and representative of the various creditors herein,

Petitions the referee to enter a restraining order herein enjoining said J. M. or his agent or agents from selling, encumbering, or in any way disposing of the said properties or any properties which may appear upon the schedule of his property hereinafter to be filed by the said J. M. or his agent, and ordering the said J. M., his agent or agents to deposit with the referee all rents and profits received from the said houses and properties until the question of the general liability of the said J. M. for the debts of the bankrupt firm S. de J. H. shall be determined by the Court.

W. H. H.,  
*Attorney for Creditors.*

May 14, 1907.

NOTE.—From record in *Munsuri v. Fricker*, 222 U. S. 121.

### § 1770. Form No. 102.

#### MOTION TO DECLARE PARTNER GENERALLY LIABLE.

[Caption.]

And now comes ———, trustee herein, and moves the court upon the minutes of the testimony taken at the first meeting of creditors herein and on all the records and proceedings herein, that ——— who claims to be a special partner in the above named bankrupt partnership and as such having only a limited liability, be declared a full or general partner in said partnership, and generally liable to the full extent of his property for the payment of the just debts of said partnership, that said ——— be ordered to deliver over to the trustee herein forthwith, all his property not exempt by law to be administered by this court for the purposes of paying the debts of said partnership, and that said ——— file schedules of his debts and inventories of his individual property.

\_\_\_\_\_  
*Trustee.*

Dated ———, 19——.

## § 1771. Form No. 103.

**PETITION BY TRUSTEE TO MAKE CREDITOR A PARTY.**

[Caption.]

Your petitioner respectfully represents to the Court that he is the duly elected, qualified and acting trustee of the estate of The H. K. M. Co., bankrupt herein; that among the assets of said estate not in his hands as such trustee for distribution among the creditors of said bankrupt, is the sum of \$52,003.80, remaining from the proceeds of the same, under former orders of this Court, of the property of The D. J. Co., which property was by the decree of this Court entered herein on June 2, 1910, duly adjudged to be the property of and belonging to your petitioner as such trustee.

Your petitioner further represents to the Court that on October 7, 1910, The M. S. B. Co., a corporation organized and existing under the laws of the State of Ohio, a citizen of said state and a resident of the Western Division of the Southern District thereof, having its office and principal place of business in the City of Cincinnati, in said State of Ohio, filed a petition against said The D. J. Co. in the Common Pleas Court of Hamilton County, Ohio, being cause No. 146,289 on the docket of said court, praying for a judgment against said The D. J. Co. for the sum of \$6,500.00 with interest from the first day of July, 1910, on account of rent alleged to be due from said The D. J. Co. under and by virtue of a lease between said companies dated August 30, 1900, for the use and occupation of certain parts of said The M. S. B. Co.'s premises in said city, known as Nos. ——— West Fourth Street, and also on account of certain alterations made by The D. J. Co. to certain parts of said premises.

Your petitioner further represents to the Court that service of the summons had been made on said The D. J. Co. in said case; that the said claim made by said The M. S. B. Co. and said suit brought by it to enforce the same, constitute a cloud upon the title and possession of petitioner to said assets of said The D. J. Co. now in his hands as trustee of the bankrupt herein, and a hindrance to their speedy and proper distribution by him to creditors of said bankrupt, and that it is necessary for the complete determination of said claim and for a speedy and proper distribution of said assets to creditors of said bankrupt, that said The M. S. B. Co. be forthwith made a party to this proceeding.

WHEREFORE, Your petitioner prays that the said The M. S. B. Co. be forthwith made a party to this proceeding and ordered to set up herein whatever claim or claims, if any, it may have against said The D. J. Co. or its said assets now in his hands as aforesaid; that notice of the pendency and prayer of this petition, in such form as to the Court may seem

proper, be given to or served upon said The M. S. B. Co., and for such other and further relief as he may be entitled to in the premises.

R. de V. C.,

*Trustee of the Estate of The H. K. M. Co., Bankrupt.*

M. & R.,

*Attorneys for the Trustee in Bankruptcy.*

[Verification.]

NOTE.—From the record in Mitchell Store Building Co. v. Carroll, 232 U. S. 379.

§ 1772. Form No. 104.

**ORDER MAKING CREDITOR A PARTY.**

[Caption.]

This cause came on for hearing this day on the petition of R. de V. C., trustee herein, to make The M. S. B. Co. a party to those proceedings, notice of filing the said petition having been given to said The M. S. B. Co. by said trustee, and was submitted to the Court by counsel for said trustee. On consideration whereof the Court finds that it is necessary for the complete determination of the claim of said The M. S. B. Co. referred to in said petition of said trustee and for a speedy and proper distribution of the assets of The D. J. Co. now in the hands of said trustee for distribution to creditors of the bankrupt herein that said The M. S. B. Co. be forthwith made a party to this proceeding, and

It is therefore ordered that the said The M. S. B. Co. be, and it is hereby, made a party to this proceeding and ordered to set up herein whatever claim or claims, if any, it may have against the said The D. J. Co. or its assets now in the hands of said trustee as aforesaid, and that a writ of subpoena be issued by the clerk of this court to said The M. S. B. Co. requiring it to answer said petition of said trustee.

C. T. G.,

*Referee in Bankruptcy.*

Nov. 23, 1910.

NOTE.—From the record in Mitchell Store Building Co. v. Carroll, 232 U. S. 379.

§ 1773. Form No. 105.

**PETITION BY TRUSTEE TO COMPEL DELIVERY OF  
CORPORATE RECORDS.**

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, B. F. B., trustee in bankruptcy of the Estate of the R. M. C. Co., a corporation, respectfully states that on the 21st day of February, A. D. 1907, a petition in bankruptcy was filed in the District

Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri against the R. M. C. Co., a corporation duly organized under the laws of the State of Missouri; that thereafter, and to-wit, on the 26th day of March, A. D. 1907, said R. M. C. Co. was by said court duly adjudged a bankrupt, a certified copy of which said order of adjudication is hereto attached and marked "Exhibit A."

That thereafter and to-wit, on the 10th day of May, A. D. 1907, your petitioner was duly appointed trustee in bankruptcy of said R. M. C. Co. and, on said 10th day of May, A. D. 1917, duly qualified as such by giving bond in the penal sum of thirty thousand dollars (\$30,000), a certified copy of which order of the referee in bankruptcy approving said bond being hereto attached and marked "Exhibit B," and that your petitioner brings this petition in his capacity as trustee in bankruptcy of said corporation.

Your petitioner further states on information and belief that at the time said petition in bankruptcy was filed against said bankrupt as aforesaid, the said J. T. G. was president, and said H. D. was secretary of said company, and that said parties are now acting, respectively, as president and secretary of said R. M. C. Co.

That certain books and papers relating to the business of said bankrupt, to-wit, the stock-certificate book, or books, the corporation minute book, and stock ledger have been and are now in the possession and custody or under the control of either said president or secretary or both of them and that the said stock-certificate book, corporation minute book and stock register book are necessary to your petitioner as trustee in bankruptcy of said R. M. C. Co. in his administration and settlement of its affairs.

That your petitioner has requested and demanded of said J. T. G. as president and said H. D. as secretary, that they deliver or cause to be delivered to your petitioner as such trustee in bankruptcy, said stock-certificate book, corporation minute book, and stock ledger, but that the demand and request have been refused in writing, a copy of which refusal is hereto attached and marked "Exhibit C."

WHEREFORE, Your petitioner prays for an order directing the said J. T. G. and H. D., or either of them, to deliver to your petitioner the stock-certificate book, corporation minute book and stock ledger of said R. M. C. Co., together with all other records and documents belonging to said corporation in their possession or under their control, and your petitioner as in duty bound will ever pray.

H., M. & P.,

*Attorneys for Petitioner.*

NOTE.—From record in *Babbitt v. Dutcher*, 216 U. S. 102. It will be noted that the petition is addressed to a court of bankruptcy other than that of original adjudication.

## § 1774. Form No. 106.

**PETITION FOR AN ORDER TO SHOW CAUSE WHY BANKRUPT  
SHOULD NOT TURN OVER ASSETS.<sup>1</sup>**

[Caption.]

Now comes ———, and respectfully shows to the Court:

1. That heretofore and on the ——— day of ———, 19—, a petition in involuntary bankruptcy was duly filed in the above named court, against said bankrupt; that thereafter said bankrupt was duly adjudicated such by the above named Court; that on the ——— day of ———, 19—, your petitioner was duly appointed trustee of the estate of said bankrupt and that he thereafter duly qualified and is still acting as such trustee.

2. That the claims of creditors not having security and entitled to participate in dividends in this estate have been filed and allowed largely in excess of the total amount and value of the assets of said estate, and that unless the relief hereinafter asked for is granted, there will not be sufficient proceeds available to pay the expense of administration herein, and that in any event there will not be enough realized to pay the creditors in full upon their said claims.

3. That during the year ———, and until the month of ———, 19—, said bankrupt was engaged in the business of ———, at ———,

4. That at the time last mentioned, said bankrupt was the owner of the following described non-exempt property, which was of the following value, to-wit: [*here describe or identify the assets, or point out the source from which the petitioner claims they come. See ante, § 1180.*]

5. That your petitioner verily believes that said bankrupt has secreted said property and the proceeds thereof from his creditors, and that he is still possessed of said property or moneys derived therefrom, or a large part thereof, that said property or the proceeds thereof rightfully constitute a part of his estate in bankruptcy, and that bankrupt unlawfully, fraudulently and wrongfully keeps, retains and conceals the same, and has refused, although demand has been duly made upon him, to turn over said property or any part thereof to your trustee and petitioner.

6. That your petitioner respectfully refers the Court herein to the testimony taken at the first meeting of creditors herein, transcript of which is now on file herein.

WHEREFORE, Your petitioner prays the order of this Court citing the said bankrupt to appear and show cause, if any there be, at a time and place to be fixed by the Court, why an order should not then and there be entered ordering and directing said bankrupt to forthwith return to

said trustee, the property hereinbefore mentioned, or in case its return is impossible, then to forthwith to pay the said trustee, the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_), the value thereof, and in default of same to be punished for contempt of court.

\_\_\_\_\_,  
Trustee,  
By \_\_\_\_\_,  
His Attorneys.

[Verification.]

<sup>1</sup> This form can also be used in case where the property is held by a third person as agent or bailee of the bankrupt.

**§ 1775. Form No. 107.**

**ORDER TO SHOW CAUSE WHY BANKRUPT SHOULD NOT  
TURN OVER ASSETS.**

[Caption.]

Upon reading and filing the petition of \_\_\_\_\_, trustee in bankruptcy of the estate of the above named bankrupt, and upon the evidence heretofore given at the first meeting of creditors herein, and after duly considering the same,

IT IS ORDERED, That the above named bankrupt \_\_\_\_\_, appear at the office of the undersigned in the city of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_-noon, and show cause, if any there be, why an order should not then and there be entered, ordering and directing said bankrupt to forthwith return to said trustee the property mentioned in the attached petition; or in the event it is impossible to return said property in specie, then to forthwith pay to said trustee the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_), the value thereof, and in default of same to be punished for contempt of court.

Let a copy of this order and said petition be served on said bankrupt on or before the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_,  
Referee.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

**§ 1776. Form No. 108.**

**PETITION FOR RE-EXAMINATION OF PAYMENT TO  
ATTORNEY.**

[Caption.]

Now comes \_\_\_\_\_, and respectfully shows to the court:

That he is the duly elected, qualified and acting trustee in bankruptcy (or, a creditor) of the estate of the above named creditor.

That claims of creditors (including your petitioner), entitled to participate in dividends in this estate, and not having security, have been filed and allowed herein, largely in excess of the total amount and value of the assets of the estate, and that unless the relief hereinafter asked for is granted, there will not be sufficient assets available to pay the administration, and that in any event there will not be enough realized to pay the creditors in full upon their said claims.

That at all times herein mentioned said bankrupt was and still is insolvent.

That between the \_\_\_\_\_ day of \_\_\_\_\_, 19—, and the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the bankrupt herein, in contemplation of bankruptcy, paid to \_\_\_\_\_, an attorney and counselor-at-law practicing his profession in the city of \_\_\_\_\_, \_\_\_\_\_ County, \_\_\_\_\_, the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), for professional services rendered and to be rendered by said \_\_\_\_\_ in connection with the proceedings herein, as more fully appears from the testimony taken at the first meeting of creditors herein, a transcript of which is now on file in this court.

That the reasonable value of said services did not exceed the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

WHEREFORE, your petitioner prays that the transactions between the bankrupt herein and his said attorney \_\_\_\_\_ be re-examined by this court, and that said \_\_\_\_\_ be cited to appear and show cause, if any there be, at a time and place to be fixed by the court, why an order should not then and there be entered ordering and directing the said \_\_\_\_\_ to forthwith pay to the trustee herein, the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), and for such other and further relief as to the court may seem just.

[Verification.]

NOTE.—See *ante*, § 983.

### § 1777. Form No. 109.

## PETITION FOR PRESERVATION OF LIENS AND SUBROGATION.

[Caption.]

To the Honorable S. C. E., Referee:

The petition of C. & C. T. & S. Bank respectfully shows that it was duly appointed as trustee herein, and has qualified as such trustee.

Your petitioner further shows that the assets of the bankrupt which came into its possession consist of a plant for the manufacture of loose leaf devices and kindred articles, machinery, merchandise and outstanding accounts, said manufacturing plant being situated in Ravenswood, Chicago, Illinois.



Your petitioner further shows that on June 3, 1910, there was entered in the Supreme Court of Cook County certain judgments against the bankrupt, said judgments being hereinafter enumerated.

That on said June 3, 1910, executions were issued on said judgments to the sheriff of Cook County, and that from the time of the issuing of said executions, the same became liens to the amount thereof upon all property of the bankrupt herein; that on June 4, 1910, these bankruptcy proceedings were instituted by the filing of the creditors' petition.

Your petitioner further shows that the said executions are still in the hands of the sheriff and are wholly unsatisfied.

That the following is a list of the judgments hereinabove referred to:

---

Your petitioner further shows that in order to avoid certain transfers it will be necessary for the benefit of the estate to preserve the liens of said judgments and executions, and to have the trustee subrogated to such rights and liens; that there are certain conveyances made by the said bankrupt prior to the institution of these bankruptcy proceedings, which are absolutely void as against the judgment and execution creditors, but which may not be void as against the trustee and that, therefore, it will be of great benefit to this estate to have said judgment and execution rights and liens preserved and said trustee subrogated to such rights and liens.

WHEREFORE, Your petitioner prays for an order preserving the rights and liens against the property and assets of the bankrupt under the judgments and executions above referred to and to have the trustee subrogated to such rights and liens and your petitioner will ever pray.

C. & C. T. & S. Bank,

*Trustee.*

By A. C.,

*Agent.*

[Verification.]

NOTE.—From record in *Fallows v. Cont. & Com. T. & S. Bank*, 235 U. S. 300.

### § 1778. Form No. 110.

## PETITION BY ADVERSE CLAIMANT FOR ACCOUNTING BY TRUSTEE.

[Caption.]

To the Honorable Judges of the District Court of the United States, for the District of New Jersey:

The petition of J. E. D. respectfully shows:

1. That your petitioner resides at \_\_\_\_\_, \_\_\_\_\_ County, New York, and is engaged in the business of banking at No. — Broad Street, in the Borough of Manhattan, City of New York.

2. On information and belief, that an involuntary petition in bankruptcy against The S.-K. Co. was filed in this proceeding on or about November 29, 1910, and E. S. A. and T. M. C. were appointed by this Court receivers of the property of said The S.-K. Co.

3. That the said The S.-K. Co. is indebted to your petitioner in a sum in excess of two hundred and fifty thousand dollars (\$250,000) and that your petitioner holds as collateral security therefor accounts receivable created in favor of the said The S.-K. Co. and assigned to your petitioner pursuant to an agreement between the said company and your petitioner, originally executed under date of September 21, 1908, and renewed and extended by agreements dated respectively, September 21, 1909, and May 16, 1910, which agreements provided in substance as follows:

That the said The S.-K. Co. will assign and deliver to your petitioner, within seven days after the shipment of the merchandise represented thereby, accounts receivable for and representing all sales of merchandise made by it from and after the date of the agreement, except sales for cash in hand; that your petitioner will loan or advance to the said The S.-K. Co. on the security of said accounts receivable, eighty per cent (80%) of the net face value of such thereof as he shall approve; that all checks, notes or money, or security or collateral of any kind which shall come to the said company in payment or on account of or in connection with any of the assigned accounts receivable, shall be immediately delivered to your petitioner, the same being his property, and that the lien of your petitioner on the accounts receivable assigned to him shall include any money which shall become due him [commissions], as well as the amount of all the loans and interest thereon.

4. That your petitioner from the time of the execution of the first of said agreements, dated September 21, 1908, received from the said The S.-K. Co., from day to day, assignments of its accounts receivable and of the merchandise therein described, and at the same time from day to day made loans or advances to the said company on the security thereof. That in some cases where the accounts receivable called for future deliveries the merchandise represented thereby was boxed and stored in warehouse for the account of your petitioner and the negotiable warehouse receipts for the same were endorsed and delivered to your petitioner.

5. That in the normal course of business the remittances in payment or on account of the accounts receivable which had been assigned to your petitioner were received at the office of the said The S.-K. Co. and were immediately delivered to your petitioner, the checks, notes and drafts being endorsed by the said company to the order of your petitioner. Similarly, returns of merchandise of purchasers were received at the office of the said The S.-K. Co., and were stored in warehouse for

the account of your petitioner, the negotiable warehouse receipts for the same being endorsed and delivered to your petitioner. On information and belief that since the 29th day of November, 1910, remittances have been received at the office of the said The S.-K. Co., in payment and on account of accounts receivable, which were assigned to and are the property of your petitioner, but that the said remittances have been retained by the receivers hereinabove named, and have not been forwarded to your petitioner, to whom they belong. That your petitioner has not notified the debtors under said assigned accounts receivable of the assignment thereof to your petitioner, for the reason that it will facilitate the collection thereof to have the remittances continue as heretofore to be sent to the office of the said company. The aggregate of the face value of assigned accounts receivable held by your petitioner is in excess of the indebtedness of the said The S.-K. Co. to your petitioner, and that it will be to the advantage of the said company and of its creditors, as well as to the advantage of your petitioner, to have the said accounts collected as speedily as possible. That it is probable that some of the merchandise shipped to customers of the said The S.-K. Co., the accounts receivable for which have been assigned to and are the property of your petitioner, will be returned to the office of said company, and that the same being the property of your petitioner should be turned over to him.

6. That the records in the office of the said The S.-K. Co., as well as in your petitioner's office, show in detail all the accounts receivable which have been assigned to your petitioner, as well as loans and advances made on the security thereof and the remittances therefor received by your petitioner and applied in the reduction of said loans and of the present balance of accounts receivable held by your petitioner and of the loans unpaid.

THEREFORE, Your petitioner prays for an order authorizing and directing the receivers of the property of the said The S.-K. Co. to pay to your petitioner the amount of all collections made by the said company prior to the time said receivers qualified as such, and which have come into the hands of said receivers, and of all collections by said receivers since that time in payment or on account of the accounts receivable theretofore assigned to your petitioner; and further authorizing and directing the said receivers to endorse and turn over to your petitioner all checks, drafts and remittances which heretofore have been received by them and which shall hereafter be received by them in payment or on account of the accounts receivable assigned to your petitioner, and to turn over and deliver to your petitioner all merchandise returned by purchasers and received by said receivers, the accounts receivable representing which have been assigned to your petitioner, and that the said receivers be directed to authorize and direct any warehouse company or

concern to deliver to your petitioner the merchandise stored therein by The S.-K. Co. for which your petitioner holds warehouse receipts endorsed by said company; until the indebtedness of the said The S.-K. Co. to your petitioner is paid in full.

No other application for an order to this effect has been made. And your petitioner will ever pray, etc.

J. E. D.,  
Petitioner.

Dated, New York, December 1, 1910.

NOTE.—From record of Greedy v. Dockendorff, 231 U. S. 513.

§ 1779. Form No. 111.

PETITION FOR RECLAMATION OF PROPERTY.

[Caption.]

To the District Court of the United States for the ——— District of ———:

The petition of ——— respectfully shows:—

That on the ——— day of ———, 19—, a petition in (in)voluntary bankruptcy was filed in the above-named court praying that the above-named ——— be adjudicated a bankrupt.

That thereafter and on the ———, as petitioner is informed and believes, this court made its order adjudicating said ——— a bankrupt.

That on the ——— day of ———, 19—, one ——— was elected trustee of the estate of said ———, and took possession and control of the property then in the possession and control of the said ———.

That among the property taken possession of by said ——— as such trustee was the following personal property:—

That the said ———, bankrupt, was not the owner of said property at the time of the filing of aforesaid petition in bankruptcy, but said property is now and at all times herein mentioned was the property of petitioner, and that said ——— received and was in possession of said property under virtue of a contract with your petitioner, a true copy of which is hereto annexed, marked Exhibit "A" and made a part hereof (which contract was duly filed and recorded in the office of the Register of Deeds in and for the county of ———, State of ———, on the ——— day of ———, 19—).

That the value of said property is ——— Dollars (\$——):

That though possession of said property has been duly demanded of said bankrupt and his said trustee by petitioner prior to the commence-

ment of this proceeding, said bankrupt and his said trustee, and each of them, has refused and still refuses to surrender said property to petitioner to pay petitioner the value thereof.

WHEREFORE, your petitioner prays for an order of this court directing the said trustee to forthwith return to your petitioner the property herein described, or to pay petitioner the value thereof, in case a recovery of possession cannot be had, and for such other and further relief as to the court may seem just.

\_\_\_\_\_,  
*Petitioner.*

[Verification.]

**§1780. Form No. 112.**

**ANSWER OF ADVERSE CLAIMANT TO ORDER TO SHOW CAUSE.**

[Caption.]

For his answer to the petition of \_\_\_\_\_, trustee in bankruptcy of the estate of the above named bankrupt and to the order to show cause based thereon, \_\_\_\_\_ appearing specially for the sole purpose of contesting the jurisdiction of the Court and not confessing or acknowledging any of the matters set forth or alleged in said petition or order to be true, respectfully shows to the Court and alleges:

That neither the bankrupt herein nor his said trustee has any right, title or interest to or in the property described in said order to show cause, or in the petition upon which the said is based.

That the property therein described and alleged to have been fraudulently transferred to your petitioner by the bankrupt, was, in good faith and for a good and valuable consideration, transferred by the bankrupt more than four months prior to the filing of the petition in bankruptcy herein to your petitioner; that your petitioner is now, and for more than \_\_\_\_\_ months prior to the date hereof was, the owner and in possession of said property.

\_\_\_\_\_,  
*Attorney for said* \_\_\_\_\_.

Dated \_\_\_\_\_, A. D. 19—.

[Verification.]

## § 1781. Form No. 113.

**PLEA IN ABATEMENT IN STATE COURT SETTING UP  
PLAINTIFF'S ADJUDICATION.**

[Caption.]

Now comes the defendant and for answer to the complaint of the plaintiff herein respectfully shows to the Court that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, prior to the commencement of this action, and after the cause of action set up in plaintiff's complaint had accrued, plaintiff was duly adjudged a bankrupt by the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_, and on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, one \_\_\_\_\_, was duly appointed trustee in bankruptcy of the estate of plaintiff and has duly qualified and is now acting as such, and that the cause of action alleged in the complaint now vests in said \_\_\_\_\_, as plaintiff's trustee in bankruptcy.

\_\_\_\_\_,  
*Attorney for defendant.*

## § 1782. Form No. 114.

**ANSWER IN STATE COURT SETTING UP PENDENCY OF  
BANKRUPTCY PROCEEDINGS.**

[Caption.]

Now, on this day comes \_\_\_\_\_ and appearing specially for the purpose of this plea only, pleads to the jurisdiction of this Court, and says this case should not be prosecuted.

Defendant further avers that heretofore, in the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_, \_\_\_\_\_ Division, a court of competent jurisdiction in that behalf, a petition was filed to adjudicate \_\_\_\_\_ defendant herein, as bankrupt. Thereafter it was by said Court ordered and adjudged that \_\_\_\_\_ plaintiff herein, be enjoined until further order of that Court, from maintaining this proceeding or prosecuting this action. The proceedings resulting in such injunction were duly had and the order and judgment of injunction were duly rendered.

\_\_\_\_\_,  
*Attorney for defendant,*

Dated \_\_\_\_\_, 19—.

**§ 1783. Form No. 115.****MOTION FOR ORDER STAYING SUIT AGAINST  
BANKRUPT.**

[Caption.]

\_\_\_\_\_, [trustee of the estate of] the bankrupt herein, moves the Court for an order restraining \_\_\_\_\_ from proceeding with or continuing the prosecution of the suit brought by it against the above named \_\_\_\_\_, in the \_\_\_\_\_ Court of \_\_\_\_\_ County, State of \_\_\_\_\_, numbered \_\_\_\_\_ on the docket of said Court.

Dated \_\_\_\_\_, 19\_\_\_\_.

NOTE.—Affidavit in support of this motion follows in § 1780.

**§ 1784. Form No. 116.****AFFIDAVIT IN SUPPORT OF ABOVE MOTION.**

[Caption.]

\_\_\_\_\_ being duly sworn, says:

That he is [the duly elected and qualified trustee of the estate of] the bankrupt herein.

That \_\_\_\_\_ has applied to the \_\_\_\_\_ Court of \_\_\_\_\_ County, State of \_\_\_\_\_ for a judgment by default or otherwise against the above named bankrupt in the suit, which was commenced by it on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and which is now pending in said Court against said bankrupt, number \_\_\_\_\_ on the docket of said Court, the nature of said suit being as follows:

That said \_\_\_\_\_ threatens to and will, unless enjoined by this Court proceed with the prosecution of said suit and obtain judgment therein against the bankrupt herein.

That the claim upon which said suit is based is one which is provable and dischargeable in bankruptcy, and from which a discharge in bankruptcy would be a release.

Further affiant saith not.

[Jurat.]

**§ 1785. Form No. 117.****ORDER STAYING SUIT AGAINST BANKRUPT.**

[Caption.]

\_\_\_\_\_, having made a motion herein for an order restraining \_\_\_\_\_ from proceeding with or continuing the prosecution of the suit brought by it against the bankrupt herein, in the \_\_\_\_\_ Court of \_\_\_\_\_ County, State of \_\_\_\_\_, numbered \_\_\_\_\_ on the docket of

said Court, and due notice of the hearing on said motion having been given said \_\_\_\_\_,

Now, on the affidavit of \_\_\_\_\_, on file herein, and on all the records and proceedings herein, on motion of \_\_\_\_\_, attorney for said \_\_\_\_\_, \_\_\_\_\_, attorney for said \_\_\_\_\_, appearing in opposition.

IT IS ORDERED, That said \_\_\_\_\_, and his agents, servants and attorneys and each of them, be and they are hereby enjoined until the further order of this Court, from proceeding with or continuing in any way the prosecution of said suit No. \_\_\_\_\_, brought by him against the bankrupt herein, in the \_\_\_\_\_ Court of \_\_\_\_\_ County, State of \_\_\_\_\_, and that all proceedings in said suit be and they are hereby stayed until further order of this Court.

Let a copy of this order be forthwith served by the marshal upon the said \_\_\_\_\_.

\_\_\_\_\_, Judge.

Dated \_\_\_\_\_, 19—.

### § 1786. Form No. 118.

#### MOTION TO SET ASIDE ATTACHMENT.

STATE OF \_\_\_\_\_ }  
COUNTY OF \_\_\_\_\_ }

In \_\_\_\_\_ Court, \_\_\_\_\_ Judicial District.

\_\_\_\_\_, Plaintiff,

v.

\_\_\_\_\_, Defendant.

Now comes \_\_\_\_\_, as trustee of \_\_\_\_\_, a bankrupt, by \_\_\_\_\_ and \_\_\_\_\_, his attorneys, and moves the Court to enter an order herein dissolving the attachment heretofore issued and levied in this cause upon the property of \_\_\_\_\_, described in the return thereof, and the subsequent proceedings, if any, had thereon, and for an order upon the receiver, \_\_\_\_\_, heretofore appointed by this Court as receiver herein, directing him to turn over to said \_\_\_\_\_, as trustee of said \_\_\_\_\_, a bankrupt, all property of said \_\_\_\_\_, which come into his possession as receiver, and for grounds of such motion shows the following:

1. That on to-wit, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, a petition in bankruptcy was filed in the District Court of the United States for the \_\_\_\_\_ Division of the \_\_\_\_\_ District of \_\_\_\_\_, against the said \_\_\_\_\_, and praying that it be adjudged a bankrupt within the purview of the act of Congress relating to bankruptcy.

2. That thereafter such proceedings were had in said cause that the said \_\_\_\_\_ was on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19—, by



the said United States District Court duly adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy.

3. That thereafter, and on, to-wit, the ——— day of ———, A. D. 19—, the said ——— was duly appointed as trustee of the said ———, a bankrupt, and filed his bond and duly qualified as and now is such trustee.

4. That by virtue of the acts of Congress relating to bankruptcy and particularly by section 70 of said act, the said ———, upon his appointment and qualification as such trustee as aforesaid, became vested by operation of law with the title of the said bankrupt as of the date it was adjudicated a bankrupt to all property of said bankrupt wherever situated.

5. That on or about the ——— day of ———, 19—, a writ of attachment was issued in the above entitled cause and was levied upon certain property of the said ———, situated in ——— County, in the ——— of ———, and that under the provisions of said acts of Congress, and particularly of section 67f thereof, by virtue of said adjudication of bankruptcy, the lien of said attachment passed to the said ———, as trustee of the said ———, a bankrupt, wholly released and discharged from the same, and the said trustee is now entitled to the possession thereof.

—————, —————,  
As Trustee of the ——— ———,  
By ——— ——— & ——— ———,

[Verification.]

*His Attorneys.*

NOTE.—From record in *Jones v. Springer*, 15 N. Mex. 98, affirmed in 226 U. S. 148. See, also, *ante*, § 890.

### § 1787. Form No. 119.

#### PETITION FOR SUBSTITUTION OF TRUSTEE AS COMPLAINANT.

[Caption.]

The petition of ———, as trustee in bankruptcy of the above-named bankrupts, respectfully shows to this court:

I. That your petitioner was appointed by order of this court, entered herein on the ——— day of ——— 19—, receiver of the property of the above-named bankrupts;

II. That thereafter, by order of this court, entered on the ——— day of ———, 19—, your petitioner, as receiver, was directed to prosecute his claim to certain securities and property in the possession of ———, and any and all claims of the bankrupt estate to the said property, and the said order directed that it be referred to the

Honorable ——— as special commissioner to hear and determine the same upon the merits;

III. That thereafter your petitioner proceeded as directed by the said order to prosecute such claims before the Honorable ——— as special commissioner, and the proceeding has been pending and is now pending before the said Honorable ———;

IV. That in the said proceeding your petitioner, as receiver, has filed a petition, and as your petitioner is informed and believes ——— and ——— and ———, esquire, liquidator thereof, have filed answers to said petition submitting to the jurisdiction of this court and to the trial of the questions on the merits before said special commissioner;

V. That your petitioner at a first meeting of creditors of the above-named bankrupt, after adjudication had been duly had, was on the ——— day of ———, 19—, duly elected trustee in bankruptcy of the above-named bankrupts and has qualified and is now acting as such.

Your petitioner therefore prays for an order substituting your petitioner as trustee in bankruptcy in the said proceedings before the said special commissioner, in place of your petitioner as receiver aforesaid.

\_\_\_\_\_,  
*As Trustee, etc.*

\_\_\_\_\_,  
*Attorney for Petitioner  
and Trustee.*

Office and Postoffice Address,  
\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_

[Verification.]

NOTE.—From record in *Sexton v. Kessler & Co.*, 225 U. S. 90.

### § 1788. Form No. 120.

#### **BILL IN EQUITY TO RECOVER PREFERENCE.**

In the District Court of the United States, Southern District of Illinois,  
Northern Division.

In Chancery.

W. J. R., Trustee in Bankruptcy of F. B.,  
Bankrupt,

v.

The R. I. P. Co., a Corporation.

To the Honorable J. O. J., Judge of Said District Court:

Your orator, W. J. R., trustee in bankruptcy of Frank Brown, F. B., bankrupt, respectfully represents unto your Honor that on, to-wit, the 27th day of November, A. D. 1907, the said F. B., of \_\_\_\_\_, \_\_\_\_\_ County, Illinois, filed in this court a voluntary petition in bankruptcy and that he was thereafter on to-wit, the said 27th day of November,

A. D. 1907, duly and regularly adjudged bankrupt by said court, and that thereafter your orator was regularly elected trustee in bankruptcy of said bankrupt estate and that your orator has qualified and is now acting as such trustee.

Your orator further represents that on to-wit, the 25th day of November, A. D. 1907, the said bankrupt, being indebted to the R. I. P. Co., an Illinois corporation, having its principal place of business in the city of ——— and State of Illinois, which is hereinafter named as the defendant, upon a previously existing indebtedness for merchandise sold and delivered by the R. I. P. Co. to the said F. B., amounting to the sum of to-wit, four hundred and six (\$406) dollars, it did transfer and deliver to the said R. I. P. Co. goods, wares and merchandise consisting of gang plows, cultivators, harrows, pulverizers and other farm implements of the property of F. B., bankrupt, of the value of to-wit, five hundred (\$500) dollars, in full payment and discharge of said indebtedness so owing by said bankrupt to the said R. I. P. Co.

Your petitioner further represents that at the time the said bankrupt transferred and delivered said merchandise to the said R. I. P. Co. in payment of said indebtedness owing by said bankrupt to the said R. I. P. Co., and at all times since then, up to the time of filing of said voluntary petition in bankruptcy, the said F. B. was insolvent, of which fact the said R. I. P. Co. at the time of the receipt of the said merchandise in payment of said debt had notice, and that the said R. I. P. Co. then had reasonable cause to believe that the said bankrupt was insolvent and unable to pay his debts in full; that the said transfer and delivery of said merchandise so made by the said bankrupt to the said R. I. P. Co. was made within four months next preceding the date of the filing of said petition in bankruptcy by said B.; that the said transfer of merchandise by the said bankrupt under the circumstances herein alleged was in violation of the rights and interests of other creditors of said bankrupt and in violation of the provisions of the acts of Congress relating to bankruptcy and amounted to an unlawful preference of said R. I. P. Co. over other creditors of said bankrupt of the same class as the said R. I. P. Co.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays: That the said R. I. P. Co., a corporation, which is made party defendant to this, your orator's bill of complaint, may be required to answer the same, but not under oath, the answer under oath being hereby expressly waived; that an account may be had under the direction of this Honorable Court and the amount of the property transferred by the said bankrupt to the said R. I. P. Co. in payment of said previously existing debt and the value thereof, within four months prior to the filing of said voluntary petition in bankruptcy may be ascertained and that the defendant

may be decreed by the court to return to your orator all property so received by the said R. I. P. Co. from the said bankrupt, or the value thereof, and that the said defendant may be decreed to surrender to your orator all preferences received by it from the said bankrupt within four months previous to the filing of said petition in bankruptcy; that the said defendant may be required to set forth and discover a full and complete description, together with the value thereof, of all property received by it from the said F. B. within four months previous to the date of filing of said voluntary petition in bankruptcy, and under what circumstances it received the same; and that your orator may have such other and further relief in the premises as the nature of the case may require and to your Honor may seem meet.

May it please your Honor to grant to your orator the writ of subpoena directed to the R. I. P. Co., commanding it on a day certain therein to be named to be and appear in this honorable court then and there to answer the premises and to stand to, perform and abide by such other and further orders, directions and decrees as may be made against it, and your orator as in duty bound will ever pray, etc.

E. J. R.,

C. & C.,

*Trustee in Bankruptcy of F. B.*

*Solicitors for Complainant.*

NOTE.—From record in *Rock Island Plow Co. v. Reardon*, 222 U. S. 354.

The form of action to set aside a preference may be in law or in equity. See *ante*, § 1127.

### § 1789. Form No. 121.

#### COMPLAINT IN ACTION BY TRUSTEE TO RECOVER PREFERENCE BASED ON ENTRY OF JUDGMENT.

District Court, ——— Judicial District,

STATE OF ——— }  
COUNTY OF ——— }

———, as Trustee in Bankruptcy  
of ———,

Plaintiff,

v.

———, a Corporation,  
Defendant.

#### COMPLAINT.

Complaining of the above-named defendant, plaintiff alleges:

#### I.

That on the ——— day of ———, A. D. 19—, ——— filed a petition in the United States District Court for the District of ———,

—— Division, praying that he be adjudged a bankrupt, and on the —— day of ——, A. D. 19——, the said —— was by said court duly adjudicated a bankrupt within the purview of the acts of Congress relating to bankruptcy.

## II.

That on the —— day of ——, A. D. 19——, plaintiff was appointed the trustee in bankruptcy of the estate of the said ——, and has accepted said trust, filed his bond as provided by order of appointment, which bond has been duly approved, and plaintiff is now the regularly appointed and acting trustee in bankruptcy of said ——; that plaintiff has been by the court of bankruptcy administering the estate of said ——, duly authorized to prosecute this action.

## III.

That during the month of ——, A. D. 19——, the said —— was insolvent and executed a deed of assignment or deed of trust to one —— as trustee, conveying to such trustee a stock of merchandise, fixtures and other property then belonging to said ——, with authority to convert the same into cash and distribute the same pro rata among the creditors of said ——, providing each and every such creditor should execute and deliver to the said trustee a full release of his claim.

That certain of the creditors of said ——, to-wit: the defendant above named, —— and Co., and —— and Co., declined to execute releases and accept the benefits of said trust deed or assignment, and thereafter the said —— executed a supplemental agreement with the said —— as trustee, directing said trustee to apportion the funds in his hands among all of the creditors of said ——, and deliver to each creditor his proportion of said estate, provided such creditor, in consideration thereof, execute a full release of his claim; and further directing said trustee to return to him, the said ——, at the expiration of thirty days any funds remaining in his hands not disbursed to creditors in accordance with said agreement.

That during the month of ——, A. D. 19——, there was in the hands of said —— as trustee of said ——, the sum of —— dollars (\$——) in money, which was then and there the property of said —— and constituted all of his estate.

## IV.

That the said defendant commenced suit in the District Court of —— County, State of ——, during the month of ——, A. D. 19——, recovered judgment in said action against said —— for the sum of —— dollars (\$——) damages and —— dollars (\$——) costs, in all —— dollars (\$——).

## V.

That on the ——— day of ———, A. D. 19—, said defendant caused to be issued out of the District Court of ——— County, an execution on its said judgment and levied upon the funds of said ——— in the hands of said ———, and took from the said ——— on or about the ——— day of ———, A. D. 19—, the sum of ——— dollars (\$——), which was then and there the property and a part of the estate of said ———.

## VI.

That at the time of levying the said execution and securing said property, the said ——— was wholly insolvent and was indebted in large amounts to divers persons, whose claims were then valid claims against the estate of said ——— and are still unpaid and have been filed against said estate in the bankruptcy proceedings of said ———.

## VII.

That the effect of the levying and taking of said money from the estate of said ——— effected a preference in favor of said defendant over and above the other creditors of said ——— (of the same class as defendant) and the said defendant received a greater proportion of its claim against the said ——— than the other creditors of said ——— (of the same class as defendant).

## VIII.

That said defendant well knew (and had reasonable cause to believe) at the time of the issuance of said execution and the taking of said money from the estate of said ——— that the said ——— was wholly insolvent and that there were not sufficient funds in his estate to pay his creditors in full, that the claim of said defendant against the said ——— had been in existence a long time prior thereto, and that by taking the said money from the said estate of ——— as aforesaid, the said defendant obtained a much greater proportion of its claim against the said ——— than the other creditors (of the same class) could have or did receive.

## IX.

That there have been filed and allowed with the referee in bankruptcy in the bankruptcy proceedings of said ———, claims amounting in the aggregate to more than ——— dollars (\$——), and plaintiff has no assets or property with which to pay the same or the expenses of administration; that more than ——— dollars (\$——) of the claims filed and allowed in the bankruptcy proceeding of the said ——— as aforesaid existed and were valid claims against the estate of said ——— on and a long time prior to the ——— day of ———, A. D. 19—.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_), with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, together with the costs and disbursements of this action.

\_\_\_\_\_,  
Attorney for Plaintiff.

NOTE.—From the record in *Marsh v. Wilson Bros.*, 124 Minn. 254.  
See, also, *ante*, § 1151.

§ 1790. Form No. 122.

**ACTION TO SET ASIDE A CONVEYANCE AS FRAUDULENT.**

United States District Court, District of \_\_\_\_\_, \_\_\_\_\_ Division.

_____	, as Trustee of _____	} Complaint.
_____	, Bankrupt,	
	v. Plaintiff,	
_____ and _____	Defendants.	

The above-named plaintiff for his complaint in the above-entitled action alleges and shows to the Court:

First. That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, the above-named bankrupt, \_\_\_\_\_, duly filed his petition in voluntary bankruptcy in the above-entitled court and was on the said day duly adjudged a bankrupt under and pursuant to the acts of Congress relating to bankruptcy.

Second. That thereafter such proceedings were had in said court, sitting as a court of bankruptcy, that the plaintiff was on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, duly appointed the trustee in bankruptcy of said bankrupt; that the plaintiff thereupon duly qualified as such trustee and ever since has been and now is the duly qualified and acting trustee of the said \_\_\_\_\_.

Third. That for several years preceding the month of \_\_\_\_\_, 19—, the said bankrupt was engaged in the \_\_\_\_\_ business in the Village of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_; that on or about the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, the said bankrupt received, among other goods, a shipment of farm implements of the value of \_\_\_\_\_ dollars (\$\_\_\_\_\_) from the \_\_\_\_\_, a corporation, at \_\_\_\_\_, \_\_\_\_\_, which implements were received by said bankrupt at his place of business in \_\_\_\_\_, \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—. That at said time the said bankrupt was indebted in the sum of about \_\_\_\_\_ dollars (\$\_\_\_\_\_) to \_\_\_\_\_ (naming other creditors).

Fourth. That the said bankrupt, in payment of said shipment of

implements, made and executed his promissory notes which became due in the month of ———, A. D. 19—, to the said ———. That said notes nor any part thereof have never been paid; that the indebtedness heretofore alleges to be due said ——— has never been paid. That the said bankrupt on the said ——— day of ———, A. D. 19—, was insolvent and unable to pay his debts in full.

Fifth. That throughout all the times and dates hereinafter referred to and for several years prior to the month of ———, A. D. 19—, and subsequent to said date and up to and after the month of ———, A. D. 19—, the above-named defendants, who are the sons of the said bankrupt, had actual knowledge of said bankrupt's business affairs; knew of his financial condition; knew of the existence of all outstanding debts, and of the property owned by said bankrupt; had access to and knew of the conditions of his books and records, and knew or had every reason to know that said bankrupt was indebted in the sum of several thousand dollars, and knew or had every reason to know and by the exercise of common prudence should have known that said bankrupt's indebtedness was in excess of his assets and knew that said bankrupt executed his notes in payment of said shipment of implements and that the said notes executed therefor would become due in ———, A. D. 19—, and that said defendants knew of the existence of debts to said ——— and to other creditors.

Sixth. That while said bankrupt was insolvent he had knowledge of his outstanding obligations, and while in contemplation of bankruptcy, he did, without consideration and with intent to cheat and defraud his creditors and to put his property beyond the reach of creditors, on the ——— day of ———, execute and deliver a warranty deed, which deed was recorded in book ——— of deeds, page ———, in the office of the register of deeds in ——— County, ———, conveying to said defendants the following described real estate situate in the County of ———, State of ———, to-wit: ———.

Seventh. That at the time said bankrupt transferred said real estate to these defendants, the said defendants and each of them knew and had reasonable cause to believe that said bankrupt was insolvent and that said defendants took and accepted the transfer of said real estate for the purpose of assisting, aiding and abetting said bankrupt to place his said property beyond the reach of his creditors, and of securing to said defendants a preference over legitimate creditors of said bankrupt, and that the effect of the transfer of said property was and is to enable the defendants to hold said real estate and the value thereof in their own names and to assist the said bankrupt in defrauding and cheating his creditors.

Eighth. That at the time of the transfer to said defendants of said real estate by said bankrupt, in the month of ———, A. D. 19—, the



actual and reasonable value of said real estate was the sum of ——— dollars (\$———). That the said plaintiff prior to the commencement of this action made a demand upon said defendants for the recovery of said property or its value, and that said defendants and each of them refuses to reconvey said property or return its value or any part thereof to this plaintiff, the trustee of said bankrupt.

Ninth. That prior to the commencement of this action, the said court of bankruptcy duly made and filed its order in said bankruptcy proceedings, authorizing and directing plaintiff to commence and prosecute this action.

WHEREFORE, plaintiff prays judgment against said defendants and each of them for the recovery of the real estate herein described, or for the sum of ——— dollars (\$———), its value, with interest thereon, in the event said real estate can not be had, and for such other relief as to the Court may seem just and proper, together with plaintiff's costs and disbursements herein.

\_\_\_\_\_,  
*Attorney for Plaintiff,*

\_\_\_\_\_,  
\_\_\_\_\_, \_\_\_\_\_.

### § 1791. Form No. 123.

## COMPLAINT IN ACTION TO SET ASIDE TRANSFER AS BOTH PREFERENTIAL AND FRAUDULENT.

[Caption.]

Plaintiff complains of defendant and alleges:

That on the 20th day of May, 1911, one R. J. J. was duly adjudged a bankrupt upon his voluntary petition theretofor filed in the clerk's office of the United States District Court for the Eastern District of the State of Washington, and thereafter on the 21st day of June, 1911, the plaintiff was duly elected trustee in the matter of the estate of said R. J. J. and thereafter qualified and entered upon the discharge of his duties.

That on the 16th day of May, 1911, an action was brought in the Eighth Judicial District of the State of Idaho by the D. C. Co., a corporation, against said R. J. J. and others, in which action an attachment was duly issued and the B. L. Co. was garnished, and in answer to such garnishment stated that it was indebted to said R. J. J. in the sum of \$369.35, and still is indebted to him in said sum, and that demand has been made by the plaintiff for the payment of said sum from the said B. L. Co., by plaintiff, but the said company still holds and refuses to pay plaintiff said sum or any part thereof.

That said R. J. J. was doing business prior to his adjudication in bankruptcy as the S. C. Co., and that any indebtedness due the S. C. Co. is in fact and reality due to said R. J. J., that being the name under which he transacted business.

That Mrs. R. J. J. was divorced from said J. on the ground of non-support.

That the said R. J. J., for the purpose of defrauding his creditors, voluntarily and without demand on the part of his former wife, assigned to her on May 17, 1911, the said account of indebtedness due him from the B. L. Co.

That said assignment was intended as a preference and to prevent said sum from being divided among his creditors proportionately and equitably, and as a transfer to his said former wife, so as to enable her to obtain a greater percentage of her debt than any other creditor of his in the same class.

That the said transfer was made while J. was utterly insolvent and knew himself to be insolvent, and such insolvency was known to Mrs. J., and that said transfer was known by her to be for the purpose of hindering, delaying and defrauding his other creditors.

That said R. J. J. and his wife had a property settlement of all their affairs, and in such settlement the said R. J. J. retained possession of said account against the B. L. Co. for his own use and benefit, and that the said transfer to his said former wife was not made to her in good faith.

That the said money is still in the possession of the B. L. Co.

That the plaintiff applied to the referee in bankruptcy where said petition in bankruptcy was filed for leave to preserve the said attachment lien for the benefit of the estate of said bankrupt, and so that the rights of said D. C. Co. under said attachment might be used for the benefit of the creditors of said bankrupt, and that upon notice to and waiver of the statutory time, and with the consent of the D. C. Co., said referee made an order permitting this plaintiff to bring this action to recover the said money and to maintain and preserve the lien of said attachment issued in said action of the D. C. Co. against the said R. J. J.

WHEREFORE, plaintiff prays that the said assignment of said claims be adjudged null and void and fraudulent as to creditors, and that plaintiff may have judgment against defendant for the sum of \$369.35, with interest and costs.

---

*Attorneys for Plaintiff.*

NOTE.—This complaint held sufficient as against demurrer, in *Corey v. Blackwell Lumber Co.*, 24 Idaho 642, 135 Pac. 742.

See, also, *ante*, § 1151.

## § 1792. Form No. 124.

**PETITION FOR ASSESSMENT OF STOCKHOLDERS.**

[Caption.]

The petition of \_\_\_\_\_ respectfully shows:

That he is the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt corporation, which was duly adjudicated bankrupt by this court on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, upon a petition filed by (*or, against*) it.

That prior to its adjudication in bankruptcy herein, the above-named \_\_\_\_\_ Company was a corporation duly organized and existing under the laws of the State of \_\_\_\_\_, as a \_\_\_\_\_ corporation, and duly engaged in carrying on the business of \_\_\_\_\_, in the City of \_\_\_\_\_, \_\_\_\_\_ County, \_\_\_\_\_.

That the capital stock of said corporation consisted of \_\_\_\_\_ shares of the par value of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) each.

That under the laws of said state of \_\_\_\_\_, the stockholders of said bankrupt corporation are liable for its debts to the amount of the stock held or owned by them, and for the amount unpaid on the shares of stock held by them (*or otherwise allege the extent of stockholder's liability according to the laws of the state wherein the corporation was organized*).

That said bankrupt corporation is insolvent, and the reasonable value of its assets do not equal the amount of its indebtedness; that claims of creditors of said corporation entitled to participate in dividends and not having security have been filed herein largely in excess of the total amount and value of the assets of said corporation, and unless (*or, though*), the relief hereinafter asked for is granted, there will not be sufficient assets to pay the expenses of administration and the claims of creditors filed and allowed as aforesaid.

That a list of the stockholders of the said bankrupt corporation, so far as known, their respective addresses, and the amount each of said stockholders have paid to the bankrupt corporation for their respective shares of stock, is attached hereto, marked Exhibit "A," and made a part hereof.

WHEREFORE, your petitioner prays that the amounts unpaid by the stockholders of the said bankrupt corporation, the stock owned and held by them, be ascertained by the court and their liability thereon adjudged, and that they be assessed and required to pay to your petitioner the amount of their liability on said stock, or so much thereof as will meet the deficiency of other assets of said corporation.

\_\_\_\_\_  
Petitioner.

[Verification.]

NOTE.—See *ante*, § 1125.

## § 1793. Form No. 125.

**ORDER REQUIRING STOCKHOLDERS TO SHOW CAUSE.**

[Caption.]

Upon reading and filing the petition of ———, trustee in bankruptcy of the estate of the above-named bankrupt, and after duly considering the same,

IT IS ORDERED, That the stockholders of the above-named corporation, and each of them, appear before said court, at ———, in said district, at ——— o'clock in the ——— noon, and show cause, if any there be, why an order should not then and there be made assessing the stock and stockholders of said corporation according to the laws of the state of ———, and directing said stockholders to pay the said trustee enough of the unpaid balance of their stock subscriptions and of the amount found to be due from them as such stockholders as will meet the deficiency of the other assets of the above-named bankrupt corporation.

Let a copy of this order and said petition be sent by mail to all known stockholders of the above-named bankrupt corporation, addressed to them at their places of residence as the same are set forth in the Exhibit marked "A" attached to said petition, and let a notice of the hearing on said petition be published in ———, a newspaper printed in said district.

WITNESS THE HONORABLE ———, Judge of said Court, and the seal thereof this ——— day of ———, 19—.

[Seal.]

\_\_\_\_\_,  
Judge.

## § 1794. Form No. 126.

**COMPLAINT TO ENFORCE STOCKHOLDER'S LIABILITY.**

[Caption.]

Plaintiff complains of defendant and alleges:

## I.

That at all times hereinafter mentioned prior to the adjudication in bankruptcy hereinafter alleged, the ——— Company was a corporation duly organized and existing under the laws of the state of ———, as a ——— corporation, and duly engaged in carrying on the business of ———, in the city of ———, ——— County, ———.

## II.

That the capital stock of said corporation consisted of ——— shares of the par value of ——— Dollars (\$——) each.

## III.

That on the ——— day of ———, 19—, the said corporation was duly adjudicated bankrupt upon a petition filed by (*or, against*) it on the ——— day of ———, 19—, by order of the District Court of the United States for the ——— District of ———, according to the provisions of the acts of Congress relating to bankruptcy.

## IV.

That on the ——— day of ———, 19—, plaintiff was duly elected trustee of the estate of said bankrupt, and thereafter duly qualified as such trustee and ever since has been and now is the duly qualified and acting trustee in bankruptcy of the said bankrupt corporation.

## V.

That on the ——— day of ———, 19—, said District Court of the United States, in said bankruptcy proceedings duly made and entered an order assessing the stockholders of said bankrupt corporation ——— per cent on the amount of stock held by each stockholder and authorizing and directing plaintiff herein, as trustee in bankruptcy, to collect the amounts so assessed by action in case of the refusal of said stockholders, or any of them, to pay said amounts upon demand.

## VI.

That at the time said order was made and entered as aforesaid, defendant was a stockholder in said corporation, owning and holding ——— shares of the capital stock thereof, and in said order was duly assessed as such by said court in the sum of ——— Dollars, and directed to pay the same to plaintiff, as trustee in bankruptcy, upon demand.

## VII.

That though the payment of the said assessment as aforesaid has been duly demanded of defendant, he has neglected and refused and still neglects and refuses to pay the same or any part thereof, and by reason of the premises he is now indebted to plaintiff in the sum of ——— Dollars (\$———), with interest thereon at the rate of ——— per cent per annum from the ——— day of ———, 19—.

## VIII.

That claims of creditors of said bankrupt corporation entitled to participate in dividends and not having security have been filed and allowed in said bankruptcy proceedings largely in excess of the total amount and value of the assets of the estate of said bankrupt, and that, unless the relief hereinafter asked for is granted, there will not be sufficient assets available in said bankruptcy proceedings to pay the expenses of administration, and that in any event there will not be enough realized to pay the aforesaid creditors in full upon their said claims.

WHEREFORE, plaintiff demands judgment against defendant in the sum of ———, with interest thereon from the ——— day of ———, 19—, at the rate of ——— per cent per annum, together with the costs and disbursements of this action.

\_\_\_\_\_,  
*Attorney for Plaintiff.*

Dated ———, 19—.

NOTE.—See *ante*, § 1125.

§ 1795. Form No. 127.

**COMPLAINT TO ENFORCE LIABILITY OF WITHDRAWING  
STOCKHOLDER.**

[Caption.]

Plaintiff complains of defendant and alleges:

I.

That on the ——— day of ———, 19—, the ——— Company was a manufacturing corporation duly organized and existing under the laws of the state of ———, and owned and operated a manufacturing plant known as the ———, in the city of ———, ——— County, ———, and continued to exist as such corporation and to own and operate said manufacturing plant until its adjudication in bankruptcy hereinafter mentioned.

II.

That the capital stock of said corporation consisted of ——— shares of the par value of ——— Dollars (\$——) each, and all of said stock was issued and delivered to actual purchasers thereof and the full amount of the par value of said stock paid in by the owners and holders thereof at the time hereinbefore mentioned.

III.

That on said ——— day of ———, 19—, after the organization of said corporation, defendant became a stockholder therein, holding ——— shares of capital stock thereof of the par value of ——— Dollars (\$——); that defendant continued to own and hold said stock until the ——— day of ———, 19—, when he surrendered all of it to the stockholders of said corporation, and said stock was thereupon cancelled; that the officers and stockholders of said corporation then entered into an agreement in writing with defendant to refund to defendant the full par value of said stock, to-wit, ——— Dollars (\$——).

IV.

That between the ——— day of ———, 19—, and the ——— day of ———, 19—, said officers and stockholders paid defendant in monthly

installments, each month, during said time, the sum of ——— Dollars (\$———), in consideration of which the said ——— shares of stock held and owned by the defendant were withdrawn and refunded to the stockholders of said corporation and surrendered and cancelled, contrary to the provisions of §——— of the General Statutes of ———, and no other certificates of stock were issued in lieu thereof.

## V.

That at the time of the withdrawal and refunding of all of the stock of this defendant, as above set forth, there existed debts and liabilities of said corporation unsecured and past due exceeding in the amount the sum of ——— Dollars (\$———); that said debts and liabilities remained unpaid from the time of the withdrawal and refunding of the stock of defendant as aforesaid continuously to the time of the adjudication of said corporation in bankruptcy as hereinafter alleged and are still unpaid, notwithstanding the creditors of said corporation to whom said debts and liabilities were owing have duly filed their claims in the bankruptcy proceedings hereinafter alleged, and the same have been allowed.

## VI.

That on the ——— day of ———, 19—, the said ———, was duly adjudicated a bankrupt upon a petition filed by (or, against) it on the ——— day of ———, 19—, by order of the United States District Court for the ——— District of ———, according to the provisions of the acts of Congress relating to bankruptcy.

## VII.

That on the ——— day of ———, 19—, plaintiff was duly elected trustee of the estate of said bankrupt, and thereafter duly qualified as such trustee and ever since has been and now is the duly qualified and acting trustee in bankruptcy of the said ———.

## VIII.

That plaintiff has been duly authorized and directed by the said United States District Court, in said bankruptcy proceedings, to commence this action in his capacity as such trustee to recover for the use of the creditors of said corporation the money so refunded to defendant.

## IX.

That prior to the commencement of this action plaintiff, as such trustee, demanded of defendant the return of the money so refunded to him, but defendant refused and still refuses to return the same, or any part thereof.

## X.

That there are insufficient assets in the hands of plaintiff to pay the unsecured debts and liabilities of said corporation, and it is necessary to secure the return of the money, belonging to said corporation, so wrong-

fully refunded to defendant, and to apply the same to the payment of the debts of the corporation for which the same is liable.

WHEREFORE, plaintiff demands judgment against defendant for the sum of ——— Dollars (\$———), with interest thereon at the rate of ——— per cent per annum from the ——— day of ———, 19—, together with the costs and disbursements of this action.

Dated ———, 19—.

\_\_\_\_\_  
*Attorney for Plaintiff.*

NOTE.—Adopted from the record in *Preiss v. Zins*, 122 Minn. 441.

### § 1796. Form No. 128.

#### ANSWER BY TRUSTEE IN ACTION OF REPLEVIN.

Now comes the defendant and for answer to the complaint of the plaintiff herein alleges and respectfully shows to the Court:

#### I.

That on the ——— day of ———, 19—, A. B. and others filed a petition in the District Court of the United States for the ——— District of ———, to have C. D. declared an involuntary bankrupt; [*or*, C. D. filed his petition in the District Court, etc., to be declared a bankrupt]; that thereafter and on the ——— day of ———, 19—, said C. D. was duly adjudged a bankrupt by said District Court; that on the ——— day of ———, 19—, defendant was appointed the trustee in bankruptcy of the estate of said C. D.; that plaintiff thereupon duly qualified and entered upon his duties as such trustee and has ever since been and now is such trustee.

#### II.

That the property described in the complaint herein was the property of said C. D., at the date of the filing of said petition in bankruptcy and at the date of aforesaid adjudication in bankruptcy, and is part of the assets of said estate of C. D., and defendant holds the same as such trustee, and this court is without jurisdiction in this action.

\_\_\_\_\_  
*Attorney for Defendant.*

### § 1797. Form No. 129.

#### SECURITY FOR COSTS—Affidavit.

[Caption.]

STATE OF ——— }  
COUNTY OF ——— } ss.

———, being first duly sworn, says:

1. That he is ——— the defendant in the above-entitled action, which was commenced on the ——— day of ———, 19—.



2. That he has fully and fairly stated the facts in this case to his attorney, ———, of ———, ———, and has a good defense on the merits, as he is advised by his counsel after such statement and verily believes true. *Or*

[2. That he has personal knowledge of the facts constituting defendant's defense to plaintiff's action and verily believes that such facts constitute a good defense on the merits; that the reason this affidavit is not made by defendant personally is ———.]

3. That the plaintiff is the trustee [*or* receiver] in bankruptcy of ———, bankrupt; that plaintiff was appointed such trustee [*or* receiver] by the District Court of the United States for the ——— District of ———, and is not a resident of this [district *or* state].

4. That the purported cause of action upon which plaintiff sues arose, if at all, prior to the bankruptcy of said ———; that in commencing and prosecuting this action the plaintiff is acting unreasonably, oppressively and in bad faith, and that it would be inequitable and unfair to the defendant not to require indemnity for costs from plaintiff, by reason of the following facts, to-wit: ———.

5. That the assets belonging to the estate of said ———, bankrupt, are insufficient to pay the costs and disbursements of the defendant herein.

6. That this affidavit is made in support of a motion to require the plaintiff herein forthwith to give security for costs in this action.

[Jurat.]

NOTE.—See *ante*, § 1166.

### § 1798. Form No. 130.

#### SECURITY FOR COSTS—Order.

[Caption.]

On the affidavit of ———, with proof of service thereof, and on all the files and records herein, on motion of ———, attorney for the defendant, ———, appearing in opposition.

IT IS ORDERED that the plaintiff, within ten days after service of this order upon his attorney, file security for costs and disbursements herein as provided by statute and pay the defendant \$——— cost of motion.

AND IT IS FURTHER ORDERED that until such security for costs is filed and costs paid, all further proceedings herein on the part of the plaintiff herein be and the same are hereby stayed, and defendant is hereby allowed ——— days after plaintiff's compliance with this order to answer, demur or otherwise plead to the complaint herein.

Dated ———, 19——.

—————, Judge.

## § 1799. Form No. 131. [Official Form No. 42.]

**PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.*

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to-wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows:—————

WHEREFORE he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated ———, 19—.

—————, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing* ——— in favor of said petition and ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ——— day of ———, A. D. 19—.

—————,  
*Referee in Bankruptcy.*

## § 1800. Form No. 132. [Official Form No. 43.]

**PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.*

Respectfully represents ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to-wit: [*here*

*describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property, has been pledged or deposited and is subject to a lien*] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this ——— day of ———, A. D. 19—.

—————, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto*], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this ——— day of ———, A. D. 19—.

—————,  
*Referee in Bankruptcy.*

### § 1801. Form No. 133. [Official Form No. 44.]

#### PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.*

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to-wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore

he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing \_\_\_\_\_ in favor of said petition and \_\_\_\_\_ in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

### § 1802. Form No. 134. [Official Form No. 45.]

#### PETITION AND ORDER FOR PRIVATE SALE.

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
\_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.* }

Respectfully represents \_\_\_\_\_, duly appointed trustee of the estate of the aforesaid bankrupt:

That for the following reasons, to-wit: \_\_\_\_\_  
it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to-wit: \_\_\_\_\_  
\_\_\_\_\_

WHEREFORE he prays that he may be authorized to sell the said property at private sale.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing \_\_\_\_\_ in favor of said petition and \_\_\_\_\_ in opposition thereto], it is ordered that

the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefore and to whom sold; which said account he shall file at once with the referee.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_  
Referee in Bankruptcy.

§ 1803. Form No. 135. [Official Form No. 46.]

**PETITION AND ORDER FOR SALE OF PERISHABLE  
PROPERTY.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
Bankrupt. } In Bankruptcy.

Respectfully represents \_\_\_\_\_, the said bankrupt, [or, a creditor, or the receiver, or the trustee of the said bankrupt's estate]:

That a part of the said estate, to-wit: \_\_\_\_\_  
now in \_\_\_\_\_, is perishable, and that there will be loss if the same is not sold immediately.

WHEREFORE, he prays the Court to order that the same be sold immediately as aforesaid.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [or without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [or after hearing \_\_\_\_\_ in favor of said petition and \_\_\_\_\_ in opposition thereto], I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_  
Referee in Bankruptcy.

## § 1804. Form No. 136.

**PETITION BY RECEIVER FOR SALE OF PERISHABLE  
PROPERTY FREE FROM LIEN.**

[Caption.]

To the Honorable C. C. K., Judge of said Court:

Your petitioner, the C. T. & T. Co., temporary receiver heretofore appointed by the Court in this cause, respectfully shows to the Court that your petitioner as such receiver has taken possession of the property and assets of the said bankrupt, all of which is situated at the premises ——— Street in the city of Chicago, Cook County, Illinois, excepting about 475 bags of timothy seed, which is in the C. D. Co. warehouse and the S. S. warehouse in said city, and your petitioner has been engaged in and has now about completed an inventory of said property; that upwards of \$30,000.00 of said estate consists of seed, in substantially the following quantities: Timothy and clover seed, 4,539 bags; millet and hungarian, 1,081 bags; redtop, 322 bags; buckwheat, 584 bags, and a limited quantity of barley, rape, peas, blue grass, and some other kinds of grain, but comparatively small quantities, the season for the sale of which is now on or drawing to a close; and your petitioner further and more particularly shows that there is a present active market for timothy and clover for fall sowing, which activity will be practically ended in the course of the next two or three weeks and that there will then be no active market until the coming winter for the spring sowing season, except a few days in July for fall sowing; that the market for the sale of redtop is nearly over for this season, and that now for a very few weeks is the season for selling and disposing of hungarian, buckwheat and millet, so that the present time is the season or nearly the closing of the season for selling, marketing and disposing of substantially all of the said stock of seed and grain belonging to the said estate, and that it is and will be to the great interest and advantage of the said estate and of the creditors thereof to have the said stock sold immediately and that as speedy a sale as possible within a couple of weeks for the most of said stock and within a week or ten days thereafter for the remainder thereof is absolutely necessary to prevent great loss and depreciation in the value of said stock of seed and grain and to save the great expense and loss that would result from selling the same out of season or carrying it over to another season; and as showing the attitude and view of the creditors of the said estate as regards the necessity of a speedy sale of said stock of seed, your petitioner shows that on the afternoon of May 10th, instant, a meeting of the following creditors of the said estate, called by your petitioner at

the request of some of said creditors, was held at room —, — Building in said city, namely:

F. E. W., J. A. P., M. T. Co., G. & Co., E. & D., M. S. H., F. N. B. of Chicago, H. W. R. & Bros., J. F. H., E. S. & Co., M. D. & Co., J. C. V., B. & S., and E. W. B., many of which creditors were personally present and also were represented by their attorneys at said meeting, and at said meeting the matter of said bankrupt's estate was considered by said creditors and it was the consensus of opinion of said creditors that the said stock of seed and grain should be sold speedily and for the reasons your petitioner has above in this petition set forth, and without formal action taken, it was agreed that your petitioner should prepare and present to this Court a petition for leave and authority to your petitioner as such receiver to sell the said stock immediately in the open markets and through the usual channels of trade, and that such petition be presented to this Court at 10 o'clock Saturday morning, May 11th, instant, and that the said creditors who attended said meeting would consider themselves as notified at such meeting of the presentation of such petition to this Court at said time on said May 11th without the service of further notice, and your petitioner shows that the said creditors, who are herein above named as attending said meeting have claims against the said estate aggregating about \$59,500.00 in amount, the same being over nine-tenths of the indebtedness of said bankrupt, as appears from the schedules filed herein by said bankrupt and as your petitioner is informed and believes.

Your petitioner therefore prays the authority and direction of the court in the premises, and that if an order be entered for the sale of said stock of seed and there are any liens or claims of priority upon or with respect to any of said stock such lien be transferred to the funds arising out of the sale of the property by the proper order of the court.

And your petitioner will ever pray, etc.

C. T. & T. Co.,  
*Receiver.*  
By D. B. L.,  
*Pres.*

N. W., *Attorney.*  
[Verification.]

NOTE.—From record in *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280.

## § 1805. Form No. 137.

**SPECIAL APPEARANCE BY PLEDGEE, DENYING AUTHORITY TO SELL.**

[Caption.]

The F. N. Bank of Chicago appears herein for the sole purpose of denying the jurisdiction of this court to enter an order as prayed in and by the petition of the C. T. & T. Co., the temporary receiver herein, filed herein May 13, A. D. 1901, or any order interfering with the control by this respondent of the property hereinafter described; and this respondent not waiving its objection to the jurisdiction of the court as aforesaid and for the sole purpose of supporting its said objection, shows to the court that it holds in pledge to secure indebtedness owing to it by the bankrupt, warehouse receipts issued by the N. S. Co., to said bankrupt as follows: ————.

Said warehouse receipts were all duly endorsed by the bankrupt and delivered and pledged to this respondent as aforesaid for moneys in good faith loaned and advanced to said bankrupt at the times, respectively, of the pledging of said receipts as aforesaid.

This respondent further says that all of the seed described in and covered by the warehouse receipts aforesaid is included, as this respondent is informed and believes, as a part of that which the temporary receiver herein claims in and by its petition aforesaid to have in its possession, but that as a matter of fact the said seed covered and represented by the warehouse receipts aforesaid is not and never has been in the possession of the said temporary receiver, and was not at the time of the bankruptcy or at any time since the issuing of the warehouse receipts therefor, respectively, as aforesaid, in the possession of the said bankrupt. On the contrary, the said seed represented and covered by the warehouse receipts aforesaid was and has been at all times since the issuing of the warehouse receipts therefor, respectively, as aforesaid, in the full possession and control of the said N. S. Co.

This respondent further shows to the court in support of its objection to the jurisdiction of the court as aforesaid, that although a representative of this respondent did attend the meeting mentioned in the said petition of the temporary receiver as held on the afternoon of May 10th, instant, this respondent by its said representative or otherwise did not concur in the proceedings of said meeting or in anything said or done thereat except to the extent of agreeing that the seed in question ought to be promptly sold in order not to lose a favorable market therefor, and this respondent therefore denies all the averments of said petitioner the effect that this respondent agreed to the filing of the petition aforesaid either with or without notice to this respondent. And this



respondent denies also that it waived notice of the filing of said petition or of any other proceeding which might be taken by the temporary receiver or other parties involved, and on the contrary avers that it insisted that it would accept no notice and consent to no application to this court until what was proposed was put into writing and submitted, which was never done until the petition aforesaid was filed.

For the reason aforesaid this respondent denies the jurisdiction of the court herein and prays that said petition may on that account be dismissed, so far as the seed represented and covered by the warehouse receipts aforesaid held in pledge by this deponent is concerned.

The F. N. B. of Chicago,

By J. B. F.,

*Pres.*

Dated, Chicago, Ills., May 15, 1901.

NOTE.—From record in First National Bank v. Chicago Title & Trust Co., 198 U. S. 280.

### § 1806. Form No. 138.

#### STIPULATION FOR SALE OF MORTGAGED PROPERTY.

[Caption.]

Whereas it is deemed for the benefit of all parties interested that the stock in trade, furniture and fixtures in the store of the alleged bankrupt at Nos. ——— Boylston Street, Boston, Mass., be converted into cash, and said stock being perishable in its nature, and

Whereas J. H. D., the alleged mortgagee thereof, claiming possession as such, now has the custody of said property, it is hereby stipulated and agreed by the undersigned, being all the parties interested in the above entitled action:

First. That the injunction of the Court now in force restraining the alleged mortgagee, J. H. D., from disposing of the said property may be dissolved.

Second. That the said alleged mortgagee, J. H. D., be allowed to forthwith convert the said stock in trade, furniture and fixtures into cash, using absolute good faith in procuring the highest price possible consistent with an immediate sale and the existing circumstances, either by selling in the usual course of trade or in bulk to the highest bidder, it being understood that the rights of the parties interested shall remain unchanged by said sale or sales, but shall exist in the funds realized therefrom in the same manner and in like proportion as they would exist in the property were it not sold.

Third. That the said J. H. D. shall pay out of the moneys received from such sale or sales the necessary expenses of conducting the same

or protecting the property, including labor, advertising and rent from this date [rent being at the rate of \$317.50 per month, and to cease as soon as the premises are vacated], and deposit the balance realized in the S. S. T. Co., in the name of J. H. D., trustee, to await the final order of the Court as to the rights of the parties herein.

Fourth. That the said J. H. D. shall act in conjunction with and consult the judgment of W. C., representing the creditors, and C. H. G., representing the alleged bankrupt, in matters pertaining to the price at which said property shall be sold and like details relating to the sale.

W. C.,

*Attorney for the Petitioning and Intervening Creditors.*

J. H. D.,

*Mortgagee.*

W. P. E.,

*Attorney for W. A. P., Landlord and Creditor.*

C. H. G.,

*Attorney for Alleged Bankrupt.*

Dated, June 7, 1909.

NOTE.—From record in *Duffy v. Clarak*, 236 U. S. 97.

### § 1807. Form No. 139.

#### REPORT OF SALE BY PLEDGEE.

[Caption.]

The F. N. Bank of Chicago respectfully reports to the Court that under and in pursuance of the order of the Court entered herein, August 5, 1901, it sold the seed which it held in pledge from said bankrupt covered or represented by warrants of the N. S. Co., numbers 9426, lot No. 60; 9427, lot 61; 9425, lot 59; a part thereof to A. D. Co., a part to T. M. H., and a part to the I. S. Co., and realized from such sale fifteen thousand eight hundred and twenty-two dollars (\$15,822.46) from which has been paid and deducted the expense of sampling and brokers' charges forty-nine dollars and five cents (\$49.05), leaving a balance in the bank's hands of fifteen thousand seven hundred seventy-three dollars and forty-one cents (\$15,773.41), and the proper charges of the N. S. Co., are also to be deducted when fixed. As to such storage charges the unpaid bill of said N. S. Co. is submitted herewith, and the Court is asked to consider the same and fix the proper amount thereof. Also attached hereto and made a part hereof are:

(1) General statement of sales of seed as aforesaid.

(2) Full and particular statement of the portions thereof sold respectively to the A. D. Co., T. M. H., and the I. S. Co.

(3) Copy of voucher for the payment of charges as aforesaid.

(4) Copy of unpaid bill of the N. S. Co.

Said F. N. Bank of Chicago further reports that the said sales of seed were made as promptly as possible after the entry of the order herein aforesaid and were made at the best obtainable prices in the regular course of business, and the net proceeds of said sales as aforesaid are held by said bank subject to the order of the Court herein.

The F. N. Bank of Chicago,

By J. B. F.,

*Pres.*

[Verification.]

NOTE.—From record in First National Bank v. Chicago Title & Trust Co., 198 U. S. 280.

### § 1808. Form No. 140.

#### ORDER FOR DISPOSITION OF PROCEEDS OF SALE.

[Caption.]

On motion of the C. T. and T. Co., trustee in bankruptcy in this cause, and on due notice to the F. N. B. of Chicago, H. W. R. and Bro., and the N. S. Co., said motion being by petition of the said trustee filed herein this day, it is

ORDERED that the said F. N. B. turn over from the proceeds of sale of seed made by it pursuant to the order of Court herein of August 5, 1901, to the said trustee the sum of five thousand dollars (\$5,000.00) as assets of said bankrupt estate, without prejudice to the rights and interest of said F. N. B., H. W. R. and Bro., and the N. S. Co. of the claims of them or any of them to liens and priority of payment, to or upon said proceeds of said sale, and the payment of any further part of said proceeds by said F. N. B. over to said trustee before the final determination of said claim for lien and priority is reserved for the future consideration of the Court.

NOTE.—From record in First National Bank v. Chicago Title & Trust Co., 198 U. S. 280.

### § 1809. Form No. 141.

#### BILL OF SALE FROM TRUSTEE.

KNOW ALL MEN BY THESE PRESENTS: That \_\_\_\_\_, as trustee in bankruptcy of the estate of \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_, a bankrupt, party of the first part, in consideration of the sum of \_\_\_\_\_ Dollars, to him in hand paid by \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_,

———, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, forever, the following described goods, chattels, and personal property, to-wit:

(Here insert description of property sold.)

TO HAVE AND TO HOLD THE SAME, Unto the said party of the second part, his executors, administrators and assigns, Forever.

IN TESTIMONY WHEREOF, The said party of the first part has hereunto set his hand and seal this ——— day of ———, 19—.

Signed, Sealed and Delivered  
in Presence of:

\_\_\_\_\_,  
\_\_\_\_\_.

\_\_\_\_\_,  
As Trustee in Bankruptcy  
of \_\_\_\_\_.

[Acknowledgment.]

### § 1810. Form No. 142.

#### TRUSTEE'S DEED.

TO ALL TO WHOM THESE PRESENTS MAY COME:

I, \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_, duly qualified and acting trustee in bankruptcy of the estate of \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_, a bankrupt, send greeting:

WHEREAS, By an order made by the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, in bankruptcy proceedings then pending in said court against the above-named bankrupt, I the said \_\_\_\_\_, in my capacity as trustee of the estate of the said bankrupt, was duly authorized and empowered, to sell the portion of the bankrupt's estate hereinafter described, by auction (*or* by private sale), subject to the incumbrance thereon (*or*, free and clear of liens),

AND WHEREAS, I the said \_\_\_\_\_, trustee of the estate of the said bankrupt, having caused the property hereinafter described to be appraised as required by law, and having given due notice of the intended sale of said property, and of the time and place thereof, as required by law and by the order of above-named court aforesaid, and having in all things fully complied with said order and with the requirements of the statute in such case made and provided, did, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, at \_\_\_\_\_, by virtue of said order of court, and pursuant thereto

and to the said notice, expose and offer for sale, at public auction, the real estate hereinafter described, and did then and there strike off and sell the same to \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_, for the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), he being the highest bidder therefor, and said sum being more than seventy-five per centum of the appraised value of said real estate:

AND WHEREAS, I, the said \_\_\_\_\_, trustee of the estate of said bankrupt, have made report of my proceedings upon the aforesaid order of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, to said court, and said court, having on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, duly made an order to said court, confirming said sale, and directing a conveyance for said real estate to be executed to the said \_\_\_\_\_,

NOW THEREFORE, KNOW YE, That I, the said \_\_\_\_\_, in my capacity of trustee of the estate of \_\_\_\_\_, bankrupt, aforesaid, by virtue of the power and authority in me vested as aforesaid, and in consideration of the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), to me in hand paid by the said \_\_\_\_\_, the receipt of which is hereby acknowledged, do hereby GRANT, BARGAIN, SELL and CONVEY, unto the said \_\_\_\_\_, \_\_\_\_\_ heirs and assigns, all (Here insert description of property sold)

TO HAVE AND TO HOLD, The above bargained premises, to the said \_\_\_\_\_, \_\_\_\_\_ heirs and assigns, to \_\_\_\_\_ and their use and behoof, FOREVER.

IN WITNESS WHEREOF, I, the said \_\_\_\_\_, trustee, as aforesaid, have hereunto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Signed, Sealed and Delivered  
in Presence of:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, [Seal.]  
As Trustee in Bankruptcy  
of \_\_\_\_\_.

[Acknowledgment.]

§ 1811. Form No. 143.

PETITION FOR LEAVE TO COMPROMISE CLAIM.<sup>1</sup>

[Caption.]

Now comes \_\_\_\_\_ and respectfully shows to the Court:

That he is the duly appointed, qualified and acting trustee in bankruptcy of the estate of the above named bankrupt.<sup>2</sup>

That a controversy has arisen in the administration of the said estate,  
Brandenburg—86

the subject matter of which is a claim against \_\_\_\_\_ of \_\_\_\_\_, \_\_\_\_\_, due and belonging to the estate of the bankrupt,<sup>3</sup> arising by reason of the following facts, to-wit: \_\_\_\_\_  
[here set forth fully the subject matter of the controversy. See *ante*, § 1191].

That your petitioner has duly presented said claim and payment thereof in full has been refused, but that said \_\_\_\_\_ has offered to pay the sum of \_\_\_\_\_ dollars in full settlement of said claim against him.

That your petitioner deems it proper and for the best interests of the estate to accept said offer of settlement for the following reasons, to-wit: \_\_\_\_\_

WHEREFORE, Your petitioner prays for an order of this court citing all creditors of the estate and other persons interested, to appear and show cause, if any there be, at a time and place to be fixed by the Court, why an order should not then and there be made and entered authorizing and directing your petitioner to accept the offer of compromise hereinbefore set forth.

\_\_\_\_\_,  
*Trustee.*

[Verification.]

<sup>1</sup> This form, with appropriate changes, can also be used where the trustee petitions for leave to submit a controversy to arbitration.

<sup>2</sup> The application may be made by the trustee, the bankrupt or any creditor who has proved his claim; if, by the latter, the petition should allege that he is a creditor and that he has proved his claim. See *ante*, § 1188. G. O. XXVIII.

<sup>3</sup> Claims against the estate may also be compromised. G. O. XXVIII.

### § 1812. Form No. 144.

#### ORDER TO SHOW CAUSE WHY CLAIM SHOULD NOT BE COMPROMISED.

[Caption.]

Upon reading and filing the petition of \_\_\_\_\_, trustee in bankruptcy of the above named bankrupt, and upon all the files and proceedings herein, on motion of \_\_\_\_\_, attorney for said trustee,

IT IS ORDERED, That the creditors of the above named bankrupt and other persons interested, and each of them, appear before the undersigned at his office in the \_\_\_\_\_, in the city of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, and show cause, if any there be, why an order should not then and there be entered authorizing and directing \_\_\_\_\_, trustee of the estate of the above named bankrupt to accept the offer of \_\_\_\_\_,

of ———, ———, to pay the sum of ——— dollars (\$——) in full settlement of the claim said bankrupt and his estate against said ———, as set forth in the aforesaid petition.

Let a copy of this order and said petition be served on creditors of said bankrupt and other persons interested on or before the ——— day of ———, A. D., according to law.

Dated at ———, ———, this ——— day of ———, A. D. 19—.

\_\_\_\_\_,  
*Referee.*

NOTE.—See Chapter XXVIII.

### § 1813. Form No. 145.

#### ORDER AUTHORIZING COMPROMISE OF CLAIM.

[Caption.]

The petition of ——— ———, trustee of the estate of the above named bankrupt, having been duly presented to this court, praying for authority to compromise a claim against ——— ——— of ———, ———, due and belonging to the estate of the bankrupt, arising by reason of the facts therein recited, and due notice of the time and place of hearing on said petition having been given to the creditors of said bankrupt and all persons interested, the Court having heard the parties interested who appeared herein and it satisfactorily appearing to the Court from said petition and the evidence submitted, that the best interests of the estate are as in said petition and hereinafter set forth;

Now on motion of ——— ———, attorney for said trustee,

IT IS ORDERED, That said trustee be and he hereby is authorized and directed to accept the sum of ——— dollars (\$——) in full settlement of the claim of said estate against said ——— ———, and to execute the necessary acquittances and receipts therefor.

\_\_\_\_\_,  
*Referee.*

Dated ——— ———, 19—.

### § 1814. Form No. 146.

#### OFFER OF COMPOSITION.

[Caption.]

The above named ——— ———, against whom a petition in bankruptcy was filed [*or*, who filed his petition in voluntary bankruptcy] herein, on the ——— day of ———, 19—, having been examined in open court [*or*, at the first meeting of creditors] herein, and having filed in

court the schedule of his property and the list of his creditors as required by law, hereby offers a composition of \_\_\_\_\_ per cent (—%) upon all unsecured debts, not entitled to priority herein, in satisfaction of his debts, payable as follows: \_\_\_\_\_

Dated \_\_\_\_\_, 19—.

NOTE.—See *ante*, § 1196.

§ 1815. Form No. 147. [Official Form No. 60.]

**PETITION FOR MEETING TO CONSIDER COMPOSITION.**

District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of }  
       *Bankrupt.* } In Bankruptcy.

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

The above named bankrupt respectfully represents that a composition of \_\_\_\_\_ per cent upon all unsecured debts, not entitled to a priority \_\_\_\_\_ in satisfaction of \_\_\_\_\_ debts has been proposed by \_\_\_\_\_ to \_\_\_\_\_ creditors, as provided by the acts of Congress relating to bankruptcy, and \_\_\_\_\_ verily believes that the said composition will be accepted by a majority in number and in value of \_\_\_\_\_ creditors whose claims are allowed.

WHEREFORE, He prays that a meeting of \_\_\_\_\_ creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

\_\_\_\_\_,  
*Bankrupt.*

NOTE.—As to the necessity for a meeting of creditors, see *ante*, § 1201.

§ 1816. Form No. 148.

**NOTICE OF COMPOSITION MEETING.**

[Caption.]

TO THE CREDITORS OF \_\_\_\_\_, IN THE COUNTY OF \_\_\_\_\_ AND DISTRICT AFORESAID, A BANKRUPT:

NOTICE IS HEREBY GIVEN that the above-named bankrupt has proposed a composition of \_\_\_\_\_ per cent upon all his unsecured debts, not entitled to priority, in satisfaction thereof, and that a meeting of cred-



itors will be held at ———, in the city of ———, ——— County, ———, for the purpose of considering the said offer of composition and acting thereon.

Dated ———, 19—.

\_\_\_\_\_,  
*Referee.*

NOTE.—This form should only be used where a special meeting is called. If the offer is submitted at the first meeting, no special meeting is necessary. See *ante*, § 1201.

§ 1817. Form No. 149. [Official Form No. 61.]

**APPLICATION FOR CONFIRMATION OF COMPOSITION.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.  
*Bankrupt.*

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

At ———, in said district, on the ——— day of ———, A. D. 19—, now comes ———, the above named bankrupt, and respectfully represents to the Court that, after he had been examined in open court [or at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ——— dollars, has been deposited, subject to the order of the judge, in the ——— National Bank of ———, a designated depository of money in bankruptcy cases.

WHEREFORE, The said ——— respectfully asks that the said composition may be confirmed by the Court.

\_\_\_\_\_,  
*Bankrupt.*

## § 1818. Form No. 150.

**ORDER FOR HEARING ON PETITION TO CONFIRM  
COMPOSITION.**

[Caption.]

Upon consideration of the petition of ———, bankrupt, for confirmation of a composition heretofore offered by him, and upon all the records and proceedings herein, on motion of ———, attorney for said bankrupt,

IT IS ORDERED, That a hearing on said petition be had before this court, as a court of bankruptcy, to be holden at ———, in the district aforesaid, on the ——— day of ———, 19—, at ——— o'clock in the ———noon, and that creditors of said ———, bankrupt, then and there appear and show cause, if any there be, why the prayer of said petition should not be granted; and

IT IS FURTHER ORDERED, That notice of the time and place of such hearing be given to the creditors of said bankrupt by the clerk of this court [or, the referee herein], as required by law.

WITNESS, The Honorable ———, judge of the said court, and the seal thereof, at ———, ———, in said district, on the ——— day of ———, 19—.

\_\_\_\_\_,  
Clerk.

NOTE.—See *ante*, § 1213.

## § 1819. Form No. 151.

**ACCEPTANCE OF COMPOSITION.**

[Caption.]

We, the undersigned, being respectively creditors of the above named, to the amounts set opposite our respective names at the foot hereof, hereby on behalf of ourselves and our respective firms severally agree to accept in full discharge of our respective debts against said ——— a composition of ——— per cent (—%) payable according to the offer of composition heretofore made and filed herein by the above named ———, as follows:—————

Creditor	Address	Amount of Claim
_____	_____	_____
_____	_____	_____
_____	_____	_____

Dated ———, 19—.

NOTE.—See *ante*, § 1196.

## § 1820. Form No. 152.

**ORDER REFERRING PETITION FOR CONFIRMATION OF  
COMPOSITION.**

[Caption.]

Whereas, on this ——— day of ———, A. D. 19—, said bankrupts filed their petition herein praying that their composition with creditors be confirmed. It is thereupon

ORDERED, In accordance with the provisions of rule ——— of the rules of bankruptcy of this court, that said petition be and the same is hereby referred to referee, ———, with directions to give notice to the bankrupt's creditors as required by the rules, said notices to be returnable before the Court on ———, A. D. 19—, at ten o'clock A. M., that said referee be and he is hereby authorized and directed to hear said application and any objections which may be filed thereto, take proofs thereon, and report his conclusions and recommendations thereon to this court.

\_\_\_\_\_,  
*Judge.*

## § 1821. Form No. 153.

**REPORT OF SPECIAL MASTER IN COMPOSITION  
PROCEEDINGS.**

[Caption.]

To the Honorable C. C. K., Judge of Said Court:

I, F. L. W., referee in bankruptcy to whom as special master was heretofore referred, the matter of the specifications of the objections to the confirmation of the composition in said cause filed herein on April 2nd, 1904, on behalf of J. T. and P. W. M. Co., and the A. W. Co., of New York, a corporation, creditors of said bankrupts, do hereby report:

That the said matter was duly set for hearing before me for argument on the sufficiency of said specifications and that on such argument it was contended that specification numbered 1, to the effect that the bankrupts had not nor had any or either of them filed any schedule of their individual property, was insufficient to warrant the Court in refusing to confirm the said composition.

It is also contended that specification numbered 8, filed on behalf of J. T., was not sufficient, if true, to prevent the confirmation of the composition because the statement charged was alleged to have been made to a commercial agency and not such false statement in writing made to the objecting creditor directly for the purpose of obtaining such property on credit.

As to specification No. 8 of J. T., referred to, I am of the opinion

that a reasonable and proper construction of section 14b (3) would require the "materially false statement in writing" to be made direct to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a commercial agency to be insufficient, and I am of the opinion that the specification should be overruled for this reason.

I am also of the opinion that specification No. 4, filed by the P. W. M. Co., is insufficient and should be overruled.

I am further of the opinion that the other specifications, if proven to be true, would be sufficient to prevent the confirmation of the composition and that, if the Court should determine that such specification 1 is insufficient, evidence should be heard with reference to other specifications.

F. L. W.,  
*Special Master.*

Chicago, April 26, 1904.

NOTE.—From record in *Friend v. Talcott*, 228 U. S. 27.

§ 1822. Form No. 154. [Official Form No. 62.]

**ORDER CONFIRMING COMPOSITION.**

In the District Court of the United States for the ———  
District of ———.

In the matter of }  
————— } In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, A. D. 19—.

[Seal of the Court.] ———, Clerk.

## § 1823. Form No. 155. [Official Form No. 63.]

**ORDER OF DISTRIBUTION ON COMPOSITION.**

UNITED STATES OF AMERICA:

In the District Court of the United States for the \_\_\_\_\_  
 District of \_\_\_\_\_.

In the matter of }  
 \_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.*

The composition offered by the above named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to-wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.] \_\_\_\_\_, *Clerk.*

## § 1824. Form No. 156. [Official Form No. 57.]

**BANKRUPT'S PETITION FOR DISCHARGE.**

In the matter of }  
 \_\_\_\_\_ } In Bankruptcy.  
*Bankrupt.*

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the District of \_\_\_\_\_.

\_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ and State of \_\_\_\_\_, in said district, respectfully represents that on the \_\_\_\_\_ day of \_\_\_\_\_, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the Court touching his bankruptcy.

WHEREFORE he prays that he may be decreed by the Court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

\_\_\_\_\_,  
*Bankrupt.*

## ORDER OF NOTICE THEREON.

District of \_\_\_\_\_, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, on reading the foregoing petition, it is—

ORDERED by the Court, that a hearing be had upon the same on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, before said court, at \_\_\_\_\_, in said district, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon; and that notice thereof be published in \_\_\_\_\_, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

AND IT IS FURTHER ORDERED by the Court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

[Seal of the Court.]

\_\_\_\_\_, Clerk.

\_\_\_\_\_ hereby depose, on oath, that the foregoing order was published in the \_\_\_\_\_ on the following \_\_\_\_\_ days, viz:

On the \_\_\_\_\_ day of \_\_\_\_\_ and on the \_\_\_\_\_ day of \_\_\_\_\_, in the year 19—.

District of \_\_\_\_\_.

\_\_\_\_\_, 19—.

Personally appeared \_\_\_\_\_, and made oath that the foregoing statement by him subscribed is true.

Before me,

\_\_\_\_\_,  
[Official character.]

I hereby certify that I have on this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, sent by mail copies of the above order, as therein directed.

\_\_\_\_\_,  
Clerk.

## § 1825. Form No. 157.

## NOTICE OF APPLICATION FOR DISCHARGE.

[Caption.]

To the Creditors of \_\_\_\_\_, in the County of \_\_\_\_\_ and District Aforesaid, a Bankrupt, and to All Parties Interested:

NOTICE IS HEREBY GIVEN that the above-named bankrupt has filed his petition praying for a full discharge from all his debts provable

against his estate in bankruptcy, except such debts as are excepted by law from such discharge, and that a hearing on said petition will be had before \_\_\_\_\_, United States District Judge, at the United States Court Room, in the city of \_\_\_\_\_, \_\_\_\_\_ County, \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, at which time and place said bankrupt will be examined, and all creditors of said \_\_\_\_\_, and other persons interested are ordered then and there to appear and show cause, if any there be, why the prayer of said petition should not be granted.

Dated \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_,  
Clerk of said  
United States District Court.

NOTE.—Thirty days' notice is required. See *ante*, § 1450.

The form here given may be used for publication in place of the more lengthy official form given in § 1824.

§ 1826. Form No. 158.

**APPEARANCE IN OPPOSITION TO DISCHARGE OR  
COMPOSITION.**

[Caption.]

Now comes \_\_\_\_\_, who is a creditor of said bankrupt, and enters his appearance herein for the purpose of objecting to the discharge [*or*, confirmation of the composition] herein, and asks ten days' time be allowed him to file his specifications of objections thereto.

\_\_\_\_\_,  
Attorneys for \_\_\_\_\_.

Dated \_\_\_\_\_, 19\_\_\_\_.

NOTE.—See *ante*, § 1458.

§ 1827. Form No. 159. [Official Form No. 58.]

**SPECIFICATION OF GROUNDS OF OPPOSITION TO  
BANKRUPT'S DISCHARGE.**

In the District Court of the United States for the \_\_\_\_\_  
District of \_\_\_\_\_.

In the matter of \_\_\_\_\_ }  
Bankrupt. } In Bankruptcy.

\_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, and State of \_\_\_\_\_, a party interested in the estate of said \_\_\_\_\_, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and

for the grounds of such opposition do file the following specifications:  
*[Here specify the grounds of opposition.]*

\_\_\_\_\_,  
 Creditor.

§ 1828. Form No. 160.

**BANKRUPT'S PLEA TO SPECIFICATIONS OF OBJECTION TO  
 DISCHARGE.**

[Caption.]

Now comes \_\_\_\_\_, the above named bankrupt, and excepts to the sufficiency of the specifications in opposition to his discharge filed herein by \_\_\_\_\_, on the following grounds, to-wit:

1. That said specifications fail to show how the aforesaid \_\_\_\_\_ is interested, or that he has a provable debt affected by the discharge.

2. That said specifications, and each of them, are not sufficiently clear, positive and direct to advise the bankrupt of the particular ground relied upon by the objector— to defeat his discharge, or to enable him to properly prepare to meet the same or to advise the Court of the issue to be tried by it.

3. That said specifications fail to state facts sufficient in law to constitute a bar to his discharge.

WHEREFORE, bankrupt prays that said specifications be dismissed, and that he be granted his discharge as heretofore petitioned for.

\_\_\_\_\_,  
 Attorney for Bankrupt,  
 \_\_\_\_\_,  
 \_\_\_\_\_.

Dated \_\_\_\_\_, 19—.

NOTE.—See *ante*, § 1461.

§ 1829. Form No. 161. [Official Form No. 59.]

**DISCHARGE OF BANKRUPT.**

District Court of the United States, \_\_\_\_\_  
 District of \_\_\_\_\_.

Whereas, \_\_\_\_\_ of \_\_\_\_\_ in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said \_\_\_\_\_ be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the \_\_\_\_\_ day of \_\_\_\_\_,



A. D. 19—, on which day the petition for adjudication was filed ——— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ———, judge of said district court, and the seal thereof this ——— day of ———, A. D. 19—.

\_\_\_\_\_,  
Clerk.

[Seal of the Court.]

### § 1830. Form No. 162.

#### SHORT FORM OF PLEA OF DISCHARGE OR COMPOSITION.

[Caption.]

Now comes the defendant and for answer to the complaint of the plaintiff herein respectfully shows to the Court that heretofore and on the ——— day of ———, 19—, he was discharged from the claim alleged in plaintiff's complaint by an order in bankruptcy of the District Court of the United States for the ——— District of ———, [of which the following is a copy]:

NOTE.—Proof of an order confirming a composition with creditors is admissible under this plea. See *ante*, § 1237.

### § 1831. Form No. 163.

#### PLEA OF DISCHARGE IN BANKRUPTCY.

[Caption.]

The defendant for his answer to the complaint of the plaintiff herein respectfully shows and alleges:

That heretofore and on or about the ——— day of ———, 19—, [and before the commencement of this action] a petition was duly filed by this defendant as petitioner in the United States District Court for the ——— District of ——— sitting in bankruptcy, alleging among other things that the petitioner, this defendant, was insolvent, and asking to be adjudged a bankrupt. Annexed to said petition were the schedules required by law, among them the schedule giving a list of the creditors of the petitioner and the amounts due or claimed. That in said list was a claim of the plaintiff for \$—— and a statement that such claim was disputed, and defendant begs leave to refer to such petition on the trial for a more particular statement of the contents.

That thereafter such proceedings were duly had in said bankruptcy

court that the petitioner, this defendant, was duly adjudicated a bankrupt.

That thereafter and on or about the ——— day of ———, 19—, upon proceedings duly had thereon, and in accordance with all the requirements of law in that behalf, the said United States District Court for the ——— District of ——— duly granted to the said petitioner, this defendant, a discharge from all debts and claims which were provable against said petitioner, this defendant, and which existed on the ——— day of ———, 19—. A copy of such discharge being hereto annexed marked "A."

That the alleged claim of the plaintiff existed prior to the ——— day of ———, 19—, and is a claim, as appears from the complaint herein, that under the acts of Congress relating to bankrupts, was made provable against the estate of the petitioner, this defendant.

That by virtue of said bankruptcy proceedings and said discharge as hereinbefore set out, the plaintiff is barred and prevented from further prosecuting this case, and this defendant has been forever released and discharged from any alleged claim set forth in the complaint herein.

WHEREFORE, defendant demands judgment that the complaint herein be dismissed, with costs.

\_\_\_\_\_,  
*Attorney for Defendant.*

### § 1832. Form No. 164.

#### AGREEMENT TO REVIVE DEBT AFTER DISCHARGE.

THIS AGREEMENT made and entered into this ——— day of ———, 19—, by and between ——— ———, of ———, ———, party of the first part, and ——— ———, of ———, ———, party of the second part, witnesseth:

WHEREAS, on the ——— day of ———, 19—, party of the first part, being then indebted to party of the second part in the sum of ——— Dollars (\$———), was by the United States District Court, for the ——— District of ———, duly adjudged a bankrupt, and under the said bankruptcy proceedings, the creditors of party of the first part, including party of the second part, were paid a dividend of ——— per cent on their claims, and thereafter and on the ——— day of ———, 19—, party of the first part was duly discharged from all liability for the residue of his debts by an order of the said United States District Court;

AND WHEREAS party of the first part considers himself morally bound to pay to party of the second part the balance of his said debt remaining unpaid at the time of the discharge in bankruptcy of the party of the first part, as aforesaid, to-wit, the sum of ——— Dollars (\$———);

NOW, THEREFORE, in consideration of the facts above recited, for the purpose of rendering himself legally liable to party of the second part for the balance of his said debt remaining unpaid as aforesaid, party of the first part hereby expressly acknowledges that he is justly indebted to party of the second part in the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), and agrees to pay the same on or before the \_\_\_\_\_ day of \_\_\_\_\_, 19—, with interest thereon at the rate of \_\_\_\_\_ per cent per annum from the \_\_\_\_\_ day of \_\_\_\_\_, 19—.

IN TESTIMONY WHEREOF party of the first part has hereunto affixed his hand and seal the day and year above written.

In presence of \_\_\_\_\_.

NOTE.—See *ante*, § 1538.

### § 1833. Form No. 165.

#### REPLY TO PLEA OF DISCHARGE.

(New Promise.)

[Caption.]

For his reply to the answer of the defendant herein, plaintiff alleges that subsequent to the order in bankruptcy set up in the answer of defendant, defendant expressly and unequivocally promised plaintiff that he would pay the claim set out in the complaint.

### § 1834. Form No. 166.

#### PETITION TO CANCEL A JUDGMENT AFTER DISCHARGE.

[Caption.]

To the Supreme Court of the State of \_\_\_\_\_:

The petition of \_\_\_\_\_ respectfully represents:

That this action was brought in the year nineteen hundred and \_\_\_\_\_, for goods, wares and merchandise sold and delivered by the plaintiffs to the defendant, and on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, a judgment was recovered in favor of the plaintiffs and against the defendant for the sum of \$\_\_\_\_\_, which judgment was duly docketed in the office of the clerk of this Court on the \_\_\_\_\_ day of \_\_\_\_\_, 19—.

That thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19—, petitioner was duly adjudged a bankrupt by the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, which court had jurisdiction to so adjudge petitioner bankrupt.

That thereafter, petitioner duly filed schedules according to law in the office of the clerk of the said United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, in which schedules appeared the name and

debt of the plaintiffs herein, and upon information and belief, this plaintiff received due notice of the pendency of such proceedings and had actual knowledge thereof.

That thereafter such proceedings were had that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, a decree was entered in the said United States District Court, discharging the defendant in the above entitled action from all debts provable in bankruptcy at the date of his adjudication.

That the debt for which this judgment was obtained was not due as a tax levied by the United States, the State, County, District or Municipality in which the petitioner resides, nor was it a liability for obtaining money by false pretense or false representations, nor for willful and malicious injury to the person or property of the plaintiff, nor for alimony due or to become due, nor for the maintenance and support of wife and child, nor for the seduction of an unmarried female, nor for criminal conversation, nor was said debt created by fraud, embezzlement, misappropriation or defalcation while acting as an officer in any fiduciary capacity, and that said debt was duly scheduled in time for proof and allowance with the name of the plaintiffs therein.

That hereto annexed is a certified copy of the decree of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, discharging this petitioner from all his debts provable against his estate in bankruptcy as was set forth.

That more than one year has elapsed since the entry of the said decree.

WHEREFORE, Your petitioner prays that an order may be made herein, cancelling the said judgment of record, and directing the clerk of this Court to mark the same cancelled and discharged, for which no previous application has been made.

\_\_\_\_\_,  
*Petitioner.*

Dated \_\_\_\_\_, \_\_\_\_\_, 19—.

[Verification.]

NOTE.—From record in *Guasti v. Miller*, 203 N. Y. 259, affirmed 226 U. S. 170.

### § 1835. Form No. 167.

#### PETITION TO REVOKE DISCHARGE.

[Caption.]

To the Honorable \_\_\_\_\_, Judge of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_ respectfully shows to the court:

That your petitioner is a creditor of the above-named bankrupt, having a provable claim amounting, in excess of securities held by him and

in excess of dividends received by him herein, to the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), which has been proved and allowed herein, the nature of said claim being as follows:

That said claim is affected by the discharge herein.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the above-named \_\_\_\_\_, was duly adjudicated a bankrupt by order of this court upon a petition filed by (*or*, against) him on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, according to the provisions of the acts of Congress relating to bankruptcy.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, upon petition of the said bankrupt, this court made its order discharging the said bankrupt from his debts.

That the actual facts existing at the time of the granting of said discharge did not warrant said discharge, but, on the contrary, said discharge was obtained through the fraud of the bankrupt, as appears from the following facts, knowledge of which has come to your petitioner since the granting of the said discharge, to-wit:

That the fraud, of the bankrupt, as aforesaid, was first discovered by your petitioner on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, in the following manner: (Here state also the diligence used to discover the fraud.)

That the time for applying for an order revoking said discharge has not expired, and no application therefor has been previously made.

WHEREFORE, your petitioner for an order of this court vacating and setting aside the discharge of the bankrupt herein, and for such other and further relief as to the court may seem just.

\_\_\_\_\_,  
*Petitioner.*

[Verification.]

NOTE.—See *ante*, § 1513.

### § 1836. Form No. 168.

#### PETITION TO RE-OPEN ESTATE.

[Caption.]

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_ respectfully shows to the court:

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, a petition in (in)voluntary bankruptcy was filed in the above-named court praying that the above-named \_\_\_\_\_ be adjudicated a bankrupt.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the above-named \_\_\_\_\_ was duly adjudicated a(n) (in)voluntary bankrupt upon said petition by the above-named court, according to the acts of Congress relating to bankruptcy.

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That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, was duly elected trustee of the estate of said bankrupt, and thereafter duly qualified as such trustee and continued to act as such trustee until the time of his discharge as hereinafter alleged.

That your petitioner is a creditor of the above-named bankrupt, having a provable claim amounting to \_\_\_\_\_ Dollars (\$\_\_\_\_\_), in excess of securities; that the nature of your petitioner's claim is as follows: \_\_\_\_\_

That your petitioner duly filed his said claim in the bankruptcy proceedings against said \_\_\_\_\_, and said claim was duly allowed on the \_\_\_\_\_ day of \_\_\_\_\_, 19—; that no part of said claim has been paid except the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, upon petition of the said bankrupt, this court made its order discharging the said bankrupt from his debts.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, by order of this court the final account of the aforesaid trustee was duly presented to this court and allowed as filed, the said trustee duly discharged of his trust, and the proceedings herein closed.

That the claims of creditors entitled to participate in dividends in said estate in bankruptcy, and not having security, were filed and allowed in said bankruptcy proceedings, largely in excess of the total amount and value of the assets thereof coming into the hands of the aforesaid trustee, and that the assets of said estate discovered by said trustee and coming into his possession were insufficient to pay the expenses of administration and the claims of the creditors whose claims were filed and allowed in said proceedings.

That at the time of the filing of the petition in bankruptcy against said \_\_\_\_\_, as aforesaid, and at the time of his adjudication in bankruptcy as aforesaid, said \_\_\_\_\_ was the owner of the following described property, no mention of which was made in the schedules filed by him in said bankruptcy proceedings, and no portion of which ever came into the possession of his trustee in bankruptcy or was ever administered in said bankruptcy proceedings, to-wit: (Here describe property in detail).

That said bankrupt wilfully, fraudulently and unlawfully omitted said property from his schedules in bankruptcy, and wilfully, fraudulently and wrongfully concealed the same from his trustee in bankruptcy and his creditors.

That said bankrupt is still in possession and control of said property.

That the value of said property is \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

That the omission of said property from the schedules in bankruptcy, as aforesaid, and the fraud of the bankrupt as aforesaid was first dis-

covered by the petitioner on the \_\_\_\_\_ day of \_\_\_\_\_, 19— (Here state also the diligence used to discover the fraud and omissions).

WHEREFORE your petitioner prays the order of the court reopening the estate of the said \_\_\_\_\_, bankrupt, for the purpose of discovering property fraudulently omitted from the bankruptcy proceedings aforesaid and administering the same in bankruptcy, for the appointment of a receiver to take charge of said property, and for such other and further relief as to the court may seem just.

\_\_\_\_\_,  
Petitioner.

[Verification.]

NOTE.—See *ante*, § 1427.

### § 1837. Form No. 169.

#### CERTIFICATE OF REFEREE THAT BANKRUPT IS IN CONTEMPT.

[Caption.]

To the District Court of the United States, for the \_\_\_\_\_ District of \_\_\_\_\_:

The undersigned, one of the referees of said court of bankruptcy, hereby certifies that the above named bankrupt is in contempt of court, and hereby recommends that he be punished therefor according to law, by reason of the following facts, to-wit:

That heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the undersigned duly made and entered an order herein directing said bankrupt to forthwith return to the trustee herein the following described personal property, to-wit: [*here describe the property as in the order referred to*], or, in the event it was impossible to return said property in specie, then to forthwith pay to said trustee the sum of \_\_\_\_\_ dollars, (\$\_\_\_\_\_), the value thereof, and in default of same to be punished for contempt of court.

That bankrupt was duly notified of the entry of said order and served with a copy thereof, and, though he has been able to comply with said order, said bankrupt has wilfully refused to deliver said property to said trustee upon demand, or to pay to said trustee the value thereof as aforesaid.

\_\_\_\_\_,  
Referee.

Dated \_\_\_\_\_, 19—.

NOTE.—See *ante*, § 1602.

## § 1838. Form No. 170.

**AFFIDAVIT OF CONTEMPT.**

[Caption.]

STATE OF \_\_\_\_\_ }  
 COUNTY OF \_\_\_\_\_ } ss:

\_\_\_\_\_, being first duly sworn, says:

1. That he is the trustee in bankruptcy of the estate of the above named bankrupt.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, an order was duly made and entered by the Court herein, of which a copy is hereto annexed marked Exhibit A, requiring \_\_\_\_\_ to [*here specify act required*].

3. That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, said order was duly served on said \_\_\_\_\_, as more fully appears by the return of the United States marshal thereon, on file in this court.

4. That although he has had and still has the ability to comply therewith, said \_\_\_\_\_ has wilfully and contumaciously refused and still refuses to obey said order, in this: \_\_\_\_\_.

WHEREFORE, Your affiant prays for an order of this Court directing said \_\_\_\_\_ to show cause why he should not be punished as for contempt.

[Jurat.]

## § 1839. Form No. 171.

**ORDER TO SHOW CAUSE IN CONTEMPT PROCEEDINGS.**

[Caption.]

On reading and filing the within affidavit of \_\_\_\_\_, trustee in bankruptcy of the estate of the above named bankrupt, and on motion of \_\_\_\_\_, attorney for said trustee,

IT IS ORDERED, That the above named bankrupt \_\_\_\_\_ show cause before this Court at \_\_\_\_\_ in the City of \_\_\_\_\_, \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_noon of said day, why he should not be punished as for contempt for his misconduct in failing to obey the order of said Court as set forth in the said affidavit hereto attached [*or otherwise state the act of contempt according to the fact*].

Let this order and a true copy of said affidavit be served on the said \_\_\_\_\_, on or before the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19—.

By the Court:

\_\_\_\_\_,  
*Judge.*

Dated \_\_\_\_\_, A. D. 19—.



## § 1840. Form No. 172.

**INDICTMENT FOR RECEIVING PROPERTY FROM BANKRUPT  
AND FOR CONCEALMENT.**

United States District Court, District of Kentucky.

UNITED STATES OF AMERICA, }  
DISTRICT OF KENTUCKY } SCT:

In the District Court of the United States for the Sixth Judicial Circuit and District of Kentucky, held at Louisville, Kentucky, October Term, in the Year of Our Lord Nineteen Hundred.

First count. The grand jurors of the United States of America, impaneled and sworn, and charged to inquire in and for the District of Kentucky, on their oaths present, that W. T. N. did on the first day of October, nineteen hundred, in the district aforesaid and within the jurisdiction of this Court unlawfully, knowingly and fraudulently receive a material part of the money and personal property of E. B. N., to-wit: the sum of ten thousand dollars in lawful money of the United States, which was then and there paid to the said W. T. N. by H. S.—a more particular description thereof is to the grand jurors aforesaid unknown; a certain check drawn by E. F. T. on the S. N. Bank of Louisville, Kentucky, in favor of E. B. N. and Co. for two dollars, dated February 21, 1900, and numbered 78, with the fraudulent intent on the part of said W. T. N. to defeat the provisions of an act of the Congress of the United States, entitled, “An act to establish a uniform system of bankruptcy throughout the United States,” approved July 1, 1898, and that said money, personal property and check were then and there personal property of the said E. B. N., as the said E. T. N. then and there knew—and that a petition then and there seeking to have the said E. B. N. adjudged a bankrupt had been then and there filed in the office of T. S., who was then and there duly appointed, qualified and acting clerk of the United States District Court for the district aforesaid, at Louisville, Kentucky, where the said E. B. N. had then resided and had his domicile for more than six months, by the W. K. M., B. Bros. and Co. and the G. I. Bank, as the said W. T. N. then and there knew and that the said E. B. N. was then and there insolvent and bankrupt as the said W. T. N. then and there knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Second count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that W. T. N. did on October 1, 1900, in the district aforesaid and within the jurisdiction of this Court, unlawfully, knowingly and fraudulently, while E. B. N. was a bankrupt aid,

abet and assist the said E. B. N. in concealing, and did then and there unlawfully, knowingly and fraudulently while the said E. B. N. was a bankrupt, procure the said E. B. N. to conceal a large amount of his, the said E. B. N.'s personal property, to-wit: the sum of ten thousand dollars, lawful money of the United States, which was then and there paid to the said W. T. N. by H. S., a more particular description whereof is to the grand jurors aforesaid unknown, from A. E. M., who was then and there the duly appointed, qualified and acting receiver and the trustee of the estate of the said E. B. N. in bankruptcy, and the said E. B. N. then and there was and had then and there been adjudged a bankrupt as the said W. T. N. then and there knew, by the United States District Court at Louisville, in the district court aforesaid, where the said E. B. N. had then resided and had his domicile for more than six months and the personal property aforesaid was then and there the personal property of the said E. B. N. and then and there belonged to his said estate in bankruptcy, as the said W. T. N. then and there knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Third count. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that W. T. N. did on October 1, 1900, in the district aforesaid and within the jurisdiction of his court, unlawfully, knowingly and fraudulently, while E. B. N. was a bankrupt conceal a large amount of personal property of the said E. B. N., to-wit: the sum of ten thousand dollars in lawful money of the United States, which was then and there paid to the said W. T. N. by H. S.—a more particular description whereof is to the grand jurors aforesaid unknown—from A. E. M., who was then and there the duly appointed, qualified and acting receiver and trustee of the estate of the said E. B. N. in bankruptcy—and the said E. B. N. then and there was and had then and there been adjudged a bankrupt as the said W. T. N. then and there knew, by the United States District Court at Louisville, in the district aforesaid, where the said E. B. N. had then resided, and had his domicile for more than six months, and the personal property, aforesaid, was then and there the personal property of the said E. B. N., and then and there belonged to the said estate of the ——— E. B. N., in bankruptcy, as the said W. T. N. then and there knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

R. D. H.,

*United States Attorney, District of Kentucky.*

Witnesses:

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NOTE.—From the record in *Mueller v. Nugent*, 184 U. S. 1.  
See, also, *ante*, §§ 1611, 1616, 1624.

**§ 1841. Form No. 173.****INDICTMENT FOR FALSE OATH.**

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the district and circuit aforesaid, on the first Monday of September, in the year of our Lord one thousand nine hundred and ten, and continued by adjournment to and including the 24th day of October, in the year of our Lord one thousand nine hundred and ten.

Southern District of New York, ss:

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that on the 2d day of August, in the year of our Lord one thousand nine hundred and nine, a petition in bankruptcy, dated on the 13th day of July, in said year, signed by W. S. M., petitioner, and creditor of the K. P. Co. (a corporation organized under the laws of New York), by and under the acts of Congress relating to bankruptcy, was duly filed in the District Court of the United States for the Southern District of New York, praying that the said K. P. Co. should be adjudged an involuntary bankrupt; that on the said second day of August of the same year, J. W. was duly appointed receiver of the property, assets and effects of the said alleged bankrupt; that on the fourth day of August of the said year the said receiver, having duly qualified, petitioned the said Court for an order under Section 21a of the Bankruptcy Act, requiring the said K. P. Co., its officers and directors, to appear before a special examiner or commissioner to be appointed for that purpose, to be examined concerning their acts, conduct and property of the said alleged bankrupts; that on the said fourth day of August in the same year, an order was made by the Honorable C. M. H., judge of the said District Court, that the said examination should proceed before T. A., special commissioner and examiner, and that the witnesses should testify and give evidence before him as to the acts, conduct and property aforesaid; that on the nineteenth day of August of the said year the said K. P. Co. was duly adjudged an involuntary bankrupt and S. M. was duly appointed referee; that the said referee was duly authorized under and by virtue of the laws of the United States relating to bankruptcy to examine witnesses and require them to give evidence in any and all examinations before him as such referee; that pursuant to the said authority, A. B. C. named herein as defendant, appeared before the said referee on the twenty-eighth day of October, in the said year, to testify before him as such referee, and the said defendant was then and there duly sworn by the said referee at the

city of New York in said Southern District of New York, who then and there had the right and authority and was a competent person to administer said oath under and by virtue of the order of the said court appointing him as such referee; and the said oath was authorized by the laws of the United States; and the said A. B. C. was then and there duly sworn that the evidence he should give in the proceedings then before the said referee should be the truth, the whole truth, and nothing but the truth; and the said defendant was then and there examined by and before the said referee under and by authority of said oath concerning the acts, conduct and property of the said alleged bankrupt on the said twenty-eighth day of October in the said year and also on the ninth day of November in the same year. And thereafter on the ninth day of March, in the year of our Lord one thousand nine hundred and ten, the said A. B. C. then and there perused and made himself acquainted with the testimony he had given as aforesaid and which had been reduced to type-writing, and signed the same with his name and was again sworn by the said referee, authorized and empowered as aforesaid, to the effect that the evidence which he, the said A. B. C., had so as aforesaid signed was the truth, the whole truth, and nothing but the truth, and upon the examination aforesaid it became and was a material matter and inquiry in the said proceeding before the said referee to ascertain and discover what property and assets the said alleged bankrupt had, was entitled to, possessed of, or owned, and which should be administered by the court of bankruptcy pursuant to the provisions of the acts relating to bankruptcy, and it was especially a material matter and inquiry then and there:

First. As to whether or not he, the said A. B. C., had been able to obtain the address of W. C. S. or had ever known the same.

Second. As to whether or not the said A. B. C. had a conversation or conversations with the said W. C. S. in regard to his buying pianos of and from the said alleged bankrupt.

And the jurors aforesaid, on their oath aforesaid, do further present that he, the said A. B. C., having been sworn as aforesaid, then and there falsely, corruptly, knowingly, willfully and contrary to said oath, did swear and depose before the said referee, among other things, in substance and to the effect following, that is to say:

First. That he, the said A. B. C., had not been able to obtain the address of said W. C. S. and had never known the said address.

Second. That he, the said A. B. C., had had a conversation or conversations with the said W. C. S. in regard to his, the said W. C. S.'s buying pianos of and from the said alleged bankrupt.

Whereas, in truth and in fact, it was not and is not true and at the time of so swearing and deposing the said A. B. C. did not believe it to be true:

First. That he, the said A. B. C., had not been able to obtain the address of the said W. C. S. and had never known the same.

Whereas, in truth and in fact, it was not and is not true and at the time of so swearing and deposing the said A. B. C. did not believe it to be true:

Second. That he had a conversation or conversations with the said W. C. S. in regard to his, the said W. C. S.'s, buying pianos of and from the said alleged bankrupt.

And so the jurors aforesaid, on their oath aforesaid, do say that A. B. C., within the said jurisdiction, in manner and form aforesaid, having taken an oath before a competent tribunal in a cause wherein a law of the United States authorized an oath to be administered, that he, the said A. B. C., would truly depose and testify, willfully, falsely and contrary to his said oath, did depose and state material matters which he then did not believe to be true, and thereby did commit willful and corrupt perjury; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

H. A. W., *U. S. Attorney.*

NOTE.—From *Cameron v. United States*, 231 U. S. 710. This indictment was drawn before the abolishment of the Circuit Court.

See, also, *ante*, §§ 1612, 1624.

### § 1842. Form No. 174.

#### PETITION FOR REVISION OF ORDER OF DISTRICT COURT.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. H. and L. H., Bankrupts. No. ———.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of J. A. S. respectfully shows as follows:

##### I.

In the District Court of the United States for the District of Washington, Northern Division, two separate proceedings were begun against D. N. H. and L. H., his wife, on the 19th day of January, 1901, to the end that they each be declared a bankrupt, and on the 9th day of February, 1901, these two proceedings were consolidated.

##### II.

Thereafter, on the 25th day of February, 1901, each of the aforesaid H.'s was adjudged a bankrupt, and thereafter, on the same proceedings, your petitioner became the duly elected and qualified trustee in bankruptcy of each of their estates under the laws of the United States.

## III.

Thereafter the aforesaid bankrupts, and each of them, claimed exemption in their favor of two certain policies of life insurance in the hands of the trustee upon the life of D. N. H., payable to L. H., the wife. Of these policies copies are hereto annexed and made a part of this petition. As therein appears, these policies are, respectively, in the sum of \$5,000 and \$2,000 in the event of death, and have a present cash surrender value, combined, of about \$2,200.

## IV.

Such proceedings were had upon this application for exemption that the claim of the bankrupts was, on the 17th day of June, 1901, denied by the referee; but upon certification of the matter to the District Court, his action was, on July 16, 1901, overruled and the exemption in favor of the bankrupts by order was allowed.

## V.

Your petitioner, considering himself aggrieved by this order of the District Court, respectfully applies to this Honorable Court for a revision and review thereof, to the end that the claim of exemption of the bankrupts of these policies of insurance may be denied and the action of the lower court corrected, and that such orders emanate from this court as are necessary to that end. For this purpose your petitioner annexes hereto a certified copy of so much of the record as will enable your Honorable Court to review and correct the action of the District Court with due care and justice to all concerned.

J. A. S.,

*As Trustee in Bankruptcy of D. N. H.*

*L. H., Bankrupts, Petitioner,*

B. & K.,

*Counsel for Petitioner.*

[Verification.]

NOTE.—From record in *Holden v. Stratton*, 198 U. S. 202.

See, also, *ante*, § 1655.

## § 1843. Form No. 175.

## NOTICE OF PETITION FOR REVISION.

In the United States Circuit Court of Appeals for the ——— Circuit.

In re ———, }  
           *Bankrupt.* } No. ———

To ———,

Attorney for ———:

YOU WILL PLEASE TAKE NOTICE, That the undersigned has filed in the United States Circuit Court of Appeals for the ——— Circuit, his

petition for a revision of that certain order of the District Court of the United States for the ——— District of ———, made and entered on the ——— day of ———, A. D. 19—, whereby [*here describe order generally*].

You will also take notice that the undersigned will call up for hearing the aforesaid petition at the regular annual ——— term of the United States Circuit Court of Appeals for the ——— Circuit, to be held on the ——— day of ———, A. D. 19—, in the courtroom in ———, in city of ———, at ——— o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

\_\_\_\_\_,  
Attorneys for \_\_\_\_\_.

See *ante*, § 1655.

### § 1844. Form No. 176.

#### DESIGNATION OF RECORD UPON PETITION TO REVISE.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. H. and L. H., Bankrupts. No. ———.

To the Above Named Bankrupts and to P. P. C., Your Solicitor:

You and each of you will please take notice that the error of the District Court upon which the undersigned trustee intends to rely in his petition for revision and review from the order of the District Court for the District of Washington, Northern Division, dated July 16, 1901, which petition has heretofore been filed and copy thereof served upon you, is the error of adjudging an exemption in favor of you and each of you of the two policies of insurance referred to in that petition. As necessary for the consideration thereof, the petitioner aforesaid designates the following portions of the record to be printed:

1. Order consolidating cases 1953 and 1954.
2. Adjudication of bankruptcy.
3. Order of district judge awarding insurance exemption.
4. The insurance policies.
5. The petition for revision and review.
6. The notice of filing and calling up the petition for revision and review.

B. & K.,  
*Solicitors for J. A. S., Trustee in Bankruptcy  
of D. N. H. and L. H., Bankrupts.*

NOTE.—From record in *Holden v. Stratton*, 198 U. S. 202.  
See, also, *ante*, § 1655.

## § 1845. Form No. 177.

**PETITION FOR APPEAL TO CIRCUIT COURT OF APPEALS.**

[Caption.]

The above-named defendant, ———, a corporation, conceiving itself aggrieved by the judgment or decree made and entered in the above-entitled cause on the ——— day of ———, 19—, does hereby appeal from said judgment or decree to the United States Circuit Court of Appeals for the ——— Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And the said ———, prays that he be allowed this appeal, and that the transcript of record, papers and proceedings upon which said judgment or decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the ——— Circuit.

—————,  
*Attorney for Defendant.*

The within petition for appeal is hereby allowed.

—————,  
*Judge.*

## § 1846. Form No. 178.

**BOND ON APPEAL.**

Know All Men by These Presents:

That we, the ————, as principals, and the ———, having an office and usual place of business at No. ——— Street, in the city of ———, as sureties, are held and firmly bound unto ————, as trustee in bankruptcy of the estate and effects of ————, in the sum of ——— thousand dollars (\$———), lawful money of the United States of America, to be paid to the said ————, as trustee in bankruptcy of the estate and effects of ————, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this ——— day of ———, in the year one thousand nine hundred and —.

Whereas, the above-named has prosecuted an appeal to the United States Circuit Court of Appeals for the ——— Circuit, to reverse the decree rendered in the above-entitled suit, by the judge of the District Court of the United States, ——— District of ———.

Now, therefore, the condition of this obligation is such, that if the above-named A. W. Co. of New York and N. W. Co. shall prosecute their appeal to effect, and answer all damages and costs if he fails to



make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Acknowledgment.]

[Justification of Sureties.]

NOTE.—See *ante*, § 1647.

### § 1847. Form No. 179.

#### ASSIGNMENT OF ERRORS ON APPEAL TO CIRCUIT COURT OF APPEALS.

Come now the A. W. Co. of New York and the N. W. Co., appellants, and make and file the following assignment of errors, upon which they and each of them will rely upon the prosecution of their appeal from the decree made by this Honorable Court on March 4, 1910, and entered March 8, 1910, in the above entitled cause: [*Here specify errors.*]

In order that the foregoing assignment of error may be and appear of record, the defendants present the same to the Court, and pray that such disposition be made thereof as in accordance with law and statutes of the United States in such case made and provided, and defendants pray a reversal of the said decree appealed from, and each and every part thereof, entered by the United States District Court for the Southern District of New York.

H., H. & W.,

*Solicitors for Defendants.*

Office and Postoffice Address, No. 115 Broadway, Borough of Manhattan, City of New York.

NOTE.—From record of *Ludvigh v. American Woolen Co.*,  
See, also, *ante*, § 1646.

### § 1848. Form No. 180.

#### ORDER ALLOWING SUPERSEDEAS.

[Caption.]

The appellant, ———, having heretofore filed his petition for an appeal from a final decree rendered herein on the ——— day of ———, 19—, filed in the office of the clerk of the United States District Court on the ——— day of ———, 19—, and granting the prayer of the plaintiffs-appellees' bill of complaint upon the merits,

with costs, and having filed an assignment of errors, and said appeal having been heretofore allowed to the petitioner, aforesaid, it is

ORDERED, that the said appeal shall operate as a supersedeas of the decree entered herein on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, and shall stay the execution of said decree pending such appeal upon the execution of a bond in the penalty of the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_).

Dated \_\_\_\_\_, \_\_\_\_\_, 19—.

\_\_\_\_\_  
U. S. D. J.

§ 1849. Form No. 181.

**PETITION FOR WRIT OF ERROR IN CRIMINAL PROCEEDINGS.**

District Court of the United States, \_\_\_\_\_ District of \_\_\_\_\_,  
Criminal Branch.

United States of America,  
Plaintiff,

v.

\_\_\_\_\_,  
Defendant.

To the Honorable Judges of the United States Circuit Court of Appeals of \_\_\_\_\_ Judicial District:

Comes now the above-named defendant, by his attorneys, \_\_\_\_\_, and complains that in the record and proceedings had in the trial of the above cause, and also in the rendition of the judgment in the above-entitled cause in said United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, at the \_\_\_\_\_ term thereof, 19—, against the said defendant on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, manifest error hath happened, to the great damage of the said defendant.

WHEREFORE, said defendant prays for the allowance of a writ of error and for such other orders and processes as may cause the same to be corrected by the said United States Court of Appeals for the \_\_\_\_\_ Judicial Circuit.

Dated \_\_\_\_\_, \_\_\_\_\_, 19—.

\_\_\_\_\_  
*Attorneys for Defendant.*  
\_\_\_\_\_

Allowed:

\_\_\_\_\_, U. S. J.

NOTE.—See *ante*, § 1658.

## § 1850. Form No. 182.

**ORDER ALLOWING WRIT OF ERROR.**

At a stated term, to-wit, the ——— term, 19—, of the District Court of the United States in and for the ——— District of ———, held at ——— in the city of ———, on the ——— day of ———, 19—.

Present: Hon. ———, U. S. District Judge.

The United States of America,  
Plaintiff,

v.

———,  
Defendant.

On motion of ———, attorneys for the defendant, and upon filing a petition for a writ of error and an assignment of error, it is

ORDERED that a writ of error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Second District, the judgment heretofore rendered herein and the sentence pronounced thereon, and it is

FURTHER ORDERED that the defendant may hereafter and within ten days after the entry of this order file additional assignments of error *nunc pro tunc*.

———, U. S. J.

NOTE.—See *ante*, § 1658.

## § 1851. Form No. 183.

**PETITION FOR WRIT OF ERROR FROM STATE COURT.**

UNITED STATES OF AMERICA, State of Georgia:

To the Honorable W. H. F., Chief Justice of the Supreme Court of Georgia:

The petition of T. M. K., Administrator of E. K., deceased, respectfully shows:

That on the 17th day of February, 1911, the Supreme Court of Georgia rendered final judgment against your petitioner in a certain cause wherein your petitioner was plaintiff in error and LaG. M. defendant in error, affirming the judgment of the Supreme Court of Troup County, Georgia, against your petitioner and in favor of said LaG. M., in a suit filed by petitioner against said LaG. M. for the recovery of a one-fifth undivided interest in certain lands in said county, and for costs, as will fully appear by reference to the record and proceedings in said case, and that the said Supreme Court of Georgia is the highest court of said state in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment of the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, because it was contended by your petitioner before the Supreme Court of Georgia that the homestead exemption set apart in 1878 to G. K., bankrupt, was not subject to a judgment founded on a debt contracted prior to the adoption of the Constitution of the State of Georgia of 1868; that a sale of said homestead under an execution predicated on such judgment was void; that the title to the property thus sold remained in said G. K. until his death, when it descended by operation of law to his children, including plaintiff's estate; that under the agreed statement of facts, in which it appears that the defendant claims the premises under said void sale, the petitioner was entitled to recover the interest in the land sued for.

Upon the hearing of the said case the Supreme Court of Georgia held that "an exemption in bankruptcy made under the Constitution of 1868 is subject to a judgment founded on a debt contracted prior to the adoption of said Constitution," and affirmed the judgment of the court below in favor of the defendant therein and against your petitioner, as appears by the record of the proceedings in said cause, which is herewith submitted.

WHEREFORE, your petitioner prays the allowance of a writ of error, returnable to the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray, etc.

D. W. R., T. M. K.,  
*Adm'r of E. K., Petitioner.*  
*Attorney for Petitioner.*

Let the writ of error issue as prayed.

April 4, 1911.

W. H. F.,  
*Chief Justice of the Supreme Court of the State of Georgia.*

NOTE.—From record of *Kener v. La Grange Mills*, 231 U. S. 215.

## § 1852. Form No. 184.

### WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

The President of the United States of America to the Judges of the District Court of the United States for the ——— District of ———,  
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between ——— and ———, a manifest error hath happened, to the great damage of the said ———, as is said and appears by his complaint: we, being willing that such error, if any hath been, should

be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the ——— Circuit, at the city of ———, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the ——— day of ———, 19—, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the ——— Circuit may cause further to be done therein, to correct the error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable ———, associate justice of the Supreme Court of the United States, this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, and of the independence of the United States the one hundred and ———.

—————,  
*Clerk of the Circuit Court of the United  
 States of America for the ——— Dis-  
 trict of ———, in the ——— Circuit.*

The foregoing writ is hereby allowed.

—————,  
*U. S. Judge.*

The execution of the judgment herein is hereby stayed pending the hearing and determination of this writ of error in the Circuit Court of Appeals for the ——— Circuit, and the defendant is hereby admitted to bail in the sum of ——— dollars (\$———).

NOTE.—See *ante*, § 1643.

§ 1853. Form No. 185.

**PETITION FOR CERTIORARI.**

[Caption.]

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, ——— ———, brings this, his petition for a writ of certiorari, to bring before this court a final judgment of the United States Circuit Court of Appeals for the ——— Circuit, confirming [*or reversing*] a decree of the District Court of the United States for the ——— District of ———, whereby it is held: ———.

Said judgment was entered in a certain suit pending in said court under the style of ——— ——— v. ——— ———.

The proceedings leading up to the judgments and decrees aforesaid are as follows: ———.

It is maintained that the Circuit Court of Appeals erred in entering the judgment aforesaid, and that this honorable court should require the said case to be certified to it for its review and determination in conformity with the provisions of the acts of Congress in such case made and provided, for the following reasons:

*[Here state such matters as the importance of the question; the diversity of opinions thereon as shown by different decisions of the lower courts, etc.]*

The contention of your petitioner is:

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Circuit Court of Appeals of the ——— Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a final and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case herein entitled: ———, Appellant, v. ———, Appellee, No. ———, to the end that the said cause may be reviewed and determined by this court, as provided by law; and that your petitioner may have such other relief or remedy in the premises as to this court may seem appropriate, and that said judgment of the Circuit Court of Appeals in said case, and every part thereof, may be reviewed by this honorable court.

And your petitioner will ever pray.

[Verification.]

\_\_\_\_\_,  
Attorney for Petitioner.

#### § 1854. Form No. 186.

### CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS TO THE UNITED STATES SUPREME COURT.

[Caption.]

In this case, duly argued and submitted to this court, there arise questions of law, concerning which this court desires the instructions and advice of the Supreme Court of the United States.

The facts so far as necessary for the determination of said questions of law are as follows: ———.

The opinion of the District Court upon the hearing referred to above is reported in *In re* ———, ———, Fed. R. ———. The petitioner here, by his original petition, has presented the matters of law raised by the order so made by the District Court sitting in bankruptcy.

The questions of law upon which this court desires the advice and instruction of the Supreme Court are: ———.

First.

Second.

These questions the court on this day certified and submitted to the Supreme Court of the United States for its proper decision.

Dated ———, 19—.

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,  
*Judges of the U. S. Circuit Court  
of Appeals for the ——— Cir-  
cuit, Sitting in Said Cause.*

NOTE.—See *ante*, § 1665.

### § 1855. Form No. 187.

#### CERTIFICATE OF CLERK TO TRANSCRIPT.

UNITED STATES OF AMERICA, Southern District of New York, ss:

I ———, clerk of the District Court of the United States of America for the ——— District of New York, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the pages, numbered from one to ———, inclusive, contain a true and complete transcript of the record and proceedings had in the said court in the cause of ———, Plaintiff in Error, against ——— ———, Defendant in Error, as the same remain of record and on file in said office.

IN TESTIMONY WHEREOF I have caused the seal of the said court to be hereunto affixed, at the city of ———, in the ——— District of New York, this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, and of the independence of the United States one hundred and ———.

\_\_\_\_\_, Clerk.

### § 1856. Form No. 188.

#### STIPULATION AS TO TRANSCRIPT.

[Caption.]

To the Clerk of the Circuit Court of Appeals for the ——— Circuit:

Sir: It is hereby stipulated and agreed that the certified transcript of record heretofore filed herein in the office of the clerk of the Supreme Court of the United States, on the ——— day of ———, ———, be taken as a return to the writ of certiorari granted herein on the ———

day of \_\_\_\_\_, \_\_\_\_\_, with the same force and effect as if filed in pursuance of said writ.

Dated \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_,  
*Attorney for Plaintiff in Error.*

\_\_\_\_\_,  
*Attorney for Defendant in Error.*

RECEIVED TO THE CLERK OF THE COURT



# GENERAL ORDERS IN BANKRUPTCY

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ADOPTED AND ESTABLISHED BY THE SUPREME COURT  
OF THE UNITED STATES, NOVEMBER 23, 1898

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[AS AMENDED]

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In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

## I

### DOCKET

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

Secs. 163, 177.

## II

### FILING OF PAPERS

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

Secs. 30, 163, 177.

## III

## PROCESS

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

Secs. 30, 145-149.

## IV

## CONDUCT OF PROCEEDINGS

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

Secs. 9, 177, 454.

## V

## FRAME OF PETITIONS

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

Secs. 153, 400.

## VI

## PETITIONS IN DIFFERENT DISTRICTS

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more peti-

tions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

Secs. 14, 27.

## VII

### PRIORITY OF PETITIONS

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

Secs. 9, 14, 27, 113, 247.

## VIII

### PROCEEDINGS IN PARTNERSHIP CASES

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

Secs. 189-197, 263, 270-276, 399, 836-840.

## IX

### SCHEDULE IN INVOLUNTARY BANKRUPTCY

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file,

within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

Secs. 344, 398.

## X

### INDEMNITY FOR EXPENSES

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

Secs. 31, 34, 365, 669.

## XI

### AMENDMENTS

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

Secs. 164-173, 408, 993.

## XII

### DUTIES OF REFEREE

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

Secs. 9, 10, 30, 322, 333, 334, 422, 424, 425.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United

States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

Secs. 1040, 1201, 1214, 1580.

### XIII

#### APPOINTMENT AND REMOVAL OF TRUSTEE

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

Secs. 9, 682, 700.

### XIV

#### NO OFFICIAL OR GENERAL TRUSTEE

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

Sec. 675.

### XV

#### TRUSTEE NOT APPOINTED IN CERTAIN CASES

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

Secs. 435, 443, 678.

### XVI

#### NOTICE TO TRUSTEE OF HIS APPOINTMENT

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

Sec. 684.

### XVII

#### DUTIES OF TRUSTEE

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the

exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

Secs. 713-740, 994.

## XVIII

### SALE OF PROPERTY

1. All sales shall be by public auction unless otherwise ordered by the court.

Secs. 727, 1275-1284, 1364.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

Sec. 1278.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

Secs. 220, 727, 1279.

## XIX

### ACCOUNTS OF MARSHAL

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

Secs. 35, 1344.

## XX

### PAPERS FILED AFTER REFERENCE

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

Sec. 603.

## XXI

## PROOF OF DEBTS

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

Secs. 185, 595, 607-614.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

Sec. 342.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

Sec. 610.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

Sec. 597.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public.

When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

Secs. 454, 463.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

Secs. 444, 662-669.

## XXII

### TAKING OF TESTIMONY

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

Secs. 463-506.

## XXIII

### ORDERS OF REFEREE

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

Sec. 348.

## XXIV

### TRANSMISSION OF PROVED CLAIMS TO CLERK

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

## XXV

### SPECIAL MEETING OF CREDITORS

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors



in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

Sec. 443.

## XXVI

### ACCOUNTS OF REFEREE

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

Secs. 367, 368, 1344.

## XXVII

### REVIEW BY JUDGE

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

Secs. 355-361, 408.

## XXVIII

### REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

Secs. 724, 726, 773, 872, 1188.

## XXIX

### PAYMENT OF MONEYS DEPOSITED

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or

warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

Sec. 341.

### XXX

#### IMPRISONED DEBTOR

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

Sec. 427.

### XXXI

#### PETITION FOR DISCHARGE

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

### XXXII

#### OPPOSITION TO DISCHARGE OR COMPOSITION

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

Secs. 1213, 1458, 1468.

### XXXIII

#### ARBITRATION

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a

bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

Secs. 1186-1194.

### XXXIV

#### COSTS IN CONTESTED ADJUDICATIONS

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

Secs. 1319, 1335, 1337, 1360.

### XXXV

#### COMPENSATION OF CLERKS, REFEREES AND TRUSTEES

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

Secs. 34, 365.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

Sec. 705.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

Secs. 32, 34, 363, 369, 371, 1483.

## XXXVI

## APPEALS

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

Sec. 1646.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

Secs. 1667. See also Acts of 1915 and 1916, p. 1450, *post*.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

Sec. 1666.

## XXXVII

## GENERAL PROVISIONS

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

Secs. 178, 180, 243, 357, 1093.

## XXXVIII

## FORMS

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

# BANKRUPTCY ACT OF 1898, AS AMENDED

[Under the various provisions of the Act will be found references to specific sections of the text where such provisions are treated.]

## CHAPTER I

### DEFINITIONS

#### § 1. Meaning of words and phrases.

**Meaning of words and phrases.** SEC. 1. (a) The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;  
Secs. 883, 1042.

(2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;  
Sec. 1069.

(3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;  
Sec. 423.

(5) "clerk" shall mean the clerk of a court of bankruptcy;

(6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;  
Secs. 332, 333, 1168, 1192, 1345, 1580.

(8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory, and of Alaska;  
Sec. 8.

(9) "creditor" shall include any one who owns a demand or claim

provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

Secs. 454, 595, 927, 1202.

(10) "date of bankruptcy" or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) "debt" shall include any debt, demand, or claim provable in bankruptcy;

Sec. 67.

(12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) "document" shall include any book, deed, or instrument in writing;

(14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

Sec. 947.

(15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

Secs. 40, 41, 880.

(16) "judge" shall mean a judge of a court of bankruptcy, not including the referee;

Sec. 28.

(17) "oath" shall include affirmation;

(18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

Secs. 36, 471.

(19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;

Sec. 27.

(20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead;

(22) "conceal" shall include secrete, falsify, and mutilate;

(23) "secured creditor" shall include a creditor who has security for

his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

Secs. 310, 451.

(24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

Secs. 785, 952.

(26) "trustee" shall include all of the trustees of an estate;

(27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

Secs. 1369-1375.

(28) words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) words importing the plural number may be applied to and mean only a single person or thing;

(30) words importing the singular number may be applied to and mean several persons or things. [1 July, 1898, 30 Stat. L., 544, c. 541, s. 1; 2 Supp., 843.]

## CHAPTER II

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION

#### § 2. Courts of bankruptcy.

**Courts of bankruptcy.** SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

Secs. 8-10, 12, 13, 19, 22, 23, 25, 27, 243, 262, 333, 1099.

(1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of

competent jurisdiction without the United States and have property within their jurisdictions;

Secs. 8, 14-17, 21, 69, 156.

(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

Secs. 8, 668.

(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

Secs. 8, 198-242, 1168, 1357.

(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

Secs. 8, 723, 1609.

(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight;

Secs. 8, 13, 19, 707, 708, 1333.

(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

Sec. 8.

(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

Secs. 8, 1096, 1406-1441.

(8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

Secs. 1427-1432.

(9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

Secs. 8, 1241-1252.

(10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

Secs. 8, 356, 359.

(11) determine all claims of bankrupts to their exemptions;

Secs. 8, 985-1026.

(12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

Secs. 8, 1442-1520.



(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;  
Secs. 8, 18, 394, 432, 475, 1577-1608.

(14) extradite bankrupts from their respective districts to other districts;  
Secs. 8, 430-432.

(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;  
Secs. 8, 10, 18, 248, 427.

(16) punish persons for contempts committed before referees;  
Secs. 8, 394, 475, 1577-1608.

(17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;  
Secs. 8, 700.

(18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;  
Secs. 8, 306, 336.

(19) transfer cases to other courts of bankruptcy; and  
Secs. 8, 27.

(20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. [1 July, 1898, 30 Stat. L., 545, c. 541, s. 2; 2 Supp., 845. 5 Feb., 1903, 32 Stat. L., 797, c. 487, s. 1. 25 June, 1910, 36 Stat. L., 838, c. 412, ss. 1, 2.]

Secs. 8, 12, 13, 1103, 1173, 1254.

## CHAPTER III

### BANKRUPTS

- § 3. Acts of bankruptcy.
- § 4. Who may become bankrupts.
- § 5. Partners.
- § 6. Exemptions of bankrupts.
- § 7. Duties of bankrupts.
- § 8. Death or insanity of bankrupts.
- § 9. Protection and detention of bankrupts.

- § 10. Extradition of bankrupts.
- § 11. Suits by and against bankrupts.
- § 12. Compositions, when confirmed.
- § 13. Compositions, when set aside.
- § 14. Discharges, when granted.
- § 15. Discharges, when revoked.
- § 16. Co-debtors of bankrupts.
- § 17. Debts not affected by discharge.

**Acts of bankruptcy.** SEC. 3. (a) Acts of bankruptcy by a person shall consist of his having  
Secs. 3, 9, 39, 160, 161, 267.

(1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

Secs. 37, 42, 45-49, 254.

(2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

Secs. 37, 40, 41, 43-48, 50, 162.

(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

Secs. 37, 40, 41, 51, 54, 254.

(4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or

Secs. 20, 37, 41, 52, 94.

(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Secs. 37, 52, 53, 84, 85, 250.

(b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after

Secs. 50, 54, 55, 181.

(1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

Sec. 21.

(c) It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

Secs. 55, 181, 251, 254.

(d) Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all

matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

Secs. 56, 254.

(e) Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. [1 July, 1898, 30 Stat. L., 546, c. 541, s. 3; 2 Supp., 846. 5 Feb., 1903, 32 Stat. L., 797, c. 487, s. 2.]

Secs. 204, 306-308.

**Who may become bankrupts.** SEC. 4. (a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

Secs. 40, 58-65, 71, 84, 89, 110-114, 159, 392.

(b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. [1 July, 1898, 30 Stat. L., 547, c. 541, s. 4; 2 Supp., 847. 5 Feb., 1903, 32 Stat. L., 797, c. 487, s. 3. 25 June, 1910, 36 Stat. L., 839, c. 412, ss. 3, 4.]

Secs. 58, 59, 61, 62, 65-83, 85-96, 109, 117, 118, 159, 181, 392, 1533.

**Partners.** SEC. 5. (a) A partnership during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

Secs. 41, 45, 88, 91, 94, 97-109, 138, 189-197, 270-276, 295, 391, 557-559, 836-840, 935, 1010.

(b) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

Secs. 449, 677.

(c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

(d) The trustees shall keep separate accounts of the partnership property and of the property belonging to the individual partners.  
Sec. 721.

(e) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.  
Secs. 1312-1344.

(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

Secs. 1433-1441.

(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Sec. 1440.

(h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. [1 July, 1898, 30 Stat. L., 547, c. 541, s. 5; 2 Supp., 847.]

Secs. 103, 107, 840.

**Exemptions of bankrupts.** SEC. 6. (a) This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. [1 July, 1898, 30 Stat. L., 548, c. 541, s. 6; 2 Supp., 848.]

Secs. 40, 955, 985-1038, 1262.

**Duties of bankrupts.** SEC. 7. The bankrupt shall

Secs. 414-421.

(1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for discharge, if filed;

Secs. 393, 439.

(2) comply with all lawful orders of the court;

Secs. 394, 724, 1503.

(3) examine the correctness of all proofs of claims filed against his estate;

Secs. 396, 653.

(4) execute and deliver such papers as shall be ordered by the court;

(5) execute to his trustee transfers of all his property in foreign countries;

Sec. 1294.

(6) immediately inform his trustees of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

Secs. 33, 344, 397-412, 743, 992.

(9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding: *Provided, however,* That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown; and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. [1 July, 1898, 30 Stat. L., 548, c. 541; 2 Supp., 848.]

Secs. 215, 411, 465, 468, 487, 494, 506, 1595, 1610, 1623, 1628.

**Death or insanity of bankrupts.** SEC. 8. (a) The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence. [1 July, 1898, 30 Stat. L., 549, c. 541, s. 7; 2 Supp., 848.]

Secs. 377-392, 811, 1310.

**Protection and detention of bankrupts.** SEC. 9. (a) A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court

having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Secs. 422-427.

(b) The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto. [1 July, 1898, 30 Stat. L., 549, c. 541, s. 9; 2 Supp., 849.]

Secs. 18, 428, 429.

**Extradition of bankrupts.** SEC. 10. (a) Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another. [1 July, 1898, 30 Stat. L., 549, c. 541, s. 10; 2 Supp., 849.]

Secs. 430-432.

**Suits by and against bankrupts.** SEC. 11. (a) A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

Secs. 9, 10, 210, 1039-1078, 1087, 1091, 1116, 1534.

(b) The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

Secs. 9, 1079-1086, 1112.

(c) A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

Secs. 9, 1088-1091, 1112.

(d) Suits shall not be brought by or against a trustee of a bankrupt

estate subsequent to two years after the estate has been closed. [1 July, 1898, 30 Stat. L., 549, c. 541, s. 11; 2 Supp., 849.]  
Secs. 1139.

**Compositions, when confirmed.** SEC. 12. (a) A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

Secs. 1195-1206.

(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

Secs. 1207-1220.

(c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

Secs. 1212-1215, 1249.

(d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

Secs. 1215-1240, 1249.

(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. [1 July, 1898, 30 Stat. L., 549, c. 541, s. 12; 2 Supp., 849. 25 June, 1910, 36 Stat. L., 839, c. 412, s. 5.]

Secs. 1223-1240.

**Compositions, when set aside.** SEC. 13. (a) The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition. [1 July, 1898, 30 Stat. L., 550, c. 541, s. 13; 2 Supp., 850.]

Secs. 757, 1241-1252.

**Discharges, when granted.** SEC. 14. (a) Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

Secs. 22, 23, 1442-1453.

(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has

Secs. 1217, 1454-1507.

(1) committed an offense punishable by imprisonment as herein provided; or

Secs. 1478, 1488.

(2) with intent to conceal his financial condition, destroyed, canceled, or failed to keep books of account or records from which such condition might be ascertained; or

(3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or

Sec. 1495.

(4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or

Secs. 1496-1501.

(5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or

Secs. 113, 1502.

(6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

Secs. 504, 1503.

(c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. [1 July, 1898, 30 Stat. L., 550, c. 541, s. 14; 2 Supp., 850. 5 Feb., 1903, 32 Stat. L., 797, c. 487, s. 4. 25 June, 1910, 36 Stat. L., 839, c. 412, s. 6.]

Secs. 1228-1240.

**Discharges, when revoked.** SEC. 15. (a) The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was



obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge. [1 July, 1898, 30 Stat. L., 550, c. 541, s. 15; 2 Supp., 850.]

Secs. 757, 1241-1252, 1508-1520.

**Co-debtors of bankrupts.** SEC. 16. (a) The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. [1 July, 1898, 30 Stat. L., 550, c. 541, s. 16; 2 Supp., 850.]

Secs. 1233, 1539-1543.

**Debts not affected by a discharge.** SEC. 17. (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

Secs. 1521-1538, 1544-1576.

(1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

Sec. 1551.

(2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

Secs. 1548, 1552, 1559, 1560, 1561.

(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

Secs. 407, 1569.

(4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. [1 July, 1898, 30 Stat. L., 550, c. 541, s. 17; 2 Supp., 850. 5 Feb., 1903, 32 Stat. L., 798, c. 487, s. 5.]

Sec. 1557.

## CHAPTER IV

### COURTS AND PROCEDURE THEREIN

§ 18. Process, pleadings, and adjudications.

§ 19. Jury trials.

§ 20. Oaths, affirmations.

§ 21. Evidence.

§ 22. Reference of cases after adjudication.

§ 23. Jurisdiction of United States and State courts.

§ 24. Jurisdiction of appellate courts.

§ 25. Appeals and writs of error.

§ 26. Arbitration of controversies.

§ 27. Compromises.

§ 28. Designation of newspapers.

§ 29. Offenses.

§ 30. Rules, forms, and orders.

§ 31. Computation of time.

§ 32. Transfer of cases.

**Process, pleadings, and adjudications.** SEC. 18. (a) Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in

the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

Secs. 11, 12, 21, 148, 149, 153, 155-162, 195-197, 472.

(b) The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

Secs. 14, 85, 143, 175, 178, 179, 245.

(c) All pleadings setting up matters of fact shall be verified under oath.

Secs. 112, 177, 183-188.

(d) If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

Secs. 22, 23, 26, 27, 243-260, 279-302.

(e) If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

Sec. 277.

(f) If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Secs. 30, 277, 320.

(g) Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee. [1 July, 1898, 30 Stat. L., 551, c. 541, s. 18; 2 Supp., 851. 5 Feb., 1903, 32 Stat. L., 798, c. 487, s. 6.]

Secs. 30, 269, 320.

**Jury trials.** SEC. 19. (a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

Secs. 52, 261-268, 1160, 1249, 1469.

(b) If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Sec. 266.

(c) The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws in force or such as may be enacted in relation to trials by jury. [1 July, 1898, 30 Stat. L., 551, c. 541, s. 19; 2 Supp., 851.]

Sec. 1626.

**Oaths, affirmations.** SEC. 20. (a) Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Secs. 459, 460.

(b) Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath. [1 July, 1898, 30 Stat. L., 551, c. 541, s. 20; 2 Supp., 852.]

Sec. 461.

**Evidence.** SEC. 21. (a) A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Secs. 465-469, 471, 473-496, 503-506, 1472, 1595.

(b) The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

Secs. 498-502.

(c) Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Sec. 499.

(d) Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with

like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

Sec. 351.

(e) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

Sec. 841.

(f) A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

Sec. 1252.

(g) A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. [1 July, 1898, 30 Stat. L., 552, c. 541, s. 21; 2 Supp., 852. 5 Feb., 1903, 32 Stat. L., 798, c. 487, s. 7.]

Sec. 1239.

**Reference of cases after adjudication.** SEC. 22. (a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

Secs. 14, 321.

(b) The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another. [1 July, 1898, 30 Stat. L., 552, c. 541, s. 22; 2 Supp., 852.]

Secs. 321, 323.

**Jurisdiction of United States and State courts.** SEC. 23. (a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Secs. 9, 10, 18, 19, 243, 1092-1094, 1104-1166.

(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, sub-division (b), section sixty-seven, sub-division (e), and section seventy, sub-division (e). [1 July, 1898, 30 Stat. L., 552, c. 541, s. 23; 2 Supp.,

853. 5 Feb., 1903, 32 Stat. L., 798, c. 487, s. 8. 25 June, 1910, 36 Stat. L., 840, c. 412, s. 7.]

Secs. 9, 10, 1095-1185.

(c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Secs. 723, 1609. Jud. Code, § 290, abolishing circuit courts, impliedly repeals this section.

**Jurisdiction of appellate courts.** SEC. 24. (a) The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

Secs. 1631, 1642, 1643, 1645, 1651, 1653, 1662-1664.

(b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved. [1 July, 1898, 30 Stat. L., 553, c. 541, s. 24; 2 Supp., 853.]

Secs. 1075, 1631, 1634, 1643, 1650-1656.

**Appeals and writs of error.** SEC. 25. (a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation as the case may be.

Secs. 141, 206, 288, 306, 1240, 1631-1649.

(b) From any final decision of a court of appeals allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases, and no other: (1) Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or (2) where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

Secs. 1643, 1657-1668. See also Acts of 1915 and 1916, p. 1450, *post*, which practically repeal this subdivision.

(c) Trustees shall not be required to give bond when they take appeals or sue out writs of error.

Sec. 1647.

(d) Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted. [1 July, 1898, 30 Stat. L., 553, c. 541, s. 25; 2 Supp., 853.]

Sec. 1665.

**Arbitration of controversies.** SEC. 26. (a) The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

Secs. 1186-1192.

(b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

Sec. 1193.

(c) The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury. [1 July, 1898, 30 Stat. L., 553, c. 541, s. 26; 2 Supp., 854.]

Sec. 1194.

**Compromises.** SEC. 27. (a) The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate. [1 July, 1898, 30 Stat. L., 553, c. 541, s. 27; 2 Supp., 854.]

Secs. 1187, 1190-1192.

**Designation of newspapers.** SEC. 28. (a) Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published. [1 July, 1898, 30 Stat. L., 554, c. 541, s. 28; 2 Supp., 854.]

Secs. 11, 436.

**Offenses.** SEC. 29. (a) A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

Secs. 723, 1621.

(b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

Sec. 1217.

(1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or  
Secs. 395, 1611, 1614.

(2) made a false oath or account in, or in relation to, any proceeding in bankruptcy;  
Secs. 1488, 1612-1614.

(3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or  
Secs. 396, 454, 1615.

(4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or  
Sec. 1616.

(5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.  
Sec. 1618.

(c) A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) acted as a referee in a case in which he is directly or indirectly interested; or  
Sec. 1620.

(2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or  
Sec. 1620.

(3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.  
Secs. 1620, 1621.

(d) A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense. [1 July, 1898, 30 Stat. L., 554, c. 541, s. 29; 2 Supp., 854.]  
Sec. 1622.

**Rules, forms, and orders.** SEC. 30. (a) All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States. [1 July, 1898, 30 Stat. L., 554, c. 541, s. 30; 2 Supp., 855.]

**Computation of time.** SEC. 31. (a) Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday. [1 July, 1898, 30 Stat. L., 554, c. 541, s. 31; 2 Supp., 855.]  
Secs. 54, 163, 947, 1645.

**Transfer of cases.** SEC. 32. (a) In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest. [1 July, 1898, 30 Stat. L., 554, c. 541, s. 32; 2 Supp., 855.]

Sec. 27.

## CHAPTER V

### OFFICERS, THEIR DUTIES AND COMPENSATION

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**Creation of two offices.** SEC. 33. (a) The offices of referee and trustee are hereby created. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 33; 2 Supp., 855.]

Sec. 309.

**Appointment, removal, and districts of referees.** SEC. 34. (a) Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction,

(1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and

Secs. 312, 314, 316, 319.

(2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 34; 2 Supp., 855.]

Sec. 310.

**Qualifications of referees.** SEC. 35. (a) Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy, or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein



they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 35; 2 Supp., 855.]

Secs. 310, 315.

**Oaths of office of referees.** SEC. 36. (a) Referees shall take the same oath of office as that prescribed for judges of United States courts. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 36; 2 Supp., 855.]

Sec. 317.

**Number of referees.** SEC. 37. (a) Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 37; 2 Supp., 855.]

Sec. 310.

**Jurisdiction of referees.** SEC. 38. (a) Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

Secs. 277, 324-338.

(2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

Secs. 324-338, 472.

(3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act;

Secs. 30, 324-338.

(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

Secs. 324-338, 1192, 1214.

(5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 38; 2 Supp., 855.]

Secs. 215, 324-338, 366, 501, 504.

**Duties of referees.** SEC. 39. (a) Referees shall

(1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

Secs. 341, 1408.

(2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

Sec. 343.

(3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; Secs. 325, 345.

(4) give notices to creditors as herein provided; Sec. 342.

(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; Secs. 350, 356, 362.

(6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; Secs. 344, 398.

(7) safely keep perfect, and transmit to the clerk the records, herein required to be kept by them, when the cases are concluded; Sec. 33.

(8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; Secs. 33, 350.

(9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and Sec. 350.

(10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. Sec. 33.

(b) Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy. [1 July, 1898, 30 Stat. L., 555, c. 541, s. 39; 2 Supp., 856.] Sec. 1620.

**Compensation of referees.** SEC. 40. (a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

Secs. 31, 363, 369, 370, 374, 375.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

Sec. 372.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. [1 July, 1898, 30 Stat. L., 556, c. 541, s. 40; 2 Supp., 856. 5 Feb., 1903, 32 Stat. L., 799, c. 487, s. 9.]

Sec. 373.

**Contempts before referees.** SEC. 41. (a) A person shall not, in proceedings before a referee,

Sec. 431.

(1) disobey or resist any lawful order, process, or writ;  
Sec. 1580.

(2) misbehave during a hearing or so near the place thereof as to obstruct the same;

(3) neglect to produce, after having been ordered to do so, any pertinent document; or  
Sec. 1587.

(4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance, shall be first paid or tendered to him.

Secs. 1590, 1595, 1602.

(b) The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court. [1 July, 1898, 30 Stat. L., 556, c. 541, s. 41; 2 Supp., 857.]

Secs. 394, 493, 504, 1599-1605.

**Records of referees.** SEC. 42. (a) The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are kept in equity cases in district courts of the United States.

Sec. 350.

(b) A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

(c) The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records

of the court. [1 July, 1898, 30 Stat. L., 556, c. 541, s. 42; 2 Supp., 857.]

**Referee's absence or disability.** SEC. 43. (a) Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy. [1 July, 1898, 30 Stat. L., 557, c. 541, s. 43; 2 Supp., 857.]

Sec. 313.

**Appointment of trustees.** SEC. 44. (a) The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so. [1 July, 1898, 30 Stat. L., 557, c. 541, s. 44; 2 Supp., 857.]

Secs. 9, 26, 441, 677, 683, 696-700.

**Qualifications of trustees.** SEC. 45. (a) Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed. [1 July, 1898, 30 Stat. L., 557, c. 541, s. 45; 2 Supp., 857.]

Secs. 685-689.

**Death or removal of trustees.** SEC. 46. (a) The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor. [1 July, 1898, 30 Stat. L., 557, c. 541, s. 46; 2 Supp., 858.]

Secs. 701, 1141.

**Duties of trustees.** SEC. 47. (a) Trustees shall respectively

(1) account for and pay over to the estates under their control all interest received by them on property of such estates;

Sec. 730.

(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied;

Secs. 321, 748, 774, 788, 796, 835, 859, 906, 1310, 1370.

(3) deposit all money received by them in one of the designated depositories;

Sec. 728.

(4) disburse money only by check or draft on the depositories in which it has been deposited;

(5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

Sec. 723.

(6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

Secs. 13, 721.

(7) lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

Secs. 13, 721.

(9) pay dividends within ten days after they are declared by the referees;

Secs. 733, 1408.

(10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the court; and

Secs. 13, 721.

(11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

Secs. 732, 992.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

Sec. 717.

(c) The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. [1 July, 1898, 30 Stat. L., 557, c. 541, s. 47; 2 Supp., 858. 5 Feb., 1903, 32 Stat. L., 799, c. 487, s. 10. 25 June, 1910, 36 Stat. L., 840, c. 412, s. 8.]

Secs. 719, 841.

**Compensation of trustees.** SEC. 48. (a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred

dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

Secs. 13, 31, 702-709, 712.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

Sec. 710.

(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

Secs. 13, 711.

(d) Receivers or marshals appointed pursuant to section two, subdivision three, shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight.

Secs. 224-233, 1344.

(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of

one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars; *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight. [1 July, 1898, 30 Stat. L., 557, c. 541, s. 48; 2 Supp., 858. 5 Feb., 1903, 32 Stat. L., 799, c. 487, s. 11. 25 June, 1910, 36 Stat. L., 840, c. 412, s. 9.] Secs. 227, 232, 707, 712, 1330, 1344.

**Accounts and papers of trustees.** SEC. 49. (a) The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest. [1 July, 1898, 30 Stat. L., 558, c. 541, s. 49; 2 Supp., 859.] Sec. 723.

**Bonds of referees and trustees.** SEC. 50 (a) Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties. Sec. 318.

(b) Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. Secs. 690-695.

(c) The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. Secs. 441, 692.

(d) The court shall require evidence as to the actual value of the property of sureties. Secs. 318, 693.

(e) There shall be at least two sureties upon each bond. Sec. 693.

(f) The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. Secs. 318, 693.

(g) Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon

the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Sec. 693.

(h) Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Secs. 33, 318, 691, 728, 738.

(i) Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

(j) Joint trustees may give joint or several bonds.

Sec. 691.

(k) If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

Secs. 318, 694.

(l) Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

Sec. 318.

(m) Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed. [1 July, 1898, 30 Stat. L., 558, c. 541, s. 50; 2 Supp., 859.]

Sec. 738.

**Duties of clerks. SEC. 51. (a)** Clerks shall respectively

(1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

Sec. 29.

(2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees;

Secs. 29, 31, 32, 363, 369, 704.

(3) deliver to the referees upon application all papers which may be referred to them, or if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they had been used;

Sec. 29.

(4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition. [1 July, 1898, 30 Stat. L., 558, c. 541, s. 51; 2 Supp., 859.]

Sec. 29.

**Compensation of clerks and marshals. SEC. 52. (a)** Clerks shall respectively receive as full compensation for their service to each estate,



a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

Secs. 31, 33.

(b) Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws in force, or such as may be enacted, fixing the compensation of marshals. [1 July, 1898, 30 Stat. L., 559, c. 541, s. 52; 2 Supp., 860.]

Sec. 35.

**Duties of Attorney-General.** SEC. 53. (a) The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important. [1 July, 1898, 30 Stat. L., 559, c. 541, s. 53; 2 Supp., 860.]

Secs. 36, 352.

**Statistics of bankruptcy proceedings.** SEC. 54. (a) Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so. [1 July, 1898, 30 Stat. L., 559, c. 541, s. 54; 2 Supp., 860.]

Secs. 36, 352.

## CHAPTER VI

### CREDITORS

§ 55. Meetings of creditors.

§ 56. Voters at meetings of creditors.

§ 57. Proof and allowance of claims.

§ 58. Notice to creditors.

§ 59. Who may file and dismiss petitions.

§ 60. Preferred creditors.

**Meetings of creditors.** SEC. 55. (a) The court shall cause the first meeting of the creditors of a bankrupt, to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

Secs. 11, 393, 433, 435, 436.

(b) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow

the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

Secs. 340, 438-440, 487.

(c) The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

Sec. 446.

(d) A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

Secs. 442-445.

(e) The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

Sec. 443.

(f) Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered. [1 July, 1898, 30 Stat. L., 559, c. 541, s. 55; 2 Supp., 860.]

Sec. 445.

**Voters at meetings of creditors.** SEC. 56. (a) Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

Secs. 177, 449, 450, 452, 453, 455-457, 1202.

(b) Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess. [1 July, 1898, 30 Stat. L., 560, c. 541, s. 56; 2 Supp., 861.]

Secs. 134, 451, 1203, 1345-1401.

**Proof and allowance of claims.** SEC. 57. (a) Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

Secs. 134, 177, 592-599, 607-612, 615-617, 661, 670-674.

(b) Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

Secs. 602, 613.

(c) Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

Secs. 600-605, 733, 859, 1203.

(d) Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Secs. 9, 592, 640-650, 660.

(e) Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

Secs. 9, 440, 451, 629-639, 1345-1401.

(f) Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

Secs. 651-659.

(g) The claims of creditors who have received preferences, voidable under section sixty, subdivision (b), or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision (e), have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

Secs. 451, 618-627, 1411.

(h) The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Secs. 631, 636, 1203, 1407.

(i) Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

Secs. 597, 638, 1555.

(j) Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

Secs. 533, 566-569.

(k) Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

Secs. 9, 662-669, 1470.

(l) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

Sec. 1419.

(m) The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

Sec. 628.

(n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer. [1 July, 1898, 30 Stat. L., 560, c. 541, s. 57; 2 Supp., 861. 5 Feb., 1903, 32 Stat. L., 799, c. 487, s. 12.]

Secs. 606, 617, 1224.

**Notice to creditors.** SEC. 58. (a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of

Secs. 150-152, 249, 287, 342, 1344, 1516.

(1) all examinations of the bankrupt;

Sec. 485.

(2) all hearings upon applications for the confirmation of compositions;

Sec. 1213.

(3) all meetings of creditors;

Secs. 436, 444.

(4) all proposed sales of property;

Sec. 727.

(5) the declaration and time of payment of dividends;

Sec. 1410.

(6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon;

Sec. 1425.

(7) the proposed compromise of any controversy;

Secs. 1188, 1191.

(8) the proposed dismissal of the proceedings; and

Secs. 286, 308.

(9) there shall be thirty days' notice of all applications for the discharge of bankrupts.

Sec. 1450.

(b) Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

Secs. 11, 303-308.

(c) All notices shall be given by the referee, unless otherwise ordered by the judge. [1 July, 1898, 30 Stat. L. 561, c. 541, s. 58; 2 Supp., 862. 25 June, 1910, 36 Stat. L., 841, c. 412, s. 9½.]

Secs. 286, 342.

**Who may file and dismiss petitions.** SEC. 59. (a) Any qualified person may file a petition to be adjudged a voluntary bankrupt.

Secs. 110, 113-115, 150-152, 155-162, 189-192, 249, 271.

(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

Secs. 112, 117, 119-143, 150-152, 155-162, 181, 195-197, 203, 249.

(c) Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

Secs. 33, 163.

(d) If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

Sec. 152.

(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

Secs. 124-142.

(f) Creditors other than original petitioners may at any time enter  
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their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Secs. 138-142, 175.

(g) A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors; and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. [1 July, 1898, 30 Stat. L., 561, c. 541, s. 59; 2 Supp., 862. 25 June, 1910, 36 Stat. L., 841, c. 412, s. 10.]

Secs. 116, 143, 279-286, 328.

**Preferred creditors.** SEC. 60. (a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

Secs. 3, 9, 621, 925-981½.

(b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Secs. 3, 619, 724, 783, 879, 925, 926, 929, 932, 948, 967-977, 1094, 1096, 1101, 1116, 1156.

(c) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

Sec. 982.

(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. [1 July, 1898, 30 Stat. L., 562, c. 541, s. 60; 2 Supp., 863. 5 Feb., 1903, 32 Stat. L., 799, c. 487, s. 13. 25 June, 1910, 36 Stat. L., 842, c. 412, s. 11.]

Secs. 724, 983, 1316.

## CHAPTER VII

### ESTATES

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|---|--|
| § 61. Depositories for money.               | § 67. Liens.   |
| § 62. Expenses of administering estates.    | § 68. Set-offs and counterclaims.                                |
| § 63. Debts which may be proved.            | § 69. Possession of property.                                    |
| § 64. Debts which have priority.            | § 70. Title to property.   |
| § 65. Declaration and payment of dividends. | § 71. Clerks of district courts to keep bankruptcy records, etc. |
| § 66. Unclaimed dividends.                  | § 72. Compensation restricted.                                   |

**Depositories for money.** SEC. 61. (a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories. [1 July, 1898, 30 Stat. L., 562, c. 541, s. 61; 2 Supp., 863.]

Sec. 728.

**Expenses of administering estates.** SEC. 62. (a) The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved, by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred. [1 July, 1898, 30 Stat. L., 562, c. 541, s. 62; 2 Supp., 864.]

Secs. 367, 1312-1344, 1368.

**Debts which may be proved.** SEC. 63. (a) Debts of the bankrupt may be proved and allowed against his estate which are

Secs. 135, 507-571.

(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

Secs. 509, 514, 516-519, 533, 537, 538, 540-544, 561.

(2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

Sec. 529.

(3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition an action to recover a provable debt;

Secs. 529, 1555.

(4) founded upon an open account, or upon a contract express or implied; and

Secs. 516-528, 550, 551.

(5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

Secs. 533, 540-544, 606, 1042.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate. [1 July, 1898, 30 Stat. L., 562, c. 541, s. 63; 2 Supp., 864.]

Secs. 570, 1048.

**Debts which have priority.** SEC. 64. (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

Secs. 9, 731, 1038, 1349-1354, 1437.

(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

Secs. 507, 1345-1348, 1402-1405.

(1) the actual and necessary cost of preserving the estate subsequent to filing the petition;

Secs. 1355-1359.

(2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt, by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;

Secs. 31, 1322, 1360.

(3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in invol-



untary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

Secs. 983, 1315-1326, 1361-1368.

(4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and

Secs. 1369-1375.

(5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

Secs. 546, 1376-1401.

(c) In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication. [1 July, 1898, 30 Stat. L., 563, c. 541, s. 64; 2 Supp., 864. 5 Feb., 1903, 32 Stat. L., 800, c. 487, s. 14. 15 June, 1906, 34 Stat. L., 267, c. 3333.]

Secs. 1251, 1423, 1520.

**Declaration and payment of dividends.** SEC. 65. (a) Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

Secs. 370, 1406-1408, 1411-1425.

(b) The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided*, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: *And provided further*, That the final dividend shall not be declared within three months after the first dividend shall be declared.

Secs. 1408, 1409.

(c) The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

Sec. 1420.

(d) Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy,

creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

Sec. 1414.

(e) A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act. [1 July, 1898, 30 Stat. L., 563, c. 541, s. 65; 2 Supp., 865. 5 Feb., 1903, 32 Stat. L. 800, c. 487, s. 15.]

**Unclaimed dividends.** SEC. 66. (a) Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

Secs. 733, 1421.

(b) Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends. [1 July, 1898, 30 Stat. L., 564, c. 541, s. 66; 2 Supp., 865.]

Sec. 1421.

**Liens.** SEC. 67. (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

Secs. 507, 861, 864, 866, 867, 915.

(b) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Sec. 860.

(c) A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

Secs. 3, 11, 724, 868-870, 874, 876, 878-897, 925.

(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which

have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.

Secs. 220, 856-858, 862, 863, 873, 875-877, 899-924.

(e) All conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid, shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Secs. 9, 330, 783, 866, 868-870, 898, 915, 925, 1094, 1096, 1101, 1115, 1116, 1129.

(f) That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry. [1 July, 1898, 30 Stat. L., 564, c. 541, s. 67; 2 Supp., 865. 5 Feb., 1903, 32 Stat. L., 800, c. 487, s. 16. 25 June, 1910, 36 Stat. L., 842, c. 412, s. 12.]

Secs. 3, 9, 11, 20, 724, 861, 863, 870, 878-897, 925, 1031.

**Set-offs and counterclaims.** SEC. 68. (a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor

the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

Secs. 572, 573, 578, 580-589.

(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy. [1 July, 1898, 30 Stat. L., 565, c. 541, s. 68; 2 Supp., 866.]

Secs. 574-577, 579.

**Possession of property.** SEC. 69. (a) A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition. [1 July, 1898, 30 Stat. L., 565, c. 541, s. 69; 2 Supp., 867.]

Secs. 198-242, 305-308.

**Title to property.** SEC. 70. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

Secs. 9, 23, 198, 741-855.

(1) documents relating to his property;

(2) interests in patents, patent rights, copyrights, and trade-marks; Sec. 841.

(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;

Secs. 852, 853.

(4) property transferred by him in fraud of his creditors;

Secs. 782-801, 847.

(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to

the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

Secs. 751, 769, 815-824, 843, 903.

(6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

Secs. 765, 766.

(b) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

Secs. 1253-1311.

(c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

Secs. 23, 727, 1293.

(d) Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

Secs. 757, 1251, 1520.

(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Secs. 9, 724, 782-804, 847, 1096, 1101, 1113-1116, 1153, 1404.

(f) Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him. [1 July, 1898, 30 Stat. L., 565, c. 541, s. 70; 2 Supp., 867. 5 Feb., 1903, 32 Stat. L., 800, c. 487, s. 16.]

Secs. 1234, 1235.

#### **Clerks of district courts to keep bankruptcy records, etc. SEC.**

71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates

as to judgments in said courts: *Provided*, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. [5 Feb., 1903, 32 Stat. L., 800, c. 487, s. 17.]

**Compensation restricted.** SEC. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act. [5 Feb., 1903, 32 Stat. L., 800, c. 487, s. 18. 25 June, 1910, 36 Stat. L., 842, c. 412, s. 13.]

Secs. 29, 35, 232, 371, 375, 709.

(a) This Act shall go into full force and effect upon its passage: *Provided, however*, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

(b) Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it. [1 July, 1898, 30 Stat. L., 566.]

SEC. 19. That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight. [5 Feb., 1903, 32 Stat. L., 801.]

SEC. 14. That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six. [25 June, 1910, 36 Stat. L., 842.]

#### JUDGMENTS OF COURT OF APPEALS FINAL—CERTIORARI

Judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; also, in all causes arising under "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight; also, in all causes arising under "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March fourth, nineteen hundred and seven; also, in all causes arising under "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; and, also, in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may hereafter be enacted, shall be final, save only

that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error. [Act 28 Jan., 1915, c. 22, § 4, as amended 6 Sept., 1916, c. 448, § 3, 38 Stat. 804. 39 Stat. —.]

1911

# THE NATIONAL BANKRUPTCY LAW OF 1867 AND AMENDMENTS

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AN ACT to establish a uniform System of Bankruptcy throughout the  
United States <sup>1</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity. Said courts may sit, for the transaction of business in bankruptcy, at any place in the district, of which place and the time of holding court they shall have given notice, as well as at the places designated by law for holding such courts.<sup>2</sup>

1—This act, together with the act of June 22, 1874, and all acts in amendment or supplementary thereto or in explanation thereof, were repealed by the act of June 7, 1878, to take effect September 1, 1878 (20 St. L. 99).

2—The act of June 22, 1874 (18 St. L. 178, § 2), amends this section by adding thereto the following words: "Provided,

That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount."



SEC. 2. *And be it further enacted*, That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said circuit courts shall also have concurrent jurisdiction with the district courts of the <sup>3</sup> same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest,<sup>4</sup> or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

#### OF THE ADMINISTRATION OF THE LAW IN COURTS OF BANKRUPTCY

SEC. 3. *And be it further enacted*, That it shall be the duty of the judges of the district courts of the United States, within and for the several districts, to appoint in each Congressional district in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act. No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the state in which he resides. Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof; and he shall, in open court, take and subscribe the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

SEC. 4.<sup>5</sup> *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty, to

3—Section 3 of the above act of 1874 inserts the word "any" in lieu of the word "same."

4—Section 3 of the act of June 22, 1874 (18 St. L. 178), here adds the words, "or owing any debt to such bankrupt."

5—The act of June 22, 1874 (18 St. L. 185, § 19), requires the register to make a report to the clerk of the court of the business transacted by him.

make adjudication of bankruptcy, to receive the surrender of any bankrupt, to administer oaths in all proceedings before him, to hold and preside at meetings of creditors, to take proof of debts, to make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case, to audit and pass accounts of assignees, to grant protection, to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose, and to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct; and he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute-book to be kept in his office, and any register of the court may act for any other register thereof: *Provided, however,* That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.<sup>6</sup> No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts. The fees of said registers, as established by this act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this act.

SEC. 5. *And be it further enacted,* That the judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this act as may not be opposed, of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred

6—The act of June 22, 1874 (18 St. L. 184, § 18), makes the following amendment: And no register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in

any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.

in so acting, shall be set[tled] by said court in accordance with the rules prescribed under the tenth section of this act, and paid out of the assets of the estate in respect of which such register has so acted; or, if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge, and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers and documents: *Provided, always,* That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. Such register shall be subject to removal by the judge of the district court, and all vacancies occurring by such removal, or by resignation, change of residence, death or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

SEC. 6. *And be it further enacted,* That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court. In any bankruptcy, or in any other proceedings within the jurisdiction of the court, under this act, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this act. The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered or transferred by one of such parties to the other of them either with or without costs.

SEC. 7. *And be it further enacted,* That parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena, and all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury. If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such

question or to sign such examination, and such person shall also be liable to be punished for contempt.

### OF APPEALS AND PRACTICE

SEC. 8. *And be it further enacted*, That appeals may be taken from the district to the circuit courts in all cases of equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars, and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from the decision of the district court to the circuit court from the same district; but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken; and no appeal shall be allowed unless the appellant at the time of claiming the same shall give bond in man[ner] now required by law in cases of such appeals. No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

SEC. 9. *And be it further enacted*, That in cases arising under this act no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars.

SEC. 10. *And be it further enacted*, That the Justices of the Supreme Court of the United States, subject to the provisions of this act, shall frame general orders for the following purposes:

For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this act;

For regulating the duties of the various officers of said courts;

For regulating the fees<sup>7</sup> payable and the charges and costs to be allowed, except such<sup>8</sup> as are established by this act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings;

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this act into effect.

After such general orders shall have been so framed, they or any of them may be rescinded or varied, and other general orders may be framed in manner aforesaid; and all such general orders so framed shall from time to time be reported to Congress, with such suggestions as said justices may think proper.

7—See note 1 to sec. 47.

8—The act of June 22, 1874 (18 St. L.

184, § 18), repeals the words "except such as are established by this act or by law."

VOLUNTARY BANKRUPTCY—COMMENCEMENT OF PROCEEDINGS

SEC. 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing of such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors and his desire to obtain the benefit of this act, and shall annex to his petition a schedule, verified by oath before the court or before a register in bankruptcy, or before one of the commissioners of the circuit court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact to be so stated, and the sum due to each creditor; also, the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same; and shall also annex to his petition an accurate inventory,<sup>9</sup> verified in like manner, of all his estate, both real and personal, assignable under this act, describing the same and stating where it is situated, and whether there are any, and if so, what encumbrances thereon, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt: *Provided*, That all citizens of the United States petitioning to be declared bankrupt shall on filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy. And the judge of the district court, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the <sup>10</sup> marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; <sup>11</sup> to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the

9—The act of June 22, 1874 (18 St. L. 182, § 15), adds the words "and valuation" after the word "inventory."

10—The act of 1874, above, § 19, provides for the making of a report by the marshal to the clerk.

11—Section 5 of the act of 1874, above referred to, makes the following amendment: That section 11 of said act be amended by striking out the words "as the warrant specifies," where they first occur, and inserting the words "as the marshal shall select, not exceeding two;"

and inserting after the word "specifies," where it last occurs, the words "but whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars."

debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:—

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

#### OF ASSIGNMENTS AND ASSIGNEES

SEC. 12. *And be it further enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

SEC. 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election. The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SEC. 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bank-

ruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings: *Provided, however*, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year <sup>12</sup> eighteen hundred and sixty-four: *Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court: *And provided further*, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby; and all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for and recover or defend the same as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they

12—The act of June 8, 1872 (17 St. L. 334), changes this year from "1864" to "1871."

might have been <sup>13</sup> presented or defended by such bankrupt; and a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as herein-before mentioned; but no property held by the bankrupt in trust shall pass by such assignment. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amend, should he see fit to do so. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon; and no suit in which the assignee is a party shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien or other encumbrances. The debtor shall also, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

SEC. 15.<sup>14</sup> *And be it further enacted*, That the assignee shall demand and receive, from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this act;

13—The act of July 27, 1868 (15 St. L. 228, § 2), changes the word "presented" to "prosecuted."

14—The act of June 22, 1874 (St. L. 178, § 1), provides: "That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: Provided, that such order shall not be made until

the court shall be satisfied that it is approved by a majority in value of the creditors."

Section 4 provides: That unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels and at such times and places as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers, to be designated by the judge, which, in his opinion, shall be best calculated to give



and he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors; and the assignee shall keep a regular account<sup>15</sup> of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SEC. 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts and effects in his own name, as the creditor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

SEC. 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate

general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months in such instalments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. [Here follows the penalty for failure to properly discharge his duties, etc.] That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on

motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, he punished by imprisonment in the penitentiary not less than one and not more than five years.

15—The act of June 22, 1874 (18 St. L. 185, § 19), requires the assignee to make a report of the business transacted by him, and of the fees received, etc.

separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon. He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court. He shall be allowed, and may retain out of the money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court. He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SEC. 18. *And be it further enacted,* That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of [the] court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person, as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate. No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee; but no title to property, real or

personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility. An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

#### OF DEBTS AND PROOF OF CLAIMS

SEC. 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if he shall have proved the same, although such payment shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.

SEC. 20. *And be it further enacted*, That, in all cases of mutual debts or mutual credits between the parties, the account between them shall

be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate:<sup>16</sup> *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SEC. 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby;<sup>17</sup> and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid. If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also [as] a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not pre-

16—The act of June 22, 1874 (18 St. L. § 6), amends this section by adding after the word "estate" the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

17—The act of June 22, 1874 (18 St.

L. 179, § 7), amends this section by inserting, immediately after the word "thereby," "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge."

vent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SEC. 22.<sup>18</sup> *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident<sup>19</sup> debtors before any register in bankruptcy in the judicial district where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation before the proper register or commissioner setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth, that the claim was not procured for the purpose of influencing the proceedings under this act, and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled, and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true. Such oath or solemn affirmation shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge; or if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer. If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts, which books shall

18—Section 20 of the act of June 22, 1874 (18 St. L. 186), provides "that in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof in the manner and under the regulations provided by law; such proof to be certified by the

notary and attested by his signature and official seal." By the act of July 27, 1868 (15 St. L. 228, § 3), this right to take proof was extended to United States commissioners.

19—The act of July 27, 1868 (15 St. L. 228, § 2), changes this word "debtors" to "creditors."

be opened to the inspection of all the creditors. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SEC. 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity or of the right of the creditor to prove it, and is of the opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers; and any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SEC. 24. *And be it further enacted*, That a supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

#### OF PROPERTY PERISHABLE AND IN DISPUTE

SEC. 25. *And be it further enacted*, That when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient,

under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of; and whenever it appears to the satisfaction of the court that the title of any portion of the estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

#### EXAMINATION OF BANKRUPTS

SEC. 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings; and the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default. He shall also be at liberty, from time to time, upon oath to attend and correct his schedule of creditors and property, so that the same

shall conform to the facts. For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife. No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.<sup>20</sup>

#### OF THE DISTRIBUTION OF THE BANKRUPT'S ESTATE

SEC. 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceeding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: *Provided*, That any debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine. In case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the

20—This section is amended by the act of June 22, 1874, § 8 (18 St. L. 180), by adding the following words at the end thereof: "That in all causes and trials

arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness."



name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

SEC. 28. *And be it further enacted*, That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of the creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court. If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under direction of the court, sell and assign such debts or other property in such manner as the court shall order. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and if found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereof; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars, and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. If by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held. In the order for a divi-

dend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:—

First. The fees, costs and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided*, That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

#### OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT

SEC. 29. *And be it further enacted*, That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days,<sup>21</sup> and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. No discharge shall be granted, or, if granted, be valid, if the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto, or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money or chattels to be attached, sequestered, or seized on execution; or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his

21—The act of July 26, 1876 (19 St. L. 102), amends this section by substituting in lieu of the words "and within one year

from the adjudication of bankruptcy" the words "before the final disposition of the cause."

books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having acknowledged that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

SEC. 30. *And be it further enacted*, That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SEC. 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

SEC. 32. *And be it further enacted*, That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows:

*District Court of the United States, District of ———.*

Whereas, ——— has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said ——— be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the ——— day of ———, on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at ———, in the said district, this ——— day of ———, A. D. ———. ———, Judge.

[Seal.]

SEC. 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty<sup>22</sup> per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge.

SEC. 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in hæc verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge: *Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently ob-

22—The act of June 22, 1874 (18 St. L. 180, § 9), amends this section as amended by the act of July 27, 1863 (15 St. L. 228, § 1), as follows: That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid

such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section thirty-three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed.

tained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

#### PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID

SEC. 35.<sup>23</sup> *And be it further enacted,* That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any

23—The act of June 22, 1874 (18 St. L. 180, §§ 10, 11), makes the following change with reference to this section: "That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section thirty-five of the act to which this is an amendment, is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases aforesaid, the period of six months mentioned in said section thirty-five is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act."

It is further amended as follows:

"First. After the word 'and,' in line eleven, insert the word 'knowing.'

"Secondly. After the word 'attachment,' in the same line, insert the words 'sequestration, seizure.'

"Thirdly. After the word 'and,' in line twenty, insert the word 'knowing.' And nothing in said section thirty-five shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."

person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.

#### BANKRUPTCY OF PARTNERSHIPS AND OF CORPORATIONS

SEC. 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had

been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SEC. 37. *And be it further enacted*, That the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators of any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors; and all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this act when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof: *Provided*, That whenever any corporation by proceedings under this act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this act in respect to natural persons.

#### OF DATES AND DEPOSITIONS

SEC. 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor; upon which an order may be issued by the court, or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act; the proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be prima facie evidence of the facts therein stated. Evidence or examination in any of the proceedings under this act may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affi-

davit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

#### INVOLUNTARY BANKRUPTCY

SEC. 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court <sup>24</sup> of any State, district, or Territory, within which such debtor resides or has property founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law <sup>24</sup> of such State, district, or Territory applicable thereto, for a period of <sup>25</sup> seven days; or has been actually imprisoned for more than <sup>25</sup> seven days in a civil action, founded on contract, for the sum of one hundred dollars or upwards; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, <sup>26</sup> or give any warrant to confess judgment; or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; <sup>27</sup> or who, being a banker, <sup>28</sup> merchant, or trader, has

24—The act of June 22, 1874 (18 St. L. 180, § 12), amends this section by here inserting the words "of the United States or."

25—Section 12 of the act of 1874, above, changes "seven" to "twenty."

26—Section 12 of the act of 1874 here adds the words "or confess judgment."

27—The act of June 22, 1874 (18 St. L. 180, § 12), amends this section by inserting the following in lieu of the balance of this paragraph: "Or who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within

a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions herein-after prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable: *Provided*, That such petition is brought within six months after such act of bankruptcy shall have been committed." [The act of July



fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions herein-after prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or <sup>29</sup> that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

26, 1876 (19 St. L. 102), here inserts a provision to the effect that an assignment made by a debtor of all his property, in good faith, for the benefit of his creditors, without creating a preference and valid under the state laws, shall not be a bar to the discharge of such debtor.] "And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at

the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

28—The act of July 14, 1870 (16 St. L. 276, § 2), amends this clause by adding the words "broker, manufacturer or miner."

29—By the act of July 27, 1868 (15 St. L. 228, § 2), this word "or" is changed to "and."

SEC. 40.<sup>1</sup> *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunctions, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged [bankrupt] and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.<sup>2</sup>

SEC. 41. *And be it further enacted*, That on such return day or adjourned day, if the notice has been fully served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy;<sup>31</sup> and if upon

30—The act of June 22, 1874 (18 St. L. 182, § 13), amends this section by adding at the end thereof the following words: "And if, on the return-day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so ad-

judge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

31—The act of June 22, 1874 (18 St. L. 182, § 14), amends this section by striking out all of said section after the word "bankruptcy" and inserting the words, "Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district, returnable within ten days before him for the trial of the facts set forth in his petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court,

such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

SEC. 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory<sup>32</sup> of his estate in the form and verified in the manner required of a petitioning debtor by section<sup>33</sup> thirteen. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain. If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

#### OF SUPERSEDING THE BANKRUPT PROCEEDINGS BY ARRANGEMENT

SEC. 43. *And be it further enacted*, That if at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value

or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one-half of his creditors in number and amount; or, in case all the creditors and such debtor assent thereto, such discontinuance shall

be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect."

32—The act of June 22, 1874 (18 St. L. 182, § 15), adds the words "and valuation," after the word "inventory."

33—The act of July 27, 1868 (15 St. L. 228, § 2), changes the word "thirteen" to "eleven."

of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed; and such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, *or* [on] oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this act. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for assuming proceed-

ings shall not be reckoned in calculating periods of time prescribed by this act.<sup>34</sup>

34—The act of June 22, 1874 (18 St. L. 182, § 17), here adds the following provisions: That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding \$50 shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satis-

fied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner, and proceeded with in the same way, and with the same consequences, as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the names of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person inter-

## PENALTIES AGAINST BANKRUPTS

SEC. 44. *And be it further enacted*, That from and after the passage of this act if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either or them in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent, or spends any part thereof in gaming; or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

## PENALTIES AGAINST OFFICERS

SEC. 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or

ested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence and hearing, that a composition under this section cannot, in consequence of

legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

SEC. 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

#### FEES AND COSTS

SEC. 47.<sup>35</sup> *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers:—

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this act, one dollar.

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions the fees now allowed by law.

For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of

35—The act of June 22, 1874 (18 St. L. 184, § 18), makes the following amendment of this section: "That from and after the passage of this act the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the

United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections ten and forty-seven of said act, and no longer, which duties they shall perform, as soon as may be. And said justices shall have power under said sections, by general regulations, to simplify and, so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided."

the estate, and, before a warrant issues, the petitioner shall deposit<sup>36</sup> with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued, shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:—

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

#### OF MEANING OF TERMS AND COMPUTATION OF TIME

SEC. 48. *And be it further enacted*, That the word “assignee” and the word “creditor” shall include the plural also; and the word “messenger” shall include his assistant or assistants, except in the provision for the fees of that officer. The word “marshal” shall include the marshal’s deputies; the word “person” shall also include “corporation”; and the word “oath” shall include “affirmation.” And in all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the fourth of July, in which case the time shall be reckoned exclusive of that day also.

SEC. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in

36—The act of July 27, 1868 (15 St. L. 228, § 2), amends this section by omitting the words “with the senior register

or” and “to be delivered to the register.”



and upon the <sup>37</sup> supreme courts of the several Territories of the United States,<sup>38</sup> when the bankrupt resides in the said District of Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

SEC. 50. *And be it further enacted*, That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini, eighteen hundred and sixty-seven.

Approved, March 2, 1867.

37—The act of June 22, 1874 (18 St. L. 182, § 16), amends this section by substituting the words "District Court" in lieu of "Supreme Courts."

38—Section 16 of the above act of 1874

inserts here the words "subject to the general superintendence and jurisdiction conferred upon circuit courts by section two of said act."



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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

- Conner v. Long, 104 U. S. 228 880  
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## [REFERENCES ARE TO PAGES]

- Cox, In re, 199 Fed. 952, 29 A. B. R. 456  
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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

- Eggert, In re, 2 N. B. N. R. 185, 2 N. B. N. R. 390, 98 Fed. 843, 3 A. B. R. 541, aff'd 102 Fed. 735, 4 A. B. R. 449 576, 733, 740, 1230 754
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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

- Lynch, In re, 101 Fed. 579, 4 A. B. R. 262, 2 N. B. R. 374 754, 790  
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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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## [REFERENCES ARE TO PAGES]

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